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THE LIABILITY OF INTERNATIONAL ARBITRATORS: A COMPARATIVE ANALYSIS AND PROPOSAL FOR QUALIFIED IMMUNITY

Susan D. Franck*

I. INTRODUCTION

With the advent of the global economy and the increasing number of international commercial transactions, arbitration has become an important dispute resolution option. Arbitration is traditionally extolled because it helps to resolve commercial disputes economically, confidentially, and finally within a neutral forum.¹ Additionally, unlike national court judgments,² arbitration provides an internationally recognized method for enforcing awards.³ As a result of these benefits,⁴ arbitration is now the

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1. See GABRIEL M. WILKER, DOMKE ON COMMERCIAL ARBITRATION § 2.01 at 13; see also William H. Daughtrey, Jr., *Quasi-Judicial Immunity Lost by the Arbitrator Who Sat on the Award: Baar v. Tigerman*, 22 AM. BUS. L.J. 583, 583 (1985).

2. See William W. Park, *Text and Context in International Dispute Resolution*, 15 B.U. INT'L L.J. 191, 194 (1997) (noting that the U.S. is not a party to a single treaty providing for enforcement of foreign judgments and that even the U.K. has refused to ratify a judgment treaty with the U.S.).

3. International arbitration awards can be enforced within different countries pursuant to the New York Convention. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter "New York Convention"]. Currently, more than 100 countries are signatories to the New York Convention. See Patrick J. Borchers, *Judgments, Conventions and Minimum Contacts*, 61 ALB. L. REV. 1161, 1161 (1998). This provides a significant benefit to businesses involved in international disputes because, with the exception of the occasional tax, friendship, commerce and navigation treaty, there is no international convention for the uniform enforcement of foreign court judgments. Instead, a country's willingness to enforce the decision of a foreign court will be determined upon either: (1) the presence of a treaty between the two countries, or (2) on the basis of international comity. See Russell J. Weintraub, *How Substantial is Our Need for a Judgments Recognition Convention and What*

preferred dispute resolution mechanism for international commercial disagreements.⁵ Unfortunately, because of perceived misconduct by arbitrators and the risk of party manipulation, the arbitration process has come under increasing attack through civil actions against arbitrators.

As a result of these concerns, the issue of an arbitrator's immunity has received increased attention,⁶ and the scope of arbitrator immunity is currently a controversial issue.⁷ Because an arbitrator's potential liability plays a key role in the effective use of arbitration, commentators have suggested addressing this issue—but have not yet proposed specific statutory or regulatory solutions.⁸ Instead, different countries and arbitral institutions

Should We Bargain Away to Get It?, 24 BROOK. J. INT'L LAW 167, 169, 176 (1998). In the United States, for example, most states will recognize and enforce foreign money judgments and approximately 26 states have adopted the Uniform Foreign Money Judgments Recognition Act which provides that "any foreign judgment that is final and conclusive and enforceable where rendered" is "conclusive between the parties to the extent that it grants or denies the recovery of a sum of money." See *id.* at 174; see also *Hilton v. Guyot*, 159 U.S. 113, 220–28 (1895) (providing for the recognition of foreign court judgments based upon the "comity of nations").

4. See Mark A. Sponseller, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, 421 n.2 (1993).

5. See THE IMMUNITY OF ARBITRATORS 1 (Julian E.M. Lew ed., 1990); see also JULIAN D.M. LEW, *Interest on Money Awards in International Arbitration*, in MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 543 (Ross Cranston ed. 1997).

6. See Gerold Hermann, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 ARB. INT'L 221, 225 (1999) (noting that there are emerging tactics of recalcitrant parties attacking the independence of arbitrators).

7. See Mark W. Levine, *The Immunity of Arbitrators and the Duty to Disclose*, 6 AM REV. INT'L ARB. 197, 197 (1995) (stating that "the duties and the legal status of arbitrators have assumed increased importance"). The International Chamber of Commerce Court of Arbitration, the American Arbitration Association and the International Centre for Settlement of Investment Disputes recently sponsored a Colloquium where speakers addressed the issues of an arbitrator's duties, liabilities, and immunity. See *Upcoming Arbitration Conferences*, 6 WORLD ARB. & MEDIATION REP. 148, 148 (1995).

8. In the 1998 Freshfields Arbitration Lecture in London, England, Dr. Gerold Hermann, primary drafter of the UNCITRAL Model Law, suggested that it might be appropriate to propose an amendment to the Model Law to expressly deal with the issue of arbitrator and institutional immunity. Dr. Hermann, however, did not give an express opinion regarding the proper scope of arbitrator immunity. See Hermann, *supra* note 6, at 225–26. See also ALAN REDFERN & MICHAEL HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 270 (2d ed. 1991) (noting that there is no conformity on the proper role of immunity in different national laws and criticizing that there is "not even a movement for such conformity amongst those concerned with international commercial arbitrations."); but see Sponseller, *supra* note 4, at 443 (suggesting qualified immunity for *domestic* arbitration matters); see generally Christian Hausmaninger, *Civil Liability of Arbitrators—Comparative Analysis and Proposals for Reform*, 7 J. INT'L ARB. 5, 48 (1990) (suggesting a standard of liability for arbitrators but failing to suggest a statute for national legislatures).

deal with this issue in a myriad of ways,⁹ and even the watershed UNCITRAL Model Law on International Arbitration does not contain any provision regarding the immunity of arbitrators.¹⁰ Ultimately, there is a startling lack of international harmonization regarding the scope of liability for international arbitrators.

This Article explores an arbitrator's immunity from liability and ultimately proposes the proper scope of arbitrator immunity. Part I analyzes the basis of arbitrator liability. Part II discusses the roots and purposes behind arbitrator immunity. Part III makes a comparative analysis of different legal systems' scope of arbitrator liability and immunity. Part IV addresses which substantive law is applicable to the issue of an arbitrator's liability. Finally, Part V discusses the proper role of immunity and proposes a model statute to expressly define the scope of arbitrator liability. This Article argues that, for international commercial disputes, there should be a specific standard that recognizes common law, civil law and Islamic law principles and blends them to harmonize international private law. The Article concludes that arbitrators should, in general, have broad immunity to ensure the integrity of the decision-making process. This should, however, be qualified by statute in certain, limited circumstances where arbitrators (1) act with intentional, bad-faith conduct, or (2) unjustifiably abandon their arbitral mandate and fail to render an award. This ultimately strikes a workable balance between the need for professional accountability towards parties paying for professional services and maintaining the integrity of arbitral process.

II. THE BASIS OF ARBITRATOR LIABILITY

A. *Types of Liability*

The breach of an arbitrator's duty can either be based upon contract or tort.¹¹ In general, common, civil, and Islamic law approaches find the source

9. See *infra* Part III.B.

10. See *Model Law of International Commercial Arbitration*, U.N. Commission on International Trade Law, 18th Session, Annex I, U.N. DOC. A/40/17 (1985); see *infra* notes 208–9 and accompanying text (discussing the legislative history of the Model Law and why it avoided addressing the issue).

11. Regardless of the theory upon which it is based, an arbitrator's liability depends upon his specific duties and obligations. Mustill and Boyd suggest that when an arbitrator takes on an appointment, he accepts three principal duties: to take care, to proceed diligently, and to act impartially. The duty to take care involves an arbitrator performing his responsibilities with reasonable skill and care. The duty to proceed diligently requires an arbitrator to fulfil his obligations and act within a reasonable time. Finally, the duty to act impartially involves

of an arbitrator's obligations in the arbitration agreement and the contractual relationship with the parties (the *receptum arbitri*). There is a divergence, however, in the willingness to accept that contractual obligations provide the basis for liability. Traditionally, civil law¹² and several Arab countries¹³ emphasize the contractual nature of the arbitrator's *receptum arbitri* and use this as a baseline for establishing potential liability. In contrast, common law approaches tend to focus more upon the potentially tortious nature of an arbitrator's conduct as a violation of a duty of care.¹⁴ Although some cases suggest that an arbitrator's contractual liability¹⁵ is broader than a

basic fairness to the parties and due process. See MICHAEL J. MUSTILL & STEWART C. BOYD, *LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 224–32 (2d ed. 1989); Tamara Oyre, *Professional Liability and Judicial Immunity*, 64 *ARBITRATION* 45, 46 (1998). Similarly, Redfern and Hunter describe the duties of arbitrators as the duty to act judicially and the duty of due diligence. See REDEFERN & HUNTER, *supra* note 8, at 268–70. Butler & Finsen argue that an arbitrator's duties depend upon the arbitration agreement but generally include: (1) the duty to take care, (2) the duty to proceed diligently, and (3) the duty to act impartially. See DAVID BUTLER & EYVIND FINSEN, *ARBITRATION IN SOUTH AFRICA: LAW AND PRACTICE*, 97–99 (1993).

Whether these duties have legal effect, however, depends upon the law of the relevant jurisdiction. See MUSTILL & BOYD, *supra* note 11, at 224 (stating that the “existence of a moral obligation to perform these duties is undeniable. The question is whether it is backed by legal sanctions.”). In one U.S. case, the court stated that, “the arbitrator has a duty, expressed or implied, to make a reasonably expeditiously decision.” See *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977). Overall, arbitrators indisputably owe a range of duties to the parties, but the relevant issue is whether the duties are enforceable when a breach occurs. See Jason Yat-Sen Li, *Arbitral Immunity: A Profession Comes of Age*, 64 *ARBITRATION* 51, 52 (1998).

12. The *receptum arbitri* is essentially an arbitrator's agreement to serve as an arbitrator pursuant to the parties' arbitration agreement and creates a contract among the arbitrator and the parties. See KLAUS P. BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 232 (1993) (stating that in accepting “expressly or tacitly his mandate the arbitrator enters into a contractual relationship [the *receptum arbitri*] with the parties or the arbitral institution).

13. See ABDUL HAMID EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES* 348–49 (Lebanon), 430 (Libya), 457 (Morocco), 520 (Qatar), 755 (Yemen) (2d ed. 1999); but compare *id.* at 221–22 n.1 (noting that some commentators suggest that acceptance of the arbitration mission does not create liability in Iraq, but asserting that any liability should be based on tort).

14. The nature of the relationship can be described as either contractual, based upon status, or a combination of these elements. See BUTLER & FINSEN, *supra* note 11, at 92–95; see also *Grane v. Grane*, 493 N.E.2d 1112, 1115 (Ill. App. 1986) (ignoring that liability could arise from a contract and instead stating that it is undisputed that an arbitrator's immunity . . . derives from a valid arbitration agreement”); cf. *Norjarl v. Hyundai*, [1991] 1 Lloyd's Rep. 524, 536 (suggesting a contractual basis of liability); cf. REDEFERN & HUNTER, *supra* note 8, at 267 (suggesting a contractual basis of liability).

15. See *Baar v. Tigerman*, 140 Cal. App. 3d 979, 985 (Cal. Ct. App. 1983); *E.C. Ernst, Inc.*, 551 F.2d at 1033.

professional duty of care,¹⁶ ultimately, both actions result in potential liability based upon a breach of duty.¹⁷

1. Contract

Under the contract theory, arbitrators are experts whose liability should be based upon the terms of their appointment agreement with the parties.¹⁸ The precise nature of the contract between the parties and the arbitrators is not yet settled,¹⁹ but even U.S. courts acknowledge that the parties' arbitration agreement creates the basis of an arbitrator's power and responsibilities.²⁰

Arbitrators are free to create their own express contract with the parties setting out their rights, responsibilities, and liabilities regarding the arbitration.²¹ In some countries, primarily Islamic, arbitrators must accept their appointment in writing;²² but it is unclear whether this "acceptance"

16. See *Palacath Ltd. v. Flanagan*, [1985] 2 All. E.R. 161, 163. The *Myron*, [1970] 1 Q.B.527; and *Succula Ltd. v. Harland & Wolff*, [1980] 2 Lloyd's Rep. 381, help establish the proposition that an arbitrator has a duty to act judicially, as well as use skill, diligence and care, regardless of whether the relationship is contractual or not. See also Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47, 76 (1986) (describing the substantial overlap among liability based upon contract theories, tort theories, and theories based upon a violation of fiduciary duty).

17. See *Arenson v. Casson Beckman Rutley & Co.*, [1975] 3 All. E.R. 901, 917.

18. See Hausmaninger, *supra* note 8, at 19.

19. See Yat-Sen Li, *supra* note 11, at 52 n.9. Redfern & Hunter assert that contract is the most appropriate legal basis for the relationship. See REDFERN & HUNTER, *supra* note 8, at 262-66.

20. In *Cort v. American Arbitration Ass'n*, 795 F. Supp. 970, 972 (N.D. Ca. 1992), the court acknowledged that the parties' agreement formed the basis of an arbitrator's authority but focused more upon that the agreement was more for the invocation of "the arbitrators' independent judgment and discretion." See *Grane*, 493 N.E.2d at 1115 (stating that "[i]t is undisputed that an arbitrator's immunity and authority derives from a valid arbitration agreement"); see also *Boraks v. American Arbitration Ass'n*, 517 N.W.2d 771, 772 (Mich. App. 1994) (noting that the doctrine of immunity "aris[es] from a contractual agreement of the parties" but stating that "immunity does not depend upon the source of the decision-making power but rather upon the nature of that power").

21. Under this approach, the liability of an arbitrator is merely a term of the *receptum arbitri* to be negotiated between the parties and the potential arbitrator. See Hausmaninger, *supra* note 8, at 20.

22. See Netherlands Arbitration Act of 1986, Code of Civil Procedure, art. 1029: 26 I.L.M. 921 (1987) (requiring an arbitrator to accept her mandate in writing); SAMIR SALEH, *COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: A STUDY IN SHARI'A AND STATUTE LAW 100* (1984) citing Syrian Code of Civil Procedure, Art. 513, at 178 (citing Iraqi Code

creates a distinct contract between the parties and the arbitrators. Unfortunately, as arbitrators do not regularly enter into a separate contract with the parties for the provision of arbitral services, a different method is necessary to determine the terms and conditions of the *receptum arbitri*.

Under a second approach, by consenting to act as an arbitrator, an individual impliedly becomes a third party to the parties' original arbitration agreement. For example, the *Norjarl v. Hyundai* court explained that the "arbitration agreement is a bilateral contract between the parties to the main contract. On appointment the arbitrator becomes a third party to the arbitration agreement which becomes a trilateral contract."²³ Another English court pointed out that arbitrators become parties to the arbitration agreement by accepting appointments under it.²⁴ At least one South African court held that when two persons ask a third to arbitrate a dispute between them, a contractual mandate exists between the disputants and the arbitrator.²⁵ This perspective is also accepted in some Islamic law countries. For example, in Lebanon and Yemen, an arbitrator becomes a party to the agreement to arbitrate and has a contractual relationship with the parties that

of Civil Procedure, Art. 259 (requiring arbitrators to accept and writing and noting that acceptance is evidence by the arbitrator's signature on the arbitration agreement) & 201 (citing Egyptian Code of Civil Procedure, art. 503(1) (arbitrator must accept appointment in writing)).

There are various methods for Islamic law nations of accepting the arbitration responsibilities: these can either be by expressly requiring acceptance in writing or impliedly inferring that an individual has accepted. See EL-AHDAB, *supra* note 13, at 108 (noting that Bahrain Code of Procedure requires an arbitrator to accept in writing), 300 (noting that the Kuwait Code of Civil and Commercial Procedure requires an express written acceptance of the arbitrator), 348-49 (describing how, in Lebanon, the acceptance must be made in writing pursuant to the civil code but noting a case from the Beirut Appeal Court that states "the arbitrator's signature of the award he has given shows his acceptance of the mission with which he was entrusted"); 430 (explaining that in Libya the arbitrator must accept in writing and this can be provided by "the arbitrator's signature on the agreement to arbitrate"); 520 (in Qatar an arbitrator must accept in writing unless appointed by the court); 658 (in Syria an arbitrator must accept his mission in writing); 689 (same in Tunisia); 249 (noting that under Jordan law an arbitrator is not required to accept his mission in writing); 457 (explaining how in Morocco an arbitrator does not necessarily accept in writing, but it can be "deduced from the fact that he has started his mission"). In other countries, such as Oman, there is no discussion or reference to this issue at all. *Id.* at 487-90.

23. *Norjarl v. Hyundai*, [1991] 1 Lloyd's Rep. at 536.

24. *Cie Europene de Cereals v. Tradex Export*, [1986] 2 Lloyd's Rep. 301, 306 (stating that "[a]ll parties to the arbitration are as a matter of contract bound by the terms of contract"). Commentators also stress the contractual nature of the relationship between the parties and the arbitrator. MUSTILL & BOYD, *supra* note 11, at 220.

25. BUTLER & FINSEN, *supra* note 11, at 93 (citing *Miller v. Kirsten* [1917] TPD 489).

may result in contractual liability.²⁶

In *Ceckolovenska Obcendi Banka v. International Chamber of Commerce*, a French court determined that where parties agreed to submit their decision to an arbitral institution for resolution, a contract between the institution and the parties was formed; and this contract included “the duty to render a decision, in accordance with [the ICC] Rules.”²⁷ Essentially, once arbitrators accept an appointment, they have duties and obligations to both parties—not merely the party who appointed them.²⁸ Under this approach, if an arbitrator breaches an express or implied term of the arbitration agreement, liability may attach.²⁹

This contractual approach to liability is usually associated with civil law countries, and some Islamic countries. In many civil law jurisdictions, arbitrators are merely professionals whose liability is determined by the general principles of contractual liability contained within the civil code.³⁰ This approach usually bases liability on the terms of appointment rather than the functions an arbitrator performs. Countries such as Italy,³¹ Austria,³² and

26. EL-AHDAB, *supra* note 13, at 348, 755.

27. Eric Robine, *The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law*, 5 *ARB. INT.* 323, 324–25 (1989) (citing *Ceckolovenska Obcendi Banka (Cekobank) v. International Chamber of Commerce*, *REV. ARB.* 367 (1987)).

28. *See* Oyre, *supra* note 11, at 45 n.1.

29. *See* Murray L. Smith, *Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment*, 8 *ARB. INT’L* 17, 20–24 (1992).

30. *See* Yat-Sen Li, *supra* note 11, at 56; *see also* LEW, *supra* note 5, at 77 (explaining that under Spanish law that the civil liability of an arbitrator is based upon the arbitral contract); PETER SANDERS, *National Report on Turkey*, in *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* 15 (1998) (stating that under Turkish law the relationship between the parties and arbitrator is “considered to be a mandate, a contract of services, a *sui generis* contract, and a contract pertaining to private law”).

31. *See* PETER SANDERS, *National Report on Italy*, in *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (1998) (citing Italian Code of Civil Procedure, amended by Law No. 25 of 5 Jan. 1994, art. 813); *see also* Maurizio Traverso, *The Liability of Arbitrators*, 8 *INT’L BUS. LAW* 339 (1980) (describing that the relationship between the parties and arbitrator in Italy is contractual and obligates arbitrators to carry out the specific mandate given to them by the parties in the dispute).

32. In Austria, an arbitrator can be liable to the parties for all damages resulting from a failure to meet the obligations of terms of appointment. *See* Austrian Code of Civil Procedure § 584(2). Moreover, depending upon how the contract is defined, in Austria, any injured party may claim damages depending upon whether the injurer acted with intent, gross negligence or negligence. *See* Yat-Sen Li, *supra* note 11, at 56. In particular, under the Austria Civil Law Code, professional liability is covered in art. 1299 where “a person who claims in public to have knowledge of a function, an art, a trade or a handicraft, or who accepts without necessity voluntarily an undertaking which requires special skills or exceptional diligence demonstrates that he believes to possess the necessary diligence and

Spain³³ have express provisions for liability, while the Netherlands,³⁴ France,³⁵ Poland,³⁶ and Germany have implied ones. In general, however, the contract between the parties and the arbitrator is subject to private law and can be characterized as a mandate with service elements or a quasi mandate in exchange for the remuneration of the arbitrator.³⁷

Although German law contains no express statute creating liability, it bases arbitrator liability on contract.³⁸ German law implies general terms of liability.³⁹ However, different types of contracts create different obligations, so proper categorization of the *receptum arbitri* is crucial.⁴⁰ In particular, if an arbitrator's appointment contract is a mandate⁴¹ with service elements, the

the required unusual skills. He is, therefore, liable for their absence.”

33. See PETER SANDERS, *National Report on Spain*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 15 (1998) (citing Spanish Code of Civil Procedure, art. 16).

34. In the Netherlands, for example, an arbitrator is held to be in a contractual relationship with the parties. See LEW, *supra* note 5, at 60–61. The arbitrator must conduct the case in accordance with the instructions of the parties and the precise terms of the arbitration agreement. The precise kind of an arbitrator's contractual obligations are uncertain, however. See *id.* at 61; but see Netherlands Arbitration Act of 1986, Code of Civil Procedure, art. 1029 (requiring an arbitrator to accept her mandate in writing), art. 1034 (providing arbitrators with a duty to disclose grounds of impartiality), art. 1039 (requiring the parties to treat the parties “with equality” and allowing each to substantiate his claims and present the case).

35. In France, if an arbitrator accepts an appointment, there is a meeting of the minds and a contractual link between the arbitrator and the parties. See Robine, *supra* note 27, at 323, 327–28; see also LEW, *supra* note 5, at 34 (noting that the “arbitration convention” is a contract that makes the arbitrator liable if he fails to abide by his terms of reference).

36. In Poland, Article 750 of the Commercial Code deems the relationship between the parties and arbitrator to be a contract for services, and the liability of an arbitrator is governed by that mandate. See PETER SANDERS, *National Report on Poland*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998); see also arts. 734–51 (explaining the terms of a mandate), arts. 752–64 (management without mandate), arts. 627–50 (contract for works) in THE POLISH CIVIL CODE (1997).

37. BERGER, *supra* note 12, at 232–34.

38. The Federal Supreme Court of Germany held that the relationship between the parties and the arbitrator is governed by the arbitration contract. See Haftung des Schiedrichters, 15 BGHZ 12, 14–15 (1954).

39. Under this provision, an obligor is responsible for intentional conduct and negligence. See Bürgerliches Gesetzbuch [BGB] § 276, translated in THE GERMAN CIVIL CODE 46 (Simon L. Goren trans., Fred B. Rothman and Co. revised ed. 1994).

40. This is less true of countries like Austria. See LEW, *supra* note 5, at 18.

41. The contract will probably not be a pure mandate, however, as an arbitrator usually receives compensation and the mandate provisions of § 662 only apply when an individual “gratuitously binds self.” See BGB § 662, translated in GOREN, *supra* note 39, at 127.

arbitrator “is bound to perform the service promised”⁴² and is subject to personal obligations.⁴³ If the *receptum arbitri* is a “contract for works,” an arbitrator would have different obligations.⁴⁴ It is probably not a “works” contract, as these usually involve parties who wish to obtain a specific result, whereas the results of a service contract are not precisely known before but result from the obligor’s personal effort and skills. The *receptum arbitri* is probably a mandatory service contract, and even German arbitration law discusses arbitral responsibilities in terms of a “mandate.”⁴⁵

For Islamic countries,⁴⁶ arbitrators also may be bound by the terms of the parties’ arbitration agreement.⁴⁷ Particularly because of the influence of the

42. See *id.* at 113, BGB § 611(1).

43. See *id.* at 128, BGB § 675. Under German law, viewing the contract as mandatory would put certain obligations on the arbitrator such as: (1) notifying the parties of a refusal of the mandate, (2) inability to deviate from the instructions of the mandate without notice and approval of the parties, and (3) other terms regarding the termination of the mandate. *Id.* at §§ 663, 665, 670, 674; see also § 664 (noting that a mandatory is also liable for the acts of his assistants).

44. *Id.* at §§ 631–51.

45. See German Arbitration Law, art. 1038; but see also BUTLER & FINSEN, *supra* note 11, at 94 n.123 (suggesting that under German law the arbitrator acts on the basis of a *sui generis* contract between himself and the parties).

46. Under Islamic law, the primary source of law is the *Qur’an*. Another source is Mohammed’s own legal discussions and sayings from the *Sunna*, the second source of Islamic law. Together, these sources form the *Shari’a*. The *Shari’a* serves two purposes: (1) to provide religious ethics to govern religious life, and (2) to outline law that is recognizable from western, secular standards. See SUSAN E. RAYNER, *THE THEORY OF CONTRACTS IN ISLAMIC LAW* 1–2 (1991). Although many Islamic countries have statutes that essentially codify the principles embodied in the *Qur’an* and *Shari’a*, there is still room for interpretation between these two legal sources. See SALEH, *supra* note 22, at 438 (suggesting that an outburst of strict application of *Shari’a* could conceivably upset modern contractual infrastructure that is unsupported by statute).

47. Traditional *Shari’a* scholars suggest that an arbitrator should expressly accept his appointment. But modern jurists tend to assert that the agreement of the parties alone to execute an arbitration agreement is not sufficient, and instead, the consent of the arbitrator must be obtained. The *Shari’a* does not specifically indicate, however, whether this arbitration agreement must be in writing. See SALEH, *supra* note 22, at 39–40.

There are some problems, however, with the validity of arbitration agreements for future disputes. The *Shari’a* does recognize arbitration as a legitimate, albeit inferior, dispute resolution mechanism. See SAYED H. AMIN, *COMMERCIAL ARBITRATION IN ISLAMIC AND IRANIAN LAW* 23, 43–44. However, arbitration clauses regarding future disputes are, in principle, unenforceable. Because such an arbitration agreement would be *Gharar* [uncertain], especially in Saudi Arabia, an agreement to arbitrate can only be made after a dispute arises. See RAYNER, *supra* note 46, at 366. Although this does not conform with *Shari’a*’s main tenants, there is a suggestion by legal practitioners that such agreements would be complied with and respected. See SALEH, *supra* note 22, at 48–50.

civil law tradition on Islamic law,⁴⁸ it is likely that liability can be based upon contract. However, because of the strong religious tradition, it is also necessary to consider the *Qur'an* and the *Shari'a* to determine liability. Although there is no general theory of contract law,⁴⁹ the Qur'anic saying, "Fulfill your Obligations," is the fundamental principle that governs contracts⁵⁰ and could create a basis for arbitrator liability.⁵¹ At the same time, "service contracts [are] of a dubious nature, [and] are also outlawed on the basis of illegal *Mahall* [subject matter] and *Sabab* [motivating cause]."⁵² Ultimately, however, it is necessary to consult the *Qur'an*, the *Shari'a*, and the Code of the relevant country before making a final determination.

2. Tort

Arbitrators may also be subject to tort liability resulting from their professional obligation to perform competently.⁵³ In England, members of a profession or skilled craft can be held liable for failing to exercise the level of skill and care normally exercised by persons of that profession. It is presumed that, "every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of skill and care."⁵⁴ Similarly, in the United States, professionals can be held liable for breach of their professional duties if they fail to use the reasonable skill and diligence

48. For example, various Islamic codes have imported the western concept of an irrevocable mandate and could prevent an arbitrator from being removed except through established court procedures. In contrast, under tradition established in the *Shari'a*, the parties' appointment of an arbitrator is revocable *any* time prior to the delivery of the award. See SALEH, *supra* note 22, at 24, 39–44.

49. See EL-AHDAB, *supra* note 13, at 23.

50. See RAYNER, *supra* note 46, at 87. The Qur'an also states that, "O ye who believe, respect your contractual undertakings" and "He authorized what he did not forbid." PETER SANDERS, *General Introduction on Arbitration in Arab Countries*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 6 (1998).

51. Under the *Qur'an*, arbitrators are required to judge according to the provisions of the *Qur'an* and arbitrate with observance of the rules of fairness and justice. See SALEH, *supra* note 22, at 15–16.

52. RAYNER, *supra* note 46, at 156.

53. In *Austern v. Chicago Board Options Exchange*, 716 F. Supp. 121 (S.D.N.Y. 1989), the plaintiffs also sued an arbitral institution for the tort of mental anguish, but were barred by the doctrine of arbitral immunity. See also *Rubenstein v. Otterbourg*, 357 N.Y.S.2d 62 (N.Y.C. Civ. Ct. 1973) (arbitrator in tort action was held immune for quasi-judicial acts).

54. *Lanphier v. Phipos*, [1838] 8 C&P 475, 479; see also YAT-SEN LI, *supra* note 11, at 52 (describing the nature of professional liability in England).

ordinarily exercised by a member of that profession.⁵⁵ Arbitrators, like other professionals, have a duty to behave competently in their capacity as arbitrators and can be liable for damages resulting from a breach of this duty.⁵⁶ In civil law countries, like Germany, it is still possible to be liable for tortious acts that are not specifically addressed by the *receptum arbitri*.⁵⁷ Similarly, although Islamic law does not adhere to the Western categories of contract and tort, the *Qur'an* does have a tort-like principle of liability for arbitrators.⁵⁸ For example, Iraq seems to accept liability based upon tort,⁵⁹ and in Saudi Arabia, "the arbitrator is liable for *any* fault he commits which results in damage to any party."⁶⁰

B. Types of Arbitrator Misconduct

There are two types of inappropriate behavior by arbitrators: affirmative misconduct and failure to act. With intentional misconduct, an injured party who has suffered damage as a result of an arbitrator's conduct has an action against the arbitrator. In contrast, both parties have actions against an arbitrator for a failure to act. Since arbitrators owe duties to both parties once they are appointed, a failure to act damages both parties as it frustrates the ultimate purpose of arbitration: the rendering of a final award.

1. Misfeasance

Misfeasance involves affirmative actions such as: inappropriate withdrawal from the arbitration process, fraud, corruption, and bad-faith actions. Various civil and Islamic law countries expressly provide for arbitrator liability for premature withdrawal from the arbitration. In Romania, for example, "arbitrators are liable for damages if . . . after

55. See WILLIAM PROSSER & W. PAGE KEETON, *PROSSER & KEETON ON THE LAW OF TORTS* 185–88 (5th ed. 1984); see also *City of East Grand Forks v. Steele*, 141 N.W. 181 (Minn. 1914) (holding that standards of reasonable care apply to the conduct of professionals engaged in furnishing skilled services for compensation).

56. See REDFERN & HUNTER, *supra* note 8, at 266.

57. See LEW, *supra* note 5, at 31.

58. In the *Sunna*, for example, the Prophet stated that, "[a]ny arbitrator chosen by the parties who does not deliver justice is cursed by God." See AMIN, *supra* note 47, at 53; see also PETER SANDERS, *National Report on Saudi Arabia*, in *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* 17 (1998) (citing KORAN, *Al-Nisa* (Women) 4:85 (stating "He that mediates in a good cause shall gain by his mediation; but he that mediates in a bad cause shall be held accountable for its evil.")).

59. See EL-AHDAB, *supra* note 13, at 221–22.

60. *Id.* at 585.

accepting their mandate, they withdraw from it without justification.”⁶¹ In Libya, if arbitrators withdraw without good reasons, they are liable.⁶² England and Wales also have a provision providing for arbitrator liability in the event of unreasonable resignation.⁶³ In the U.S., by contrast, neither federal nor state laws address the issue for liability for improper withdrawal.

In the Australian case, *Road Rejuvenating and Repair Services*, there were several types of affirmative arbitrator misconduct that caused the court to extend liability.⁶⁴ Specifically, the arbitrator inappropriately contacted parties directly, refused to abide by court orders, wrote directly to the judge and refused to appear in court at the requested time.⁶⁵

Usually arbitrators are liable for affirmative conduct taken in bad faith, but immune for conduct if an arbitrator acts “honestly,” “not in bad faith,” or “without fraud.”⁶⁶ Within the U.S., however, several courts have held that arbitrators *are* immune from damages even if they act maliciously, corruptly, fraudulently, or in bad faith.⁶⁷ In *Jones v. Brown*, an arbitrator was immune

61. PETER SANDERS, *National Report on Romania*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 18 (1998) (citing Romanian Code of Civil Procedure, art. 353(a)).

62. See PETER SANDERS, *National Report on Libya*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Libyan Code of Civil Procedure art. 74); see also PETER SANDERS, *National Report on Tunisia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Tunisia Arbitration Code of 1993, art. 11 (stating that after an arbitrator's acceptance, “he may not withdraw without good reason, on penalty of being liable for damages”)); compare PETER SANDERS, *National Report on Indonesia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Indonesia Code of Civil Procedure, Third Book, Title 1, art. 623 (stating that arbitrators “cannot withdraw except for reasons to be approved by the Court”)).

63. See English Arbitration Act of 1996, § 25.

64. *Road Rejuvenating and Repair Servs. v. Mitchell Water Bd.*, from Supreme Court of Victoria, 15 June 1990, reprinted in 1992 ARB. AND DISP. RESOL. L.J. 46, 47.

65. See *id.*

66. MUSTILL & BOYD, *supra* note 11, at 232 (explaining that courts have said an arbitrator is not liable if he acts “honestly,” “not in bad faith,” and “without fraud”); see also *Penberthy v. Dymock*, [1954] N.Z.L.R. 130, 134 (stating that “an arbitrator is not liable for want of skill or care, and no misconduct short of bad faith or fraud would render him liable to an action for damages”); PROSSER & KEETON, *supra* note 55, at 186 (noting that for professional malpractice, there is no liability if there was an honest mistake of judgment where the proper course of action was open to reasonable doubt).

67. In *Ludgren v. Freeman*, 307 F.2d 104, at 117–18 (9th Cir. 1962) the court held an arbitrator liable for actions taken in bad faith and with the intent to harm one of the parties. See also *City of Durham v. Reidsville Eng'g Co.*, 120 S.E.2d 564, 567 (N.C. 1961) (stating that arbitrators are liable for actions taken in bad faith). These cases are potentially distinguishable, however, as they involve engineers and architects performing quasi-arbitral functions. See *Feichteinger v. Conant*, 893 P.2d 1266, 1267 n.4 (Alaska 1995).

even though he was said to have acted “fraudulently and corruptly” when he “conspired” with another arbitrator and made a decision without a regular meeting,⁶⁸ without the presence of the third arbitrator, and without the third arbitrator’s signature.⁶⁹ Despite allegations of several types of inappropriate conduct, the Alaska Supreme Court recently refused to make arbitrators liable for their bad-faith conduct.⁷⁰ In another case, an arbitrator was not liable for “fraudulently inducing, in pursuance of a conspiracy with the attorney of the other party, the other arbitrator to unite with him in an unjust award in favor of the latter party.”⁷¹ Only in *Grane* did a court find liability for the fraudulent acts of an arbitrator; and *Grane* involved the limited circumstances of an arbitrator’s conduct in fraudulently inducing the parties to enter into the arbitration agreement.⁷²

2. Nonfeasance

In contrast to affirmative misconduct, nonfeasance includes behavior such as: failure to disclose conflicts of interest, failure to abide by party requests, failure to abide by the duties imposed by the arbitral rules,⁷³ failure to take part in the deliberation process, or failure to render an award. In U.S. cases, courts regularly extend immunity to arbitrators who fail to disclose a conflict of interest even though it created an impression of bias and contaminated the decision-making process.⁷⁴

68. *Jones v. Brown*, 54 Iowa 140, 142–43 (Iowa 1880). Although the arbitrators were immune from suit, the original award was vacated. *Id.* at 143. In a subsequent case, they were not allowed to recover their arbitral fees. *See Beaver v. Brown*, 9 N.W. 911 (Iowa 1881); *see also* *Hornet v. Godfrey*, 3 Luzerne Leg. Reg. R. 10 (Pa. 1883) (holding that the arbitrator could not collect fees from the parties due to failure to make a timely award).

69. *See Beaver*, 9 N.W. at 913.

70. *See Feichteinger*, 893 P.2d at 1267. In particular, allegations of arbitrator misconduct included such examples as: (1) improperly excluding plaintiff from a hearing, (2) colluding with a party to deny plaintiff a fair hearing, (3) favoring one party over another, (4) and fraudulently rendering decisions based on only one party’s evidence. *See id.* at 167 n.1.

71. *Hoosac Tunnel Dock & Elevator Co. v. O’Brien*, 137 Mass. 424 (Mass. 1884). Although the arbitrator had fraudulently induced his co-arbitrators to unite with him in an award against the plaintiff, the court held that there was as much reason to protect an arbitrator and insure his impartiality, independence and freedom from undue influences – and he should receive immunity just as a judge. *See id.* at 426.

72. *See Grane v. Grane*, 493 N.E.2d 1112, 1118–19 (Ill. App. 1986).

73. In arbitration under the International Chamber of Commerce (ICC); for example, it is the duty of the arbitrators to draft the Terms of Reference and succinctly state the issues for resolution within the arbitration. *See* ICC Rules of Arbitration, art. 18.

74. *See, e.g., L&H Airco Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 377 (Minn. 1989). Instead of suits against arbitrators, the court asserted that vacation of the arbitral award was

In some countries, arbitrators may also be subject to liability for failing to abide by the party arbitration agreement or institutional rules.⁷⁵ However, two American courts refused to extend liability to institutions under these circumstances. First, in *Olson v. National Association of Securities Dealers*,⁷⁶ the arbitral institution failed to follow its own rules regarding the process of appointing an arbitrator. Second, in *Thiele v. RML Realty*, even though an award based upon settlement was founded upon the direction that it remain confidential, when the arbitral institution improperly released the award contrary to party direction, the institution was immune.⁷⁷

Arbitrator misconduct also involves failure to render a timely award. In Argentina, for example, if arbitrators, without justification, fail to render their award within the required term, they will, "lose all right to their fees and will be, furthermore, held liable for costs and damages."⁷⁸ Similarly, in Indonesia, arbitrators "are liable to compensate the damages of the parties should they, without any justifiable reasons fail to make their award within the period of time fixed for it."⁷⁹ By rendering a late award in the United States, an arbitrator loses resemblance to a judge and therefore may lose his claim to immunity.⁸⁰ However, more recent cases suggest this failure cannot form the basis of arbitrator liability.⁸¹

the appropriate remedy for the injured party. See *id.* Similarly, in *John Street Leasehold LLC v. Brunjes*, 650 N.Y.S.2d 649 (N.Y. App. Div. 1996), where an arbitrator failed to disclose that he was represented by the opposing party's attorney in a personal matter, the arbitrator was immune from liability.

75. This type of analysis is akin to the contractual basis for establishing liability. See *supra* Part I.A.1.

76. See *Olson v. National Ass'n of Sec. Dealers*, 85 F.3d 381, 383 (8th Cir. 1996).

77. See *Thiele v. RML Realty Partners*, 18 Cal. Rptr. 2d 416, 416-18 (Cal. Ct. App. 1993). In *Rubenstein v. Otterbourg*, 357 N.Y.S.2d 62, 62-63 (N.Y.C. Civ. Ct. 1973), where an arbitral institution refused to intervene at a party's request and disqualify an arbitrator, an arbitrator was found to be immune.

78. PETER SANDERS, *National Report on Argentina*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Argentina National Code of Civil and Commercial Procedure of 1981, arts. 756 & 745 (providing that parties can hold arbitrators "liable for costs and damages derived from the non-performance of arbitral functions")).

79. PETER SANDERS, *National Report on Indonesia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Indonesia Code of Civil Procedure, Third Book, Title 1, art. 623).

80. See *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977). Similarly, in *Baar v. Tigerman*, 140 Cal. App. 3d 979 (Cal. Ct. App. 1983), the court held the arbitrator liable for damages caused by his failure to render an award. This last decision was later abrogated by statute. See CAL. CIV. PRO. CODE § 1297.119.

81. See *Coopers & Lybrand v. Superior Court*, 260 Cal. Rptr. 713 (Cal. Ct. App. 1989). Although it adopted the U.S. common law doctrine of immunity, Alaska specifically left

Because liability for inaction is a more difficult issue, commentators suggest nonfeasance should be of a sufficiently serious degree⁸² and not merely, for example, missing a deadline by a few days.⁸³ Others argue that failure to act should not cause an arbitrator to lose her immunity⁸⁴ because the proper remedy for arbitrator misconduct is vacatur of an award⁸⁵ or the failure to award arbitration fees or both.⁸⁶

II. THE BASIS OF ARBITRATOR IMMUNITY

The immunity of arbitrators from suit is partly based upon the doctrine of judicial immunity⁸⁷ and often depends on whether an arbitrator's responsibilities are functionally comparable to those of a judge.⁸⁸ In essence, although some countries evaluate arbitral immunity on the basis of

open the issue of whether complete failure to render a timely decision results in arbitrator liability. See *Feichtinger v. Conant*, 893 P.2d 1266, 1267 n.3 (Alaska 1995).

82. Hausmaninger, *supra* note 8, at 32–34.

83. Professor Nolan further argues that courts should instead focus upon whether delay is so long as to “demonstrate convincingly that performance is unlikely.” Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 *INDUST. REL. L.J.* 228, 253 (1996).

84. See *Austern v. Chicago Bd. Options Exch.*, 716 F. Supp. 121, 124–25 (S.D.N.Y. 1989), (providing an arbitrator with immunity despite a procedural failure to notify one of the parties of the initiation of arbitral proceedings and stating that the reasoning of *Baar v. Tigerman* is “not persuasive”).

85. See *Olson v. National Ass'n of Sec. Dealers*, 85 F.3d 381, 383 (8th Cir. 1996) (determining that even though the arbitral institution broke its own rules regarding arbitral appointment, vacatur, and not civil liability, was the proper remedy) and *L&H Airco Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 377 (Minn. 1989); see also *European Grain & Shipping*, [1983] Q.B. 520 (determining that when an arbitrator failed to participate in process of rendering an award and merely signed his name on the bottom of a blank award, vacatur of the award was appropriate). Because of the specific statutory scheme involved, one court justified arbitral immunity on the basis that there were alternative remedies available—namely, remedies against trustee/fiduciaries who breached their duties. *International Union, United Auto., Aerospace and Agric. Implement Workers of Amer. and its Locals 656 and 985 v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1187–88 (6th Cir. 1983). This remedy is not available in the context of international arbitration.

86. See *Jones v. Brown*, 54 Iowa 140, 142–43 (Iowa 1880) and *Beaver v. Brown*, 9 N.W. 911 (Iowa 1881) (providing arbitrators with immunity but denying them compensation for their inadequate arbitral services).

87. See, e.g., *Coopers & Lybrand*, 260 Cal. Rptr. at 713 (noting that arbitral immunity conforms to judicial immunity) and LEW, *supra* note 5, at 44–47 (describing how an arbitrator's immunity cannot be broader than a judge's).

88. See *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209–10 (6th Cir. 1982) and Richard J. Mattera, *Has the Expansion of Arbitral Immunity Reached its Limits After United States v. City of Hayward?*, 12 *OHIO ST. J. ON DISP. RESOL.* 779, 780 (1997).

contractual obligations, others determine the scope of arbitral immunity by evaluating an arbitrator's similarity in status to judges.⁸⁹ It is therefore helpful to examine the roots of judicial immunity.

A. Judicial Immunity

In common law countries, judicial immunity originates from two cases holding that judges are not liable for their judicial acts.⁹⁰ This rule of immunity is subject to two important caveats.⁹¹ First, *The Marshalsea Case* held that actions taken in complete absence of jurisdiction can subject a judge to personal liability.⁹² Second, *Floyd v. Barker* determined that a judge can only be immune for "judicial actions" rather than acts that are administrative, legislative, or personal.⁹³

In *Bradley v. Fisher*,⁹⁴ the U.S. Supreme Court provided federal judges with immunity. The Court reasoned that because of the need for the proper and efficient administration of justice, a judge "cannot be subjected to responsibility for [a decision] in a civil action, however erroneous the act may have been, and however injurious the consequences it may have proved to the plaintiff."⁹⁵ Despite a vigorous dissent⁹⁶ and allegations of deliberate, malicious and wilful misconduct, the Court held that a judge was immune because he had not acted in excess of his subject matter jurisdiction.⁹⁷ Similarly, in *Pierson v. Ray*, the Court granted immunity to a judge allegedly engaged in malicious actions.⁹⁸ In justifying this grant of immunity, these

89. There is a sense that the issue is evaluated from two radically different perspectives: one on the contractual basis of liability and the other upon immunity based upon the functional similarity to a judge. BUTLER & FINSSEN, *supra* note 11, at 92–97.

90. See generally PROSSER & KEETON, *supra* note 55, at 1056–59.

91. See Nolan & Abrams, *supra* note 83, at 230.

92. *The Marshalsea Case*, 10 Coke's Kings Bench Rep. 68, 77 Eng. Rep. 1027 (K.B. 1612); see also Michael R. King, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549, 553 (1978).

93. *Floyd v. Barker*, 12 Coke's Kings Bench Reports 23, 77 Eng. Rep. 1305 (K.B. 1607). In *Forrester v. White*, 484 U.S. 219, 229–30 (1988), a federal judge was held not to have immunity for his decisions to hire and fire an employee as the court determined these actions were administrative in nature.

94. 80 U.S. 335 (1871).

95. *Id.* at 346–47.

96. See *id.* at 357 (asserting that a judge should be liable if he acts maliciously and corruptly).

97. See *id.*

98. *Pierson v. Ray*, 386 U.S. 537 (1967), involved allegations of inappropriate conduct of a judge in convicting civil rights protestors for their lawful actions in a Jackson, Mississippi

two cases focused upon the availability of alternative remedies such as impeachment⁹⁹ and the possibility of appeal.¹⁰⁰ The availability of appellate error correction is central to the justification of judicial immunity since, without the possibility for correcting errors, litigants would be justified in using collateral attacks to redress errors of justice.¹⁰¹

Butz v. Economou clarified that the basis of immunity depends upon whether the functions performed are judicial in nature.¹⁰² *Stump v. Sparkman*¹⁰³ explained that whether a judge's actions are "judicial" and immune from liability depends on (1) "whether it is a function normally performed by a judge," and (2) "whether [the parties] dealt with the judge in his judicial capacity."¹⁰⁴

Despite this broad immunity, there are areas of liability. Specifically, judges are not immune from criminal prosecutions and impeachment from office.¹⁰⁵ Despite these somewhat limited exclusions, however, judicial immunity in common law countries is nearly absolute.¹⁰⁶

In civil law jurisdictions, "there is no concept of an absolute immunity of the judiciary for *judicial* acts."¹⁰⁷ In general, judges can be liable for all wrongful acts and parties to a judicial proceeding can recover damages

bus station.

99. In *Bradley*, the Court focused upon the availability of remedies such as impeachment, suspension, or removal from office. See 80 U.S. at 350.

100. The *Pierson* court focused nearly exclusively on the fact that a judge's "errors may be corrected on appeal." See 386 U.S. at 553-54.

101. See Andrea Mettler, *Immunity v. Liability in Arbitral Adjudication*, 47 *ARB. J.* 24, 25 (1992) and Chaykin, *supra* note 16, at 78-79. Originally, in England, immunity was developed to eliminate collateral attacks on judgments and confine error correction to the hierarchy within the King's courts. Judicial immunity followed from the doctrine of sanctity of records but was welcomed largely because it strengthened the appellate system by cutting off collateral attacks on judgments. See Block, *Stump v. Sparkman and the History of Judicial Immunity*, 5 *DUKE L.J.* 879, 881, 922-24.

102. See *Butz v. Economou*, 438 U.S. 478, 512 (1978) (stating that immunity "stems from the characteristics of the judicial process rather than its location").

103. 435 U.S. 349 (1978) (holding that because the judge performed an act normally performed only by judges and had acted in his capacity as a judge, he was immune from liability).

104. *Id.* at 362-63. Judges in the U.S. are *not* immune when they act in an administrative function. See *Forrester v. White*, 484 U.S. 219, 224 (1988).

105. See Mettler, *supra* note 101, at 782-83 and Nolan & Abrams, *supra* note 83, at 232.

106. In the United Kingdom, judges also enjoy an absolute immunity from any form of civil action being brought for their judicial acts. See *Sutcliffe v. Thackrah*, [1974] *App. Cas.* 727, 757-58.

107. Hausmaninger, *supra* note 8, at 13 (emphasis in original).

caused by judicial wrongdoing.¹⁰⁸ In Argentina, for example, judges are liable for damage and loss resulting from tortious conduct that occurs in the exercise of their judicial functions.¹⁰⁹ Similarly, in Spain, judges do not enjoy absolute immunity for acts in the course of official conduct; instead, Spanish law expressly provides that judges might be liable for "inexcusable negligence or ignorance."¹¹⁰ In the Netherlands, liability of judges occurs only if (1) the judge's actions involved "a negligence of fundamental legal principles", (2) a party was deprived of fair and impartial treatment, and (3) there are no other remedies available to rectify the damage.¹¹¹ Because this rule can virtually never be applied, one commentator suggests that the Dutch law of judicial immunity is very similar to the absolute immunity of the U.S. and England.¹¹²

Although South Africa tends toward the common law, a civil law influence still exists. Interestingly, a judge is generally immune for his judicial actions and cannot be held liable for lack of care or skill in the course of judicial duties.¹¹³ There is still, however, a small possibility for liability pursuant to the Supreme Court Act of 1959 which provides that a summons may be issued against a judge with the consent of the court.¹¹⁴ Although the precise scope of judicial immunity varies from country to country, common law countries generally tend to provide more protection to judges for their judicial acts.

B. Arbitral Immunity: The Extension of Judicial Immunity?

1. Arbitrators

Some commentators advocate extending immunity to arbitrators because of the quasi-judicial nature of the actions they perform and the need to protect the independence of those acts.¹¹⁵ In essence, rather than focusing upon the terms of an arbitrator's appointment to establish the scope of liability, the limitation of liability is justified because of an arbitrator's status and functional similarity to judges. Particularly within common law

108. *See id.*; *see, e.g.*, LEW, *supra* note 5.

109. *See* LEW, *supra* note 5, at 5.

110. *See id.* at 72-73.

111. *See id.* at 60.

112. *See id.*

113. *See* BUTLER & FINSEN, *supra* note 11, at 100-101.

114. *See id.* at n.178.

115. *See, e.g.*, DOMKE, *supra* note 1, at § 23.01.

jurisdictions, courts appear willing to extend immunity to arbitrators when they are acting in a quasi-judicial capacity¹¹⁶ since “arbitrators are in much the same position as judges, in that they carry out more or less the same functions.”¹¹⁷ As with the Administrative Law Judges who gained immunity in *Butz*, individuals trying to make principled decisions should be immune from suit because of the “special nature of their responsibilities.”¹¹⁸

In the United States, when arbitrators assume responsibilities that are functionally comparable to those of judges, they receive immunity.¹¹⁹ As one respected commentator explained, functional similarity to a judge depends upon “(i) whether a dispute exists, (ii) whether there is an ultimate determination of liability, and (iii) whether the decision-maker conducts a hearing and takes evidence from the parties, as would a judge.”¹²⁰

In *Hutchins v. Merrill*,¹²¹ for example, although he acted as a log appraiser, the arbitrator was immune. The court found he exercised a judicial function because, “the proper discharge of the duties of the scaler involves the exercise of skill and judgment, as well as absolute impartiality on his part, and of the mutual agreement of the parties that . . . this scale should be

116. When deciding whether to extend quasi-judicial immunity, one important prerequisite is whether the individual truly acts with a judicial function. See *City of Durham v. Reidsville Eng'g Co.*, 120 S.E.2d 564 (N.C. 1961) (extending immunity to engineers); *Blecick v. School Dist. No. 18*, 406 P.2d 750 (Ariz. Ct. App. 1965) (extending immunity to architects); *Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994) (extending immunity to mediator and case evaluator acting in court-related program); see also *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (extending quasi-judicial immunity to guardians *ad litem*); cf. *Craviolini v. Scholer & Fuller Assoc. Architects*, 357 P.2d 611 (Ariz. 1960) (failing to extend immunity to architects who were not acting in an arbitral capacity); *Gammel v. Ernst & Ernst*, 72 N.W.2d 364 (Minn. 1955) (determining that certified accountants were not entitled to immunity where they were not acting in a quasi-judicial, decision-making capacity).

117. *Sutcliffe v. Thackrah*, [1974] App. Cas. 727, 735.

118. *Butz v. Economou*, 438 U.S. 478, 511 (1978). Employees of administrative agencies who work as judges (ALJs) are immune from liability because they perform quasi-judicial functions. See *id.* at 511, 513–14. Unlike arbitrators, however, ALJs are subject to *de novo* review for questions of law, and questions of fact are reviewed under the substantial evidence test. See *Universal Camera v. NLRB*, 340 U.S. 474, 491 (1951) and *Brickner v. FDIC*, 747 F.2d 1198, n.4 (8th Cir. 1984). Ultimately, ALJs are subject to greater scrutiny and have a more involved appellate review.

119. See *Hausmaninger*, *supra* note 8, at 16 and *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982). As the *Corey* court clearly articulated, arbitrators are judges chosen by the parties to decide matters submitted to them; and by this private agreement, the parties invoke the arbitrators' independent judgment and discretion as a decision-maker. See *Corey* at 1209.

120. *Park*, *supra* note 2, at 206–7.

121. 84 A. 412 (Me. 1912).

final and conclusive.”¹²² In *Austern*, even though the hearing took place without the plaintiff’s presence or knowledge,¹²³ the court assumed that the act of holding hearings and rendering a final decision was sufficiently “judicial” to justify immunity.¹²⁴

In contrast, there is no entitlement to immunity when there is no underlying dispute and the misconduct is unrelated to the defendant’s decision-making capabilities.¹²⁵ In *Baar v. Tigerman* (“*Barr II*”),¹²⁶ an arbitrator was held liable because he failed to render a decision within the time prescribed by the arbitration agreement. Although it focused more upon the contractual obligations of the arbitrator, *Baar II* nevertheless held that there were significant differences between judicial actions¹²⁷ and arbitrators,¹²⁸ and that the significant delay could not be deemed functionally equivalent.¹²⁹ Unfortunately, the precedential value of *Baar II* has been

122. *Id.* at 413.

123. *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 884 (2nd Cir. 1990) [hereinafter *Austern II*]. Although the plaintiffs had an arbitration agreement which required them to be notified of the beginning of any arbitration proceedings, they were never notified of the initiation.

124. *Id.* In another case, a labor arbitrator was immune from suit because when he broke a deadlock between trustees he was “functionally comparable” a judge in that he had no interest in the outcome of the conflict and he was acting according to his mandate to break the deadlock. See generally *International Union, United Auto., Aerospace and Agric. Implement Workers of Amer. and its Locals 656 and 985 v. Greyhound Lines, Inc.*, 701 F.2d 1181 (6th Cir. 1983).

125. *Craviolini*, 357 P.2d at 613–14.

126. *Baar v. Tigerman*, 189 Cal. Rptr. 834, 836–39 (Cal. Ct. App. 1983) [hereinafter *Baar II*].

127. *Baar II* did focus upon the fact that in California there are several ways to address arbitrator non-feasance. First, a judge is required to swear that no cases remain undecided for more than 90 days before they get their salaries. Second, judges are subject to impeachment. Third, judges may be censured or removed under certain circumstances including “persistent failure or inability to perform [a] judge’s duties.” *Id.* at 837 n.7.

128. Essentially, this involved a general policy-based distinction where the court distinguished the cases by arguing that: (1) a judge receives a mandate from the government, (2) the judiciary is essential to preserving democracy, (3) trials are public, (4) judges must follow the law, (5) arbitral decisions have little precedential value, (6) arbitration cannot affect third party rights, and (7) judges cannot decline to take a case within the court’s jurisdiction. See *id.* at 837–38.

129. Interestingly, in discussing the *Baar* case, the General Counsel of the American Arbitration Association explained that the arbitrator was a “former bar association president who was experiencing personal difficulties” at the time he was being condemned for excessive delay. Michael F. Hoellering, *The Role of the International Arbitrator*, 51 SEPT. DISP. RESOL. J. 100, 106 (1996). This aspect was not discussed by the *Baar* court. Other jurisdictions do consider whether delay is justified in determining whether to extend

questioned.¹³⁰In England,¹³¹ an arbitrator is immune when acting in a “judicial capacity” or performing functions “sufficiently judicial in character.”¹³² English law explains that indicia of judicial functions include: “(1) the existence of a dispute; (2) the submission of the dispute by agreement of the parties, or unilaterally, for binding decision; (3) the hearing of evidence and arguments by the parties; (4) making an unbiased decision fairly between the parties.”¹³³ In *Arenson*, Lord Simon stressed that “the essential prerequisite for [the arbitrator] to claim immunity is that, by the time the matter is submitted to him for decision, there should be a formulated

immunity. See *supra* notes 61 & 78 and accompanying text. See also *infra* notes 272–75 and accompanying text.

In *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1033–35 (5th Cir. 1977), modified on other grounds, 559 F.2d 268 (5th Cir. 1977), an arbitrator was sued for failing and delaying in making decisions. In this case, the court held that, “[w]here his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decision-making (good or bad), he loses his resemblance to a judge. He has simply defaulted on a contractual duty to both parties.” *Id.* at 1033.

130. See *Austern v. Chicago Bd. Options Exch.*, 716 F. Supp. 121, 124 (S.D.N.Y. 1989); *Cort v. American Arbitration Ass'n*, 795 F. Supp. 970, 971 (N.D. Cal. 1992).

131. Although these cases refer to the common-law approach of an arbitrator’s functional comparability to a judge in order to determine the scope of immunity, the precise scope of arbitral immunity has been clarified, however, by the 1996 Arbitration Act.

Also, in Australia, the important basis for providing immunity is whether the individual has a judicial function and is engaged in an exercise with a significant judicial element. *Thomas Cooke v. Commonwealth Banking Corp.*, [1986] 4 BPR 9185, 1986 NSW LEXIS 7181, *14–22. In a recent case, however, an arbitrator was required to indemnify and arbitral institutions when the arbitrator engaged in repeated, improper conduct. See *Road Rejuvenating and Repair Services*, [1992] ARB. & DISPUTE RESOLUTION L. J. 47. Although there is no analysis of whether his bad-faith conduct was sufficient “judicial” to warrant immunity, he was found liable nonetheless. See also *Gas & Fuel Corp. of Victoria v. Wood Hall Ltd*, [1978] V.R. 385, 411 (determining that removal of an arbitrator was appropriate where an arbitrator had engaged in the “non-judicial” activities of (1) making a decision while being “insufficiently informed about all the facts and circumstances of the case,” (2) describing counsel as “wasting time”, and (3) attempting to decide the case unnecessarily in advance); but see PETER SANDERS, *National Report on Australia*, in *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (1998) (citing *Victoria Commercial Arbitration Act of 1984* § 52). Stating that an arbitrator “is not liable for negligence in respect of anything done or omitted to be done by the arbitration. . . in the capacity of arbitration. . . but is liable for fraud in respect of anything done or omitted to be done in that capacity”) and *Australia International Arbitration Act of 1984*, § 28 (stating that an arbitrator “is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, but is liable for fraud in respect of anything done or omitted to be done in that capacity”). The *Australia International Arbitration Act* was amended in 1989 to bring it in conformity with the *UNCITRAL Model Law*. See LEW, *supra* note 5, at 14.

132. *Sutcliffe v. Thackrah*, [1974] App. Cas. 727, 738.

133. *Yat-Sen Li*, *supra* note 11, at 54 (citing *Sutcliffe* and *Arenson v. Casson*).

dispute between at least two parties which his decision is required to resolve.”¹³⁴

Under New Zealand case law, arbitrators are also immune if they act with a judicial function.¹³⁵ In the leading case, *Pickens v. Templeton*,¹³⁶ the High Court of Christchurch determined that, although the Arbitration Act of 1908 technically classified the valuer as an arbitrator, his actions were not sufficiently judicial to justify immunity.¹³⁷ In making this determination, the Court focused upon the fact that the “arbitrator’s” role was “essentially to investigate the value of the assets.” Because this was based upon the arbitrator’s personal “knowledge, expertise and experience in the field” and was followed by a negotiation between the arbitrators and a third “umpire” who “had to make the final decision,” the acts of the arbitrator/valuer were not judicial.¹³⁸ Because the “arbitrator” used personal knowledge and did not make an ultimate determination, the acts were not sufficiently “judicial” to warrant immunity.

Canada has a similar approach. In *Sport Maska Inc. v. Zittreer*,¹³⁹ the Canadian Supreme Court held that immunity would only attach where the precise function of the arbitrator was judicial. The court focused on the status of an arbitrator and her similarity to a judge to determine whether an

134. *Arenson v. Casson*, 3 All. E.R. at 912 (1975).

135. See *Pickens v. Templeton*, [1994] 2 N.Z.L.R. 718. This position may have been changed by the new Arbitration Act. See PETER SANDERS, *National Report on New Zealand*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing New Zealand Arbitration act of 1996, § 13).

136. [1994] 2 N.Z.L.R. 718. There is an older case from New Zealand, *Penberthy v. Dymock*, [1954] N.Z.L.R. 130, which the *Pickens* case cast significant doubt upon. See *Pickens* 2 N.Z.L.R. at 727 (stating that there have been “very substantial developments in the law [since 1954 and]. . . it is no longer possible to say that simply because someone acts as an arbitrator they are entitled to immunity from civil suit whatever their actual function.”). Although the arbitrators in that case merely valued shares, the court determined they were not liable for lack of skill and care since the court felt they were not “valuers strictly.” *Penberthy*, [1954] N.Z.L.R. at 134–35. Even the *Penberthy* court provided that an arbitrator might be liable for conduct involving bad faith or fraud. See *id.* at 134.

137. See *Pickens*, [1994] 2 N.Z.L.R. at 728. The *Pickens* court set up a helpful continuum to examine the extent of judicial content, stating that, “At one end of the scale is the arbitrator who sits to hear evidence and submissions and then adjudicates in the same way as a Judge. At the other end is the arbitrator who is appointed to use his own expertise, skill and care to investigate a particular matter and to come to a decision on it without evidence, submissions or any type of hearing.” *Id.* at 728.

138. *Id.* The court did focus upon the fact that it was the umpire who ultimately made the final decision and, in a sense, adjudicated the figures adopted by the two arbitrators. *Id.* The court did not address whether this third “umpire” could be immune.

139. *Sport Maska Inc. v. Zittreer* [1988] 1 S.C.R. 564, 38 BUS. L. REP. 221 (1988).

individual was immune. The Supreme Court indicated that the test for whether an arbitrator should be immune is: (1) the existence of a dispute, and (2) the duty or intent of the parties to submit the dispute to an arbitrator.¹⁴⁰ In evaluating whether an individual is an arbitrator, Canadian courts consider: (1) the language of the parties in labeling the function the third party performs, (2) the similarity between the arbitrator and the judicial process and whether the parties “have the right to be heard, to argue, to present testimonial or documentary evidence, that lawyers are present at the hearing and that the third party delivers an arbitral award with reasons,” (3) whether the decision is final and binding, and (4) whether the arbitrator must decide between opposing arguments or render something akin to an expert opinion based on personal experience.¹⁴¹

These cases demonstrate that under the common law approach, an arbitrator deserves immunity when an actual dispute exists; the arbitrator must decide between opposing arguments; there are hearings and presentation of evidence; the individual is impartial; and the decision is final and binding upon the parties.

Arbitrators, however, are not judges.¹⁴² Because there are several key distinctions between the roles played by arbitrators and judges, the functional analogy between arbitrators and judges eventually breaks down. First, judges derive their power and remuneration from the state while arbitrators derive their power from private contracts and receive payment from the parties in exchange for professional services.¹⁴³ Because of its relation to the state, the judiciary is “essential to the preservation of democracy.”¹⁴⁴ Although arbitration is an important commercial service, its role is, perhaps, less “noble.”¹⁴⁵ Second, judges are required to follow the law and judicial decisions have critical precedential consequences. In contrast, arbitrators are

140. See *Sport Maska*, 38 BUS. L. REP. at 284. Interestingly, in its analysis of French law on immunity, the *Sport Maska* court found that French law has a similar two-pronged analysis. *Id.* at 291. Ultimately, the court concluded that there is “no fundamental difference between the approaches taken by the common law and that taken by French case law and academic analysis.” *Id.* at 291; but see LEW, *supra* note 5, at 34–35 (suggesting that an arbitrator’s liability in France is based upon contract but noting that if an arbitrator is exercising a “jurisdictional function” that arises from “the very contents of the final and binding decision” an arbitrator should be free from all liability).

141. See *id.* at 301–2.

142. See BUTLER & FINSSEN, *supra* note 11, at 95–97, for a general discussion of the major differences between judges and arbitrators in South Africa.

143. See *Baar v. Tigerman*, 140 Cal. App. 3d 979, 984 (Cal. Ct. App. 1983); *Arenson v. Casson*, [1975] 3 All. E.R. at 918–19.

144. *Baar*, 140 Cal. App. 3d at 984.

145. See *Sponseller*, *supra* note 4, at 430.

not necessarily bound by precedent,¹⁴⁶ nor do they create it.¹⁴⁷ Third, trials are public, while arbitration involves private and often confidential dispute resolution.¹⁴⁸ Fourth, unlike a court proceeding, arbitration cannot determine the rights and obligations of non-parties to the arbitration contract and cannot decide any questions not presented by the parties' submission.¹⁴⁹ Additionally, arbitration lacks other procedural formalities such as strict rules of evidence and requirement of a transcript.¹⁵⁰ Finally, arbitral awards are subject to a very limited judicial review.¹⁵¹ This is an important distinction given that the availability of appellate review of judge's decisions is fundamental to judicial immunity. Therefore, despite this "functional" similarity, legislatures and courts should be cautious about extending immunity to arbitrators without also considering the contractual agreement underlying the arbitrator's authority and the proper balance of public policy concerns.

146. For example, under the ICC, UNCITRAL and LCIA Rules, arbitrators have the authority to decide cases as *amiables compositeurs* or *ex aequo et bono*. See International Chamber of Commerce Rules on International Arbitration, as in effect 1/1/98, art. 17.3; London Court of International Arbitration Rules on International Arbitration as in effect 1/1/98, art. 22.4; UNCITRAL Rules on International Arbitration, adopted by U.N. General Assembly on 15 Dec. 1976, art. 33(2). Under these doctrines, arbitrators are not bound to apply specific rules of law, and instead have the authority to decide on the basis of general principles of law or as equity and justice require. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999); but see *Gas & Fuel Corp. of Victoria v. Wood Hall Ltd.*, [1978] V.R. 385, 394. Most countries provide that arbitrators may only act as *amiable compositeurs* or *ex aequo et bono* if the parties expressly authorize it. English Arbitration Act; PETER SANDERS, *National Report on Peru*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Peruvian Code of Civil Procedure, art. 117); French Code of Civil Procedure; Swiss Code of Civil Procedure. However, in certain South American Countries, as a default, arbitrators have the authority to decide as *amiable compositeurs*. See PETER SANDERS, *National Report on Argentina*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Argentine Code of Civil Procedure, art. 766) and PETER SANDERS, *National Report on Columbia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Columbia Decree No. 2279, amended by law No. 23 of 21 Mar., 1991, art. 51).

147. See *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1356 (9th Cir. 1981); *Baar*, 140 Cal. App. 3d at 984; and *Arenson*, [1975] 3 All. E.R. at 918.

148. See *Baar*, 140 Cal. App.3d at 984.

149. See *id.*

150. See *Mattera*, *supra* note 88, at 785 and *Sponseller*, *supra* note 4, at 436–37.

151. See *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1210 (6th Cir. 1982).

2. Arbitral Institutions

Various courts have held that immunity should extend to institutions that sponsor arbitration.¹⁵² These courts then have focused upon the need to effectuate policies that underlay arbitral immunity.¹⁵³ Without this immunity, American courts assert that arbitrator immunity would be meaningless because liability would merely shift from individual arbitrators to the sponsoring organization.¹⁵⁴

A minority of cases hold arbitral institutions liable. *Baar v. Tigerman*, for example, held a sponsoring organization liable.¹⁵⁵ The court based its reasoning on the fact that organizations derive their immunity from the arbitrator and the AAA did not act in an "arbitral capacity" when it failed to oversee the arbitration.¹⁵⁶ One Australian case also stands in stark contrast to the vast majority of U.S. cases. In *Road Rejuvenating and Repair Services*, the Supreme Court of Victoria held that an arbitral institution was liable for the misconduct of its arbitrator.¹⁵⁷ Because the court was concerned that the arbitrator was biased through its "inexcusable alignment of the arbitrator,"¹⁵⁸ it ordered the removal of the arbitrator at the institution's expense.

The basis of institutional immunity is somewhat different. It is not the institution's functional comparability to a judge, but rather, whether its actions are necessary to give effect to the arbitral process.¹⁵⁹ In essence, arbitral immunity protects all acts within the scope of administering the arbitral process. As another court put it, arbitral immunity protects

152. See *Thiele v. RML Realty Partners*, 18 Cal. Rptr. 2d 416, 419 (Cal. Ct. App. 1993).

153. See *id.*

154. See *Olson v. National Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996); *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2nd Cir. 1990); and *Corey* 691 F.2d at 1211 (6th Cir. 1982).

155. See *Baar v. Tigerman*, 189 Cal. Rptr. 834, 839 (Cal. Ct. App. 1983).

156. See *id.*

157. *Road Rejuvenating and Repair Servs.*, 1992 ARB. & DISP. RESOL. L.J. 47. In that case, the court complained of several acts, including: (1) the improper admission of legally privileged documents, (2) repeated ex parte communications with one party, (3) refusal to abide by a court order, (4) writing directly to a judge and refusing to appear in court. *Id.* In justifying the breadth of this immunity, the court stated that, "the Board should have known and its officers should have been instructed that they should not communicate directly with the arbitrator or allow him to communicate directly with them." *Id.*

158. *Id.*

159. See *Corey*, 691 F.2d at 1211.

arbitrators and their organizations for all actions performed in their arbitral capacity.¹⁶⁰

Most courts extend immunity to institutions because they act in a quasi-judicial function as a quasi-judicial organization. For example, in *Rubenstein*, the court held that an institution and one of its officers¹⁶¹ were immune from liability.¹⁶² Ultimately, the court based its extension of immunity on the basis that both the institution and its vice president were “in effect quasi-judicial organizations.”¹⁶³ In a similar case, despite allegations that the AAA had misrepresented the effectiveness of its arbitration services and breached its duty to provide competent arbitrators, the court held the institution immune.¹⁶⁴

Other courts bring institutions within the umbrella of immunity because they perform acts that are necessary extensions and sufficiently related to the arbitral process that ensure the policies behind immunity are fulfilled.¹⁶⁵ Various cases elucidate what it means to be sufficiently related to the arbitral process. Appointment of the arbitrator is worthy of immunity because it is a necessary function of the administration and directly connected to the arbitral process.¹⁶⁶ Even though in one case it spoiled evidence, the institution’s administrative control of the arbitral proceeding was sufficient to warrant immunity.¹⁶⁷ Improper notice and scheduling of hearings is also sufficiently related to adjudication to justify immunity.¹⁶⁸ Other types of

160. See *Wally v. General Arbitration Council of the Textile and Apparel Indus.*, 630 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 1995).

161. The organization’s Vice President was also immune even though he had “knowledge of all the facts.” *Rubenstein v. Otterbourg*, 357 N.Y.S.2d 62, 63 (N.Y.C. Civ. Ct. 1973).

162. In this case, one party asked the chairman to disqualify himself because of his previous professional relationships with the opposing party. See *id.*

163. *Id.* at 64.

164. See *Boraks v. American Arbitration Ass’n*, 517 N.W.2d 771, 773 (Mich. App. 1994). The *Boraks* court reasoned that arbitral immunity extends to quasi-judicial bodies that sponsor arbitrations and make arbitration facilities available because they are natural and necessary extensions of arbitrator immunity. *Id.* at 772.

165. See *Thiele v. RML Realty Partners*, 18 Cal. Rptr. 2d 416, 417 (Cal. Ct. App. 1993).

166. See *Olson v. National Ass’n of Sec. Dealers*, 85 F.3d 381, 383 (8th Cir. 1996) and *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2nd Cir. 1990).

167. *Cort v. American Arbitration Ass’n*, 795 F. Supp. 970, 972 (N.D. Cal. 1992). Interestingly, the result here might be different under Arab law. With traditional Islamic law principles, institutions can be liable for failing to take note of important documents, or losing or damaging them. See PETER SANDERS, *National Report on Indonesia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 17 (1998).

168. The court in *Austern II* assumed that the CBOE arbitration rules were included in the terms of the arbitration agreement. It was these rules that the institution broke that was the

irregularities such as inability to present evidence and the postponement of hearings without notice have also garnered immunity.¹⁶⁹

One feature common to these cases is that when institutions break their own rules and fail to abide by the arbitration agreement, they still receive immunity.¹⁷⁰ For example, in *Thiele*, the parties arrived at a negotiated award and asked the institution to keep the award confidential.¹⁷¹ Although the institution had agreed, it ultimately released the award contrary to the parties' agreement. In justifying the extension of immunity, the *Thiele* court argued that sending out an award is not an administrative act, but is rather "as much a part of the arbitral process as is determining the award."¹⁷² This broad construction of functions that are "integrally related" to the arbitral process creates a very broad scope of immunity for arbitral institutions.

Although protecting the policies underlying immunity and avoiding a shift of blame is certainly a worthy goal, it is a matter of concern that agencies disregard their own stated rules—rules that the parties probably considered when deciding with which institution to work. In a dispute resolution mechanism that supposedly values party autonomy and freedom of choice, it is quite ironic that institutions are insulated from their failure to adhere to the parties' agreement.

Even United States government agencies are subject to criticism under the Administrative Procedure Act for failing to follow their own rules.¹⁷³

alleged cause of the plaintiff's damage. *See Austern*, 898 F.2d at 884–86.

169. *See* *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982). There was a sense, however, that because the arbitrators were immune for their inappropriate acts, the NYSE was merely acting through its immune agents, and should therefore be granted immunity. *See id.* at 1209. Other cases demonstrate that there is a sense that institutions are vicariously liable for the torts of arbitrators appointed pursuant to their rules. *See Baar v. Tigerman*, 140 Cal. App. 3d 979, 979 (Cal. Ct. App. 1983).

170. *See Olson*, 85 F.3d at 383; *Austern*, 898 F.2d at 886; and *Corey*, 691 F.2d at 1208.

171. *See Thiele*, 18 Cal. Rptr. 2d at 417–18. Interestingly, the court decided to extend this immunity to institutions despite the fact that: (1) the new California legislation expressly providing international arbitrators with immunity did *not* refer to arbitral institutions, and (2) a provision extending immunity to sponsoring organizations was recommended to the Legislature but was rejected. *See id.* at 416.

172. *Id.* at 419.

173. *See, e.g.*, 5 U.S.C. § 706; *see also* William Funk, *Supreme Court News*, 22 ADMIN. & REG. L. NEWS 3 (1997) (stating that "it is hornbook law that an agency's unexplained departure from settled policy is arbitrary and capricious."); *INS v. Yang*, 117 S. Ct. 350 (1996) (acknowledging that if an agency "announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from the policy . . . could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act."); and James J. Fishman, *Enforcement of Securities Laws Violations in the*

Unlike arbitration with its limited rights to appeal, under the APA, this type of arbitrary, capricious and abuse of discretion behavior can result in reversal upon appeal. Moreover, in France, arbitration centers are required to adhere to the rules applicable to the arbitration¹⁷⁴ and are potentially liable for their failure to adhere to the parties' arbitration agreement.¹⁷⁵

Ultimately, arbitration agencies should not necessarily be completely free to disregard their own rules and the parties' arbitration agreement. However, they perform a key function as a quasi-judicial organization that allows arbitrators to function effectively and ensure that the arbitration comes to fruition. In order to avoid blanket protection without providing a reasoned analysis, courts and legislatures should properly balance these competing concerns.

C. Policy-Based Justifications for Arbitral Immunity

Courts often justify extending judicial immunity to arbitrators because of public policy.¹⁷⁶ One of the primary reasons for extending immunity is the concern for the independence and integrity of the decision-making process. The fear is that if arbitrators, unlike judges, are liable: (1) unhappy parties might threaten or harass arbitrators,¹⁷⁷ or (2) arbitrators might not make principled decisions if they are concerned about being sued and reprisals from dissatisfied litigants.¹⁷⁸ In other words, without immunity, the integrity of the judicial process will be sacrificed because normally diligent arbitrators will be intimidated by the possibility of dissatisfied parties bringing lawsuits.¹⁷⁹

A second argument is that immunity helps ensure the finality of arbitral awards.¹⁸⁰ Without immunity, an unsuccessful party could re-litigate a case

United Kingdom, 9 INT'L TAX & BUS. L. 131, 165 (1991) (describing that within the United Kingdom, the Securities and Investment Board cannot fail to follow its own rules).

174. See Robine, *supra* note 27, at 328–29.

175. See *Société Cubic Defense Sys. v. Chamber de Commerce Internationale*, 1997 REV. ARB. 417.

176. See *Butz v. Economou*, 438 U.S. 478, 508–11 (1978).

177. See *Sutcliffe v. Thackrah*, [1974] App. Cas. 727, 757.

178. See *id.* at 736; see also *Pierson v. Ray*, 386 U.S. 537, 547 (1967).

179. See *Cort*, 795 F. Supp. at 970 (determining that in order to encourage independent judgments, the arbitration process is granted immunity because functional comparability of arbitrator's decision-making process since immunity furthers need to be free from threat of lawsuits for independent decisions).

180. See *Yat-Sen Li*, *supra* note 11, at 53 and *REDFERN & HUNTER*, *supra* note 8, at 266–67.

by attacking the arbitrator and vitiate one of the primary advantages of arbitration. Even the Departmental Advisory Committee drafting of the 1996 English Arbitration Act stated that it felt “strongly that unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined.”¹⁸¹

A third reason for extending immunity is that without it, the number of skilled persons prepared to act as arbitrators would be significantly reduced.¹⁸² The idea is that the threat of liability deters responsible and capable individuals from accepting posts and that it thus would be difficult to find skilled persons prepared to serve as arbitrators.¹⁸³

Some argue that imposing liability¹⁸⁴ for negligence and wilful misconduct will not cause people to leave the profession.¹⁸⁵ Instead, because arbitration has become a profession, potential liability merely increases the quality of services provided. Moreover, it is “one of the marks of a fully developed profession that its members undertake to accept personal responsibility to those whom they serve, including full legal liability for loss caused by any failure.”¹⁸⁶ Therefore, if arbitration really wishes to be recognized as a legitimate profession, arbitrators must accept professional liability.¹⁸⁷

Finally, immunity can also be justified on the basis of the protection of the public. For example, in *Pickens v. Templeton*, a New Zealand court focused upon the fact that arbitration exists not for arbitrators, “but for the protection of the public in cases in which truly judicial functions are being

181. Oyre, *supra* note 11, at 48 (citing Departmental Advisory Committee on Arbitration Report on the Arbitration Bill at 32 (February 1996)).

182. See *Tamari v. Conrad*, 552 F.2d 778, 780–81 (7th Cir. 1977) and *REDFERN & HUNTER*, *supra* note 8, at 266.

183. See Hausmaninger, *supra* note 8, at 11. Although it may drive up fiscal costs of an arbitrator’s practice, malpractice insurance is often available.

184. One commentator even suggests that removal of immunity, like that of other professional liability actions, is not likely to spur suits against arbitrators. See Andrew I. Okekeifere, *The Parties’ Rights Against a Dilatory or Unskilled Arbitrator: Possible New Approaches*, 15 J. INT. ARB. 129, 139–40 (1998).

185. For example, Sponseller notes that arbitration is becoming a profession with “for profit” arbitration firms and established degrees in ADR. He further notes that “while imposing potential liability may speed this professionalization by increasing the need for malpractice insurance, increased professionalism and accountability is not an undesirable outcome.” Sponseller, *supra* note 4, at 438.

186. Yat-Sen Li, *supra* note 11, at 55.

187. See Okekeifere, *supra* note 184, at 140 (citing *Arenson v. Casson*, [1975] 3 All. E.R. 901, 918, 927).

discharged.”¹⁸⁸ In essence, by providing a private service and a means to unburden crowded court dockets, the public receives a benefit—and the integrity of this benefit must be protected.

Several courts have defended challenges to quasi-judicial immunity arguing that there are built-in procedural safeguards to prevent abuses of discretion and ensure the integrity of the decision-making process.¹⁸⁹ In particular, (1) the voluntary use of arbitration,¹⁹⁰ (2) the adversarial nature of the process,¹⁹¹ and (3) the right of judicial review compel the conclusion that “the risk of a wrongful act by the arbitrators is outweighed by the need for preserving the independence of their decision-making.”¹⁹² Other safeguards also include the potential liability of an arbitrator and the procedures for an arbitrator’s removal.¹⁹³ Moreover, because arbitrators are chosen by private parties and are not subject to the political process,¹⁹⁴ they are more insulated from political pressures and are more likely to make reasoned decisions.¹⁹⁵

In contrast there are significant policy arguments against immunity. First, immunity encourages carelessness by removing any incentives to be cautious. Second, the system places finality of the decision above individual justice. Third, disciplinary remedies are generally unavailable against arbitrators.¹⁹⁶ Fourth, although parties have consented to arbitration, they have not consented to be abused and there is an implied duty of good faith

188. *Pickens v. Templeton*, [1994] 2 N.Z.L.R. 718, 725.

189. See *Butz*, 438 U.S. at 508–11 and Hausmaninger, *supra* note 8, at 27.

190. As Professor Park aptly put it, by agreeing to arbitration “the parties have assumed the risk that the arbitrator may get it wrong on the merits of the dispute.” Park, *supra* note 2, at 200.

191. See *Mettler*, *supra* note 101, at 26 (arguing that the adversarial nature of the process, the right to an attorney, to discovery, and presentation of witnesses and evidence provides sufficient procedural safeguards).

192. *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1210 (6th Cir. 1982). Professor Nolan also argues that by voluntarily submitting the dispute to arbitration the parties assume the risk of a breakdown in the process and accept the lack of a remedy for the resulting harm. See *Nolan & Abrams*, *supra* note 83, at 234.

193. See *Mettler*, *supra* note 101, 26–27.

194. In some jurisdictions within the United States, judges are elected through the normal political process.

195. See *Mattera*, *supra* note 88, at 785; cf. *Sponseller*, *supra* note 4 (arguing that arbitrators are not politically insular because they often participate in the same industry in which they arbitrate disputes). There is also a sense that an arbitrator’s concern about his professional reputation and getting “repeat business” is a sufficient basis for acting in a highly professional basis. See *BUTLER*, *supra* note 11, at 108.

196. See *Yat-Sen Li*, *supra* note 11, at 56. *But see infra* notes 343–44, 252–55, and *supra* note 33 and accompanying text.

that courts should recognize. Finally, the alternative remedies are inadequate because parties cannot be made whole and the arbitrator's behavior cannot be punished merely through vacatur and the withholding of fees.¹⁹⁷ Moreover, courts should be wary of completely abdicating their judicial responsibility merely because they wish to clear over-crowded court dockets. Ultimately, however, the acceptance of these various policy arguments depends upon the law of the relevant jurisdiction.

III. COMPARATIVE ANALYSIS

There is a broad spectrum of arbitral immunity with one end providing absolute immunity and the other absolute liability. In between, there are types of qualified immunity where arbitrators are immune with respect to some acts performed in the exercise of their functions and not others.¹⁹⁸ Part III examines variations in the existence and scope of arbitral immunity in national laws and institutional rules.

A. National Laws

Most countries accept the proposition that, like judges, arbitrators can be criminally liable for their actions. Some countries accept that arbitrators should be liable for actions taken in a personal or executive capacity. Beyond this, the scope of liability varies significantly. To complicate matters, most countries do not have express statutes clearly delineating the scope of arbitrator liability and few courts have addressed this issue.

1. The Extreme: Absolute Immunity

In the United States, an arbitrator is absolutely immune from civil liability for all acts related to his decision-making functions.¹⁹⁹ The scope of immunity even extends to situations where the arbitrator was careless,

197. See Okekeifere, *supra* note 184, at 136–38.

198. See LEW, *supra* note 5, at 4.

199. See PETER SANDERS, *National Report on the United States*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 18 (1998). However, American arbitrators will *not* be immune if: (1) the arbitrator does not have subject matter jurisdiction over the matter, and (2) the conduct does not constitute an “arbitral acts” performed by the arbitrator. See Sponseller, *supra* note 4, at 427. But broad immunity does not shield arbitrators from *criminal* liability for fraud or corruption. See *Earle v. Johnson*, 84 N.W. 332, 333 (Minn. 1900).

grossly negligent, or intentionally acted in a fraudulent manner.²⁰⁰ Instead of imposing liability for bad-faith behavior such as fraud and conspiracy, the American cases hold that the arbitrator's inappropriate behavior merely prevented them from collecting their arbitral fees.²⁰¹

Courts have extended absolute immunity to arbitrators on the ground that federal policy encourages arbitration and "arbitrators are indispensable actors in furtherance of that policy."²⁰² They have even gone so far as to expand the umbrella of quasi-judicial actions to include conduct that seems largely administrative in nature.²⁰³ While some assert that when an arbitrator fails to act he is not "functionally comparable" to a judge and loses immunity, most have been willing to find arbitrators immune for delay or failure to render an award.²⁰⁴ Most recently, there is a profound unwillingness to allow arbitrators to be liable for any behavior, let alone complete abandonment of their quasi-judicial mandate. Following this trend, California and Florida have statutes providing arbitrators with absolute civil immunity for their actions or inaction.²⁰⁵

Similarly, before the Arbitration Act of 1996 clarified the position of English law, English case law provided nearly unlimited immunity for arbitrators. Despite the confusion created by *Sutcliffe v. Thackrah*²⁰⁶ and *Arenson v. Arenson*,²⁰⁷ all arbitrators were entitled to immunity when performing a judicial function.²⁰⁸ In contrast to the American position on

200. See *supra* notes 67–72 and accompanying text (discussing U.S. cases where arbitrators have been held immune despite their intentional, reprehensible conduct).

201. See *Beaver v. Brown*, 9 N.W. 911 (Iowa 1881) and *Jones v. Brown*, 54 Iowa 140 (Iowa 1880).

202. *Mattera, supra* note 88, at 787.

203. See *supra* notes 156–67 and accompanying text.

204. See *supra* notes 75–86 and accompanying text. Immunity can attach to arbitral acts and all "indispensable proceedings" related to the arbitration process. See *Mattera, supra* note 88, at 787; see also *Corbin v. Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393, 398 (S.C. 1968) (holding that absolute immunity attaches to all "indispensable proceedings").

205. See CAL. CIV. CODE, § 1297.119 (1994); FLA. STAT. § 684.35 (1998) (providing immunity for arbitrations against actions arising from their performance of the arbitrators' duties).

206. [1974] App. Cas. 727.

207. [1977] App. Cas. 405.

208. Mustill and Boyd suggest that the primary characteristic of such a function is that "the person who performs it is required to adjudicate upon an existing formulated dispute. But there are other matters which help to show whether or not the person in question is acting judicially; in particular, whether he receives evidence and arguments from the parties." MUSTILL & BOYD, *supra* note 11, at 226.

liability, however, England considered the terms of the arbitrator's appointment²⁰⁹ and left open the possibility for liability for fraud.²¹⁰

Interestingly, in one civil law based country, absolute immunity may be possible. In Brazil, Article 17 of the new arbitration act declares that arbitrators are "subject to the effects of criminal legislation as are civil servants."²¹¹ Because former provisions of the Code of Civil Procedure establishing arbitrator liability have been repealed, it is likely that the exclusive focus on criminal liability for inappropriate acts may create a basis for completely immunizing arbitrators from civil liability.²¹²

2. The Middle Position: Qualified Immunity

a. Express Immunity

When originally proposed, the UNCITRAL Model Law did not contain an express provision making arbitrators liable or immune from their acts or omissions. In fact, the Model Law's legislative history indicates that the issue of arbitrator liability was specifically ignored because "the liability problem is not widely regulated and remains highly controversial."²¹³ However, some countries addressed this issue when adopting the Model Law.

Several countries allow extensive arbitrator immunity, but limit it where the arbitrator has acted in bad faith. For example, unlike countries such as Canada,²¹⁴ when Bermuda adopted the UNCITRAL Model Law in 1993 it

209. *See id.*

210. *See* LEW, *supra* note 5, at 27; *see also* Arenson, [1974] App. Cas. at 432-33 (stating that "it is conceded that an arbitrator is immune from suit, aside from fraud") and MUSTILL & BOYD, *supra* note 11, at 232 (noting that in English courts an arbitrator is not liable if the "honest" acts, "not in bad faith" or "without fraud," and that "arbitrators can be held liable in damages, in the event of serious want of impartiality, but give no guidance as to how far this liability extends").

211. PETER SANDERS, *National Report on Brazil*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 11 (1998).

212. Under the old Code of Civil Procedure, arts. 1082 and 1083 created a basis for extending liability to arbitrators. In particular, under Article 1082, "[t]he arbitrator is liable for loss and damages if: (I) he does not make the award, so causing the expiration of the submission; (II) he withdraws without justifiable cause after the acceptance of his appointment." *Id.* at 11 n.3.

213. HOWARD M. HOLTZMAN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1119 (1989) *citing* First Secretariat Note, A/CN.9/207, para. 70. *See also id.* at 1443, 1148-50 (providing the legislative history of the rejected provision regarding arbitrator liability).

214. Canada essentially adopted the UNCITRAL Model Law in total and, federally, has

expressly provided that, "an arbitrator is not liable for any act or omission in the capacity of arbitration in connection with any arbitration."²¹⁵ The Act includes the proviso that arbitrators may be liable for the consequences of conscious and deliberate wrongdoing.²¹⁶

Similarly, section 28 of the Australia International Arbitration Act of 1984 provides that an arbitrator "is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, but is liable for fraud in respect of anything done or omitted to be done in that capacity."²¹⁷ The Province of Victoria has a similar provision that gives arbitrators immunity for most actions, but not fraud.²¹⁸ Unfortunately, neither statute indicates whether an arbitrator would be liable for grossly negligent acts such as failure to render an award or completely abandoning the arbitral mandate. However, pre-existing case law may still be applicable.²¹⁹

England's new 1996 Arbitration Act provides arbitrators with a statutory basis for immunity in tort, contract, or otherwise.²²⁰ Section 29 provides an

never addressed the civil liability of arbitrators in international arbitration. See PETER SANDERS, *National Report on Canada*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 19 (1998) (noting that Canada only changed one word when it adopted the Model Law and omitted the word "international" from the definition of commercial arbitration). The irony is that during the drafting of the Model Law, the Canadian delegation was the only one to suggest that arbitrators be given immunity for "good-faith" actions. See HOLTZMAN & NEUHAUS, *supra* note 213, at 1149-50.

215. PETER SANDERS, *National Report on Bermuda*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998)

216. *See id.* (citing International Conciliation and Arbitration Act of 1993, § 34).

217. PETER SANDERS, *National Report on Australia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Australia International Arbitration Act of 1984, § 28).

218. *See id.* (citing Victoria Commercial Arbitration Act of 1984 § 52 (stating that an arbitrator "is not liable for negligence in respect of anything done or omitted to be done by the arbitration . . . in the capacity of arbitration . . . but is liable for fraud in respect of anything done or omitted to be done in that capacity"))).

219. *See supra* note 128 and accompanying text.

220. *See* PETER SANDERS, *National Report on England*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 30 (1998). This broad statutory immunity, however, does not protect an arbitrator from liability incurred by reason of resigning. Sections 29(3) and 25 do provide for the potential liability of an arbitrator for his withdrawal from the arbitration. The parties are free to agree with an arbitrator of the consequences of resignation regarding entitlement to fees or expenses and any liability. *See* Arbitration Act § 25(1). Otherwise, a resigning arbitrator must apply to a court for: (1) relief from liability or (2) an order regarding fees and expenses. *See* Arbitration Act § 25(3). In making the determination about liability, the court will consider whether the resignation was reasonable. *See* Arbitration Act § 25(4). This provision is unique because it allows an arbitrator to go to court prospectively to obtain a "grant [of] relief from liability" incurred by reason of

arbitrator with general immunity for anything done or omitted in the discharge or purported discharge of his functions as arbitrator. There are only two specific situations justifying liability: (1) if an arbitral act or omission is done "in bad faith,"²²¹ and (2) if a court determines withdrawal is unreasonable.²²² Although immunity under the Arbitration Act is fairly broad, unlike the U.S. approach, it is qualified to give parties a remedy for an arbitrator's intentional misconduct.

Other countries, like New Zealand and Singapore, address whether arbitrators are liable for their negligent acts. Although it did not adopt the Model Law, under section 13 of the New Zealand Arbitration Act of 1996, an arbitrator is "not liable for negligence in respect of anything done or omitted to be done in the capacity of the arbitrator."²²³ Because the only specific exclusion involves negligence, an arbitrator could still be liable for grossly negligent or intentional acts. Moreover, pre-existing case law may still apply, and *Pickens* did not overrule the possibility that bad faith and fraud could make an arbitrator liable.²²⁴

Similarly, when Singapore adopted the Model Law in the International Arbitration Act of 1994, it provided that an arbitrator shall not be liable in two situations. In particular, an arbitrator is immune for: (1) negligent acts "done or omitted to be done in the capacity of [an] arbitrator" and (2) "any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award."²²⁵ Despite Singapore's significant

resignation. See Arbitration Act § 25(3)(a).

Under § 74, the Act also expressly provides immunity to arbitral institutions and their employees in the discharge or purported discharge of its duties *unless* the act or omission is done in bad faith. See Arbitration Act § 74(1). Similarly, the Act expressly immunizes institutions from vicarious liability for the conduct of an arbitrator in the discharge of his functions. See Arbitration Act § 74(2).

221. One important critique of the 1996 United Kingdom Arbitration Act act is that it does not expressly define "bad faith," but rather leaves the judiciary to interpret this term. Thomas Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 TUL. MAR. L.J. 131, 142 (1997). Currently, under English law, "bad faith" means actual malice or actual knowledge of the absence of any power to discharge the function at issue. See SANDERS, *National Report on England*, *supra* note 220, at 31-32; see also *Melton Medes v. Securities and Inv. Bd.*, [1995] 3 All. E.R. 880, 890 (defining "bad faith" in a narrow sense that "a moral element is an essential ingredient. Lack of good faith connotes either (a) malice in the sense of personal spite or desire to injure for improper reasons, or (b) knowledge of absence of power to make the decision in question.")

222. See English Arbitration Act of 1996, § 25.

223. PETER SANDERS, *National Report on New Zealand*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing New Zealand Arbitration Act of 1996, § 13).

224. See *Pickens v. Templeton*, [1994] 2 N.Z.L.R. 718, 727.

225. PETER SANDERS, *National Report on Singapore*, in INTERNATIONAL HANDBOOK ON

limitation of liability, because negligent acts and mistakes are the only acts expressly granted immunity, it is quite likely that arbitrators would still be liable for acts of gross negligence or intentional misconduct.

b. Implied Immunity

Although it is not enumerated by statute, many other countries provide for immunity except for situations of intentional misconduct. Belgium, for example, does not have an express provision of its arbitration law providing for the immunity or liability of arbitrators.²²⁶ However, two unreported cases have addressed the issue. In the first case, the Civil Court of Brussels determined that arbitrators are *not* protected by judicial immunity and could be liable for damages resulting from a "serious mistake."²²⁷ Although one commentator suggested these "mistakes" might include withdrawal without a valid reason or failure to render a decision within the time limit, a 1992 decision by the Antwerp Court of Appeal explained that an arbitrator is only liable for serious offences equivalent to a false representation or fraud.²²⁸ This seems to establish immunity for cases that do not involve bad faith or intentional misconduct, a position similar to that of England and other countries.

Canada is another country that might provide an implied basis for extending arbitral immunity. Although there is no statute on point, under *Sport Maska*, arbitrators may be immune as the functional equivalent of judges.²²⁹ As a former commonwealth country, Canada may also hold arbitrators liable for fraud.²³⁰ Although usually applied in domestic arbitrations,²³¹ British Columbia and Alberta do expressly provide for

COMMERCIAL ARBITRATION (1998) (citing International Arbitration Act of 1994, § 25).

226. Under the 1985 arbitration law, arbitrators are removable on the same grounds as judges. See PETER SANDERS, *National Report on Belgium*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing art. 1690, Sixth Part, Judicial Code).

227. *Id.* at 15 (citing decision of the Civil Court of Brussels, June 6, 1980, cited in Huys & Keutgen, *L'Arbitrage, Cronique de Jurisprudence*, 1975-1982, JOURNAL DES TRIBUNAUX 54 no. 28 (1984)).

228. *Id.* at 15 (citing decision of the Antwerp Court of Appeal, Jan. 21, 1992, cited in Huys & Keutgen, *L'Arbitrage, Cronique de Jurisprudence*, 1975-1982, JOURNAL DES TRIBUNAUX (1987 to 1992) no. 30.)

229. See generally *Sport Maska Inc. v. Zitrer* [1988] 1 S.C.R. 564, 38 BUS. L. REP. 221 (1988).

230. See *supra* note 205 and accompanying text.

231. Although there is a sense that these statutes only apply to domestic arbitration because of the separate statutes for international arbitration, there is no provision excluding their application to international arbitrations.

arbitrator liability, but only when a court first orders removal. In British Columbia, if the court removes an arbitrator for: “(a) corrupt or fraudulent conduct, or (b) undue delay in proceeding with the arbitration or in the making of the award,” the arbitrator will receive no remuneration for his services. The arbitrator will also be required to pay all or part of the costs that the parties have incurred up to the date of his removal.²³² Similarly in Alberta, if a court removes an arbitrator for “a corrupt or fraudulent act or for undue delay,” it can order that the arbitrator receive no payment as well as compensate the parties for their costs.²³³ Ultimately, these provinces expand liability not just to bad-faith conduct but also to significant nonfeasance.

Other civil and Islamic law countries have greater liability because of their focus on contractual duties but still provide for immunity in the making of awards and the conduct of proceedings. Like most civil law countries, Austria predicates the liabilities and duties of the arbitrator upon the contract subject to the general civil law.²³⁴ These obligations might include the duty to conduct the proceedings appropriately, render an award, and be objective.²³⁵ In older cases, arbitrators have been liable for ungrounded resignation and conducting themselves in a way that has led to an invalidity of the awards.²³⁶ In addition, under Article 584 of the Austrian Code of Civil Procedure, an arbitrator who “does not fulfil in time or at all” his obligations is “liable to the parties for all the loss caused by his wrongful refusal or delay.”²³⁷ Despite this, under Austrian legal doctrine, arbitrators should enjoy the same status as judges and be immune for acts during the conduct of the proceedings and the making of awards.²³⁸ Ultimately, an arbitrator’s “liability for procedural mistakes or defective awards-[is] limited to damage caused by intent or gross negligence.”²³⁹

232. See 1986 British Columbia Commercial Arbitration Act, § 18(2). The 1986 British Columbia International Commercial Arbitration Act is a blanket adoption of the UNCITRAL Model Law.

233. See PETER SANDERS, *National Report on Canada*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing 1991 Alberta Arbitration Act, § 15(4)).

234. See Christian Hausmaninger, *Immunity of Arbitrators Book Review*, 6 FOREIGN INVESTMENT L.J. 601, 602 (1991) [hereinafter “Hausmaninger II”].

235. See PETER SANDERS, *National Report on Austria*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 8 (1998).

236. See LEW, *supra* note 5, at 17.

237. See SANDERS, *supra* note 235 (citing Austrian Code of Civil Procedure of 1983, art. 584).

238. See LEW, *supra* note 5, at 18.

239. *Id.* at 18–19.

The Netherlands is similar to most civil law countries in that the arbitrator's acceptance of appointment creates a mandate to render certain services and failure to abide by the *receptum arbitri* can generate liability in special circumstances.²⁴⁰ Uniquely, arbitrators are given treatment that is similar to judges and when making a decision "an error in law or fact will never lead to liability."²⁴¹ This creates a small basis for qualified immunity.

Italy and South Africa, however, are in a slightly unique position since they have an express basis for liability and implied basis for immunity. South African case law provides that when an arbitrator performs functions that are analogous to a judge, he is immune from liability provided that he acts in good faith and in the honest discharge of his duties.²⁴² Implicitly, liability would be possible if an arbitrator acted in bad faith, but this will probably involve an analysis of public policy.²⁴³ At the same time, section 13 of the 1965 Arbitration Act provides that if an arbitrator is removed from office he shall not be entitled to any remuneration for his services. More importantly, the statute indicates that apart from this, the court may order costs against the arbitrator personally.²⁴⁴ It is this provision which expressly opens the door to arbitrator liability.

Similarly, Italian arbitration law provides one express basis for liability. When arbitrators have failed to render an award within the proper time limit and the award is set aside on this ground.²⁴⁵ In addition, the arbitrator can also be responsible for fraud.²⁴⁶ At the same time, however, at least one court has held that an arbitrator's liability is limited to a loss of fees.²⁴⁷ As a result of the combination of these express and implied provisions, Italy appears to have a limited basis for extending qualified immunity to arbitrators.

240. See PETER SANDERS, *National Report on the Netherlands*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 14–15 (1998).

241. *Id.* at 15.

242. See PETER SANDERS, *National Report on South Africa*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 30 (1998) (citing *Matthews v. Young*, 1922 A.D. 492, 508-9 and *Hoffman v. Meyer*, 1952 (2) SA 752(C) at 756 (a–e)). Some authors suggest that this immunity is limited to only *negligent* activities of an arbitrator, but this is still an unsettled issue within South African law. See BUTLER & FINSSEN, *supra* note 11, at 101–3.

243. See BUTLER & FINSSEN, *supra* note 11, at 102–3.

244. See South African Arbitration Act 42 of 1965, § 13(3), in BUTLER & FINSSEN, *supra* note 11, at 319, 325.

245. See PETER SANDERS, *National Report on Italy*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 24 (1998) (citing Italian Code of Civil Procedure, amended by law No. 25 of 5 Jan. 1994, art. 813).

246. See *id.* at 25.

247. See *id.* (citing Court of Appeal of Palermo, 5 February 1952 in FORO ITALIANO 1952, I, p. 1017).

Although Germany does not have an express provision regarding the liability of arbitrators, most commentators assume that the arbitrators can be liable on a contractual basis.²⁴⁸ Consequently, arbitrators can be liable for failure to perform promised services²⁴⁹ and, unless otherwise provided, intentional and negligent acts.²⁵⁰ This means that arbitrators are potentially liable for such acts as delay in the arbitration proceedings, withdrawal without serious cause, or failure to comply with procedural formalities.²⁵¹

What makes Germany distinct is that an arbitrator is considered to enjoy the same immunity granted to judges in state courts.²⁵² Although an arbitrator does not receive immunity under German law because he is not a judge,²⁵³ courts imply a contractual immunity that the arbitrator shall not receive less immunity than a judge.²⁵⁴ Ultimately, this means that arbitrators are immune from errors in the making of the award. However, similar to German judges, they will probably still be liable for breaches of other duties such as delay.

Unlike most Islamic law countries, Turkey takes a qualified approach to arbitrator immunity that is similar to Germany.²⁵⁵ Although never addressed by Turkish courts, academic literature consistently asserts that a limitation of liability is likely.²⁵⁶ Although an arbitrator could be liable for negligence under the contract theory, scholars argue that arbitrators should be liable on

248. See PETER SANDERS, *National Report on Germany*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 14 (1998) and LEW, *supra* note 5, at 42–43.

249. See BGB §§ 611, 675 in GOREN, *supra* note 39.

250. See *id.* § 276(1).

251. See LEW, *supra* note 5, at 42–43 and Hausmaninger II, *supra* note 234, at 603.

252. See SANDERS, *supra* note 248, at 14 and LEW, *supra* note 5, at 44–47.

253. Under German law, if a public official “wilfully or negligently commits a breach of official duty . . . he shall compensate the third party for any damage arising therefrom.” BGB § 839(1) in GOREN, *supra* note 39, at 155. But, judges are immune from liability when act “in giving judgment.” See *id.* at § 839(2) (stating that if an official “commits a breach of his official duty in giving judgment in an action, he is not responsible for any damage arising therefrom, unless the breach of duty is punished with a public penalty to be forced by criminal proceedings”). This immunity does not apply, however, if the breach of duty consists of “refusal or delay in the exercise of the office.” *Id.*

254. See LEW, *supra* note 5, at 45–46, citing 65 RGZ 175 (1907) (explaining that although arbitrators are not state officials when the parties appoint an arbitrator they implicitly agree to hold him liable only to the standard in § 839) and *Haftung des Schiedsrichters*, 15 BGHZ 12 (implicitly agreeing that the position of the arbitrator is similar to that of a judge and making an arbitrator liable for unjustifiably refusing to sign the arbitral award).

255. This is not necessary surprising given the strong civil law influence on Turkish law. See *supra* note 46 and accompanying text.

256. See PETER SANDERS, *National Report on Turkey*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 15–16 (1998).

the same basis as judges since arbitration functions are similar to those of judges.²⁵⁷ If Turkish courts accept this theory, then an arbitrator would only be liable for “serious offences like fraud, but not for errors made in good faith or mistakes in fact or law.”²⁵⁸

China has an express provision for liability for certain bad-faith actions; but there may be an implied basis for extending immunity for other acts. Specifically, in its 1995 Arbitration Law, China created sanctions for two types of inappropriate arbitrator activities. First, an arbitrator can be held liable if the arbitrator has “privately met with a party or agent, or accepted an invitation to entertainment or a gift”²⁵⁹ and the “circumstance is serious.”²⁶⁰ Presumably, a sufficiently serious circumstance would involve a case where the actions give rise to a justifiable doubt regarding the integrity of the award and the decision-making process. Second, an arbitrator can be liable if he “committed embezzlement, accepted bribes, practiced graft, or made an award that perverted the law.”²⁶¹ Given the serious nature of these inappropriate arbitrator actions, it is unclear whether less offensive conduct such as negligence would create liability; but because the People’s Congress had the opportunity to create additional liability and it failed to do so, this may be the extent of an arbitrator’s liability in China. Interestingly, when an arbitrator is liable there are two important ramifications. First, the arbitrator assumes full legal responsibility. Second, the arbitrator’s name will be removed from the list of potential arbitrators.²⁶²

3. The Extreme: Unlimited Liability

a. Express Liability

In those with an express basis for finding liability, countries tend to base liability on faults such as inappropriate withdrawal, failure to render an award, and general failure to abide by the term of their appointment. As

257. This theory might be supported by the fact that the Turkish Code of Civil Procedure provides that the “grounds for challenge of arbitrators are the same as for judges.” *Id.*

258. *Id.* at 15.

259. PETER SANDERS, *National Report on China*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Arbitration Law of the People’s Republic of China, arts. 38 & 34(4)).

260. *Id.* at art. 38.

261. *Id.* at arts. 38 & 58(6).

262. *See id.* at art. 38. At least one commentator has suggested full “legal responsibility” subjects arbitrators to the full range of civil and criminal liability.

there is no indication in these countries of immunity, however, liability probably extends to all negligent acts and breaches of duty.

Although there may be additional implied grounds of liability, many Arab countries create express liability for improper resignation. In Qatar, an arbitrator is liable to the parties if he withdraws without serious grounds.²⁶³ Similarly, in Tunisia, the 1993 Arbitration Code does not provide any immunity for arbitrators and, instead, expressly subjects an arbitrator to damages if he "withdraw[s] without good reason."²⁶⁴ Libya also has a law that does not create immunity but instead provides for an arbitrator's liability for withdrawal without good reason.²⁶⁵ Under the New Code of Civil Procedure, Lebanese law expressly provides that an arbitrator "will become liable" if he withdraws without sufficient reason.²⁶⁶ However, in international arbitration, parties may opt out of this provision through agreement.²⁶⁷

Other Muslim countries create liability for resignation but add additional bases of liability. In Syria, if arbitrators resign except for a serious reason they may be required to compensate the parties.²⁶⁸ Moreover, since arbitrators are not subject to the same procedures for judicial liability, arbitrators are liable for *any* negligence or fault committed during the arbitration.²⁶⁹

Indonesia creates arbitral liability for improper withdrawal from the arbitration.²⁷⁰ In addition, unless they give a "justifiable reason," arbitrators

263. See Qatari Code of Civil and Commercial Procedure, art. 194, in EL-AHDAB, *supra* note 13, at 904.

264. PETER SANDERS, *National Report on Tunisia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing 1993 Tunisia Arbitration Code, art. 11). In Bahrain, under domestic arbitration law, if an arbitrator withdraws without good cause, he may be liable in damages. See EL-AHDAB, *supra* note 13, at 108 (citing Bahrain Code of Procedure, art. 234. Although there is a Bahraini International Arbitration Act, no provision within this statute expressly addresses the issue of arbitrator liability).

265. See PETER SANDERS, *National Report on Libya*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 5 (1998) (citing Libyan Code of Civil and Commercial Procedure of 1953, art. 748).

266. See Lebanon New Code of Civil Procedure, art. 769 in EL-AHDAB, *supra* note 13, at 864.

267. See *id.* at 871, art. 812

268. See Syrian Code of Civil Procedure, art. 514 in EL-AHDAB, *supra* note 13, at 928 and SALEH, *supra* note 22, at 100.

269. See EL-AHDAB, *supra* note 13, at 658-59.

270. Under Indonesian law, the only appropriate withdrawal is that "approved by the Court." See PETER SANDERS, *National Report on Indonesia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Code of Civil Procedure, Third Book, Title 1,

are liable for damages if they fail to "make their award within the period of time fixed for it."²⁷¹ The default time period established for making an award is six months from the day an arbitrator accepts the appointment.²⁷² Because arbitrators usually accept their appointments on different days, this has particularly interesting ramifications in the case of multiple-member tribunals. In essence, even if the same national law would apply, different arbitrators could have different times establishing their liability.

Other countries create express liability for arbitrators who fail to fulfill their contractual duties. Spain has interesting provisions regarding the liability of arbitrators; and it addresses the liability of the arbitral institution. Specifically, once they accept their mandate, arbitrators must "faithfully fulfill their duties."²⁷³ If they fail to do so, they "shall be responsible for the damages caused by their fraud or fault."²⁷⁴ Similarly, the statute empowers injured parties to bring an independent claim against the arbitral institution.²⁷⁵ Moreover, under Article 14, arbitrators who have "previously failed to fulfill their functions within the established period, or who have been held liable by a judgment for their unsatisfactory performance" are prohibited from being arbitrators in future disputes.²⁷⁶

Under the Kuwait Arbitration Law of 1980, there is only one stated ground for an arbitrator's liability. Specifically, "if the arbitrator, without serious grounds, refrains from acting after having accepted his mission, he may be liable in damages to the parties."²⁷⁷ But, because arbitrators are also required to accept their appointment in writing, failure to abide by duties enumerated in the arbitration law is likely to lead to liability.²⁷⁸ Morocco has a similar scope of arbitrator liability. Under the arbitration act of 1974,

art. 623).

271. *Id.* at art. 623.

272. *See id.* at art. 620.

273. PETER SANDERS, *National Report on Spain*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Law 36/1988 on Arbitration of 5 Dec. 1988, art. 16).

274. *Id.*

275. *See id.*

276. *Id.* at art. 14. One commentator does note, however, that this raises an interesting constitutional issue since this is a limitation upon an arbitrator's civil rights. *See* PETER SANDERS, *National Report on Saudi Arabia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 10 (1998).

277. Kuwait Law No. 38, art. 178 in EL-AHDAB, *supra* note 13, at 885.

278. *See id.* at 300.

“arbitrators cannot refuse to act once they have started, else they shall have to pay compensation to the parties for the damage thus caused.”²⁷⁹

The Argentine National Code of Civil and Commercial Procedure provides for liability in two circumstances.²⁸⁰ First, once they have accepted their appointment, arbitrators can be held liable for costs *and* damages for failure to perform “arbitral functions.”²⁸¹ Second, similar to the U.S. case of *Baar v. Tigerman*,²⁸² arbitrators are liable if they “without justification do not render their award within the stated term.”²⁸³ Under this second provision, arbitrators are liable for costs and damages, but they also “lose all right to their fees.”²⁸⁴

Like Argentina, in the Peruvian 1996 General Arbitration Law an arbitrator’s acceptance of the appointment “entitles the parties to compel them to discharge their responsibilities within the fixed period of time, under penalty of being liable for the damages caused by delay or failure to comply with their obligations.”²⁸⁵ Although this Act may not necessarily apply to international arbitrators, arbitrators might still be liable for “inexcusable malice, negligence, or ignorance.”²⁸⁶

Romania has one of the most developed provisions for liability. There are four specific situations where arbitrators will be liable for damages: (1) unjustified withdrawal, (2) failure without justification to take part in the decision or make the award within the required time period, (3) publication or disclosure of information without the parties’ consent, and (4) flagrant neglect of their duties.²⁸⁷ This last provision is quite large and probably encompasses both contractual, statutory, and implied duties such as good

279. Act of 28 September 1974, art. 313. *Id.* at 885.

280. Argentine law also expressly provides for penal liability for arbitrators and judges. See Hausmaninger II, *supra* note 234, at 602.

281. PETER SANDERS, *National Report on Argentina*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing National Code of Civil and Commercial Procedure of 1981, art. 745).

282. 140 Cal. App. 3d 979 (Cal. Ct. App. 1983).

283. See SANDERS, *supra* note 281 (citing National Code of Civil and Commercial Procedure of 1981, art. 756).

284. *Id.*

285. PETER SANDERS, *National Report on Peru*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 11 (1998) (citing General Arbitration Law, Law No. 26572, art. 18). Arbitrators can also be criminally liable under the Penal Code. *Id.*

286. *Id.* at 11.

287. See PETER SANDERS, *National Report on Romania*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Code of Civil Procedure as amended in 1993, art. 353).

faith. Although there is no case law testing these standards, Romania is unique in its extensive, express guidelines for arbitrator behavior.

Saudi Arabia applies traditional Islamic law principals to the issue of arbitrator immunity. Although there is one primary basis for liability, its potential is quite broad. The *Qur'an* contains the basic principle and states, "[h]e that mediates in a good cause shall gain by his mediation; but he that mediates in a bad cause shall be held accountable for its evil."²⁸⁸ Under this general principle, an arbitrator could be liable for negligence in "failing to take note of important documents, in losing or damaging important documents, or in failing to take note of a vital statement made by one of the [parties]."²⁸⁹ Essentially, an arbitrator is liable for nearly any fault he commits which results in damage to any party.²⁹⁰ Although there was a regulation proposed in 1979 to hold arbitrators liable for inappropriate withdrawal, this was never enacted.²⁹¹ Instead, Article 11 of the 1983 Arbitration Regulation of Saudi Arabia provides that if the parties remove an arbitrator who was "not the cause of such removal," the arbitrator may "claim compensation" against the parties.²⁹² It is not clear, however, that the failure to enact a legislative provision will immunize the otherwise broad potential for arbitrator liability in Saudi Arabia.

b. Implied Liability

In most countries with implied liability, there is a focus on the contractual nature of the relationship and the arbitrator's duty to perform according to the *receptum arbitri*. Ultimately, however, these countries include *no* basis for immunity and probably create liability for any intentional, grossly negligent, or negligent behavior.

In France, there is no statute expressly providing for the liability or immunity of arbitrators. However, parties can sue arbitrators for breach of their arbitration contract for failure to perform according to the terms of reference or negligence,²⁹³ but liability can only arise from acts or omissions falling within the exercise of their mission.²⁹⁴ Similarly, if an arbitrator

288. SANDERS, *supra* note 276, at 17 (citing KORAN, Al-Nisa (Women) 4:85).

289. SALAH HEJAILAN, *National Report on Saudi Arabia*, in 4 YEARBOOK OF COMMERCIAL ARBITRATION 162, 167 (1979).

290. See EL-AHDAB, *supra* note 13, at 585.

291. See SANDERS, *supra* note 276, at 17.

292. See *id.* at 27-28 (citing Arbitration Regulation of Saudi Arabia, art. 11).

293. See LEW, *supra* note 5, at 34.

294. See PETER SANDERS, *National Report on France*, in INTERNATIONAL HANDBOOK ON

breaches the confidence of parties, they might either be subject to criminal penalties or suits of damages.²⁹⁵ Comparable to the liability existing for judges under Article 505 of the Code of Civil Procedure, arbitrators may be liable for denials of justice including: (1) withdrawal without a valid reason, (2) failure to render an award within the applicable time limit, and (3) failing to perform arbitral duties.²⁹⁶ Although it has been suggested that an arbitrator should be entitled to immunity because of his "jurisdictional function" in rendering a "final and binding decision," French law appears to afford arbitrators no immunity.²⁹⁷ Ultimately, the private contractual nature of his appointment makes him fully liable for his wrongful acts.²⁹⁸ In a recent case with unique application, a French court addressed the immunity of an institution. Although the court found a contract between the parties and the arbitration institute and noted the failure to properly execute its obligations, in *Société Cubic Defense System v. Chambre de Commerce Internationale*, the court rejected liability on the part of the ICC.²⁹⁹

Swedish law also does not have a statute expressly providing for liability for arbitrators, and, at the same time, there does not appear to be any basis for extending arbitral immunity.³⁰⁰ In general, however, grounds for liability include the obstruction of proceedings, failure to observe applicable rules of procedure, or conviction of a crime committed in connection with consideration of the matter in dispute. Interestingly, in unique contrast to *Baar*, the failure to render a timely award does not entail the arbitrator's liability if a *foreign* party is involved as the arbitration law does not have a statute to address this issue.³⁰¹

Under Polish law, there is no express provision for immunity, but there is an implied provision regarding liability. Specifically, because the

COMMERCIAL ARBITRATION (1998) (citing Jean-Baptiste Gouault v. Jacques Gouault, REV. ARB. 39 (1978)).

295. See Penal Code art. 378. This provision, however, seems more appropriate in domestic arbitrations. See SANDERS, *supra* note 294, at 27–28.

296. See SANDERS, *supra* note 294, at 27–28; see also 1981 Code of Civil Procedure, art. 1462 (requiring arbitrators to "proceed with their mission until it is completed").

297. See LEW, *supra* note 5, at 35–36.

298. See Hausmaninger II, *supra* note 234, at 603. Grounds for arbitral liability include: unjustified resignation, procrastination of proceedings, loss of evidence, breach of confidentiality of the deliberations. A party must demonstrate a minimum of gross negligence to challenge any error in the making of an award. *Id.*

299. See SANDERS, *supra* note 294, at 27–28 n.81 (citing *Société Cubic Defense Sys. v. Chamber de Commerce Internationale*, [1997] REV. ARB. 417).

300. See LEW, *supra* note 5, at 81–84.

301. See Hausmaninger II, *supra* note 234, at 605.

relationship between the arbitrators and the parties is deemed to be a contract for services,³⁰² liability is possible. Therefore a party who sustains damage because of an arbitrator's "wrongful act or omission, including an award, and who proves that this arbitrator acted negligently or wilfully," would probably be entitled to damages. Unfortunately, there are no cases addressing this issue.³⁰³

Swiss law is similar to Polish law in that its 1987 International Arbitration Act does not contain any rules for civil liability or immunity. Instead, the *receptum arbitri* is considered to be a mandate or quasi-mandate, and the arbitrator is therefore liable for negligence or any other inappropriate conduct or omission. There is a sense, however, that strict criteria will be applied before an arbitrator can be found negligent.³⁰⁴

For a majority of Islamic countries, the potential liability of an arbitrator is quite broad. In Iraq, after accepting appointment, "an arbitrator may not decline to act without a just cause."³⁰⁵ Although this does not expressly create liability, at least one commentator asserts that this becomes a part of the *receptum arbitri* and is an implied basis of liability.³⁰⁶ The potential scope of immunity, however, is never discussed. Although the Egyptian Code of Civil and Commercial Procedure of 1968 did provide for arbitrator liability for resignation "without serious reason,"³⁰⁷ under the new 1994 Law Concerning Arbitration in Civil and Commercial Matters, adopting the UNCITRAL Model Law, there is no express provision for arbitrator liability or immunity.³⁰⁸ Although one author asserts that the duties implied by the 1994 create the basis for liability, this is not necessarily certain.³⁰⁹

Jordan's 1952 Arbitration Act does not contain an express provision for liability. But, under the current law an arbitrator is generally not liable if she

302. See *supra* note 36 and accompanying text.

303. See PETER SANDERS, *National Report on Poland*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 13 (1998).

304. See PETER SANDERS, *National Report on Switzerland*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 19 (1998).

305. 1969 Iraq Code of Civil Procedure, art. 260, in EL-AHDAB *supra* note 13, at 837.

306. See EL-AHDAB, *supra* note 13, at 221.

307. PETER SANDERS, *National Report on Egypt*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998) (citing Chapter III of Book No. III of the Code of Civil and Commercial Procedure, art. 503(1)).

308. See EL-AHDAB, *Law Concerning Arbitration in Civil and Commercial Matter*, *supra* note 13, at 821-35.

309. See *id.* at 175 (asserting that because the arbitrator accepts his mission in writing, he has a contractual obligation to make an award within a specific time period and fully declare his independence or impartiality—otherwise this creates a basis of extending liability).

refuses to perform her mission; but if a party can prove a link between the damages and the refusal of an arbitrator to act, the general rules of liability apply.³¹⁰ Yemen has a similar standard of liability. Although arbitrators are not required to accept in writing,³¹¹ the arbitrator is a party to the agreement to arbitrate and is contractually bound to perform according to the agreement and is potentially liable for any breaches.³¹² Overall, the potential for liability in these countries is quite extreme in comparison to common law countries.

B. Institutional Rules

Many arbitration institutions do not have express rules elucidating the existence or scope of arbitral immunity,³¹³ but several frequently used institutions do. The London Court of International Arbitration provides that no arbitrator “shall be liable to any party howsoever for any act or omission in connection with any arbitration conducted” under the auspices of the LCIA.³¹⁴ However, the LCIA does provide an exception where the arbitrator can be liable for “conscious or deliberate wrongdoing.”³¹⁵ Similarly, the American Arbitration Association provides arbitrators will not be liable “to any party for any act or omission” except that they can be held liable for “the consequences of conscious and deliberate wrongdoing.”³¹⁶ The World Intellectual Property Organization also has a similar standard for immunity where, “[e]xcept in respect of deliberate wrongdoing, the arbitrator or arbitrators, WIPO and the Center shall not be liable to a party for any act or omission in connection with the arbitration.”³¹⁷ In essence, these institutions provide arbitrators with immunity, but draw the line at an arbitrator’s

310. *See id.* at 249. There is, however, a new arbitration bill that is being considered in Jordan. There are no express provisions for arbitrator liability, but instead, there are uniform standards allowing for dismissal of an arbitrator and the setting aside of the award. *See id.* at 273–74.

311. *See* Yemen Presidential Decree No. 22-1992 Issuing the Arbitration Act, art. 4, *Id.* at 960.

312. *See id.* at 755.

313. For example, the UNCITRAL Arbitration Rules and CIETAC do not have any rules addressing arbitrator immunity.

314. The New London Court of International Arbitration Rules, art. 31.1 (effective Jan. 1, 1998).

315. *Id.*

316. American Arbitration Association, *International Arbitration Rules*, art. 35 (visited May 12, 2000) <<http://www.adr.org>>.

317. World Intellectual Property Organization Rules on International Arbitration, *Arbitration Rules: Miscellaneous*, art. 77 (visited May 12, 2000) <<http://www.arbitr.wipo.int/arbitration/arbitration-rules/miscellaneous.html>>.

intentional or bad-faith actions. Similarly, although they do not have the force of law unless the parties incorporate them into their agreement, the International Bar Association's Rules for Ethics for International Arbitrators provide for immunity except in cases of "wilful or reckless disregard of their legal obligations."³¹⁸

The International Chamber of Commerce, in contrast, provides that arbitrators will not "be liable to any person for any act or omission in connection with the arbitration."³¹⁹ The Netherlands Arbitration Institute also provides broad immunity. "Neither the NAI, nor any member of its governing Board, nor the Administrator, nor any arbitrator can be held liable for any act or omission with regard to an arbitration governed by [the NAI] Rules."³²⁰ Interestingly, the Bahrain International Commercial Arbitration Center recently made an amendment providing for "judicial immunity for the acts done by them to carry out their duties."³²¹ Ultimately, these institutions do not necessarily provide an express exception for bad-faith actions, and appear, on the surface, more similar to the absolute immunity of the United States.

C. Contractual Immunity

An arbitrator can try to secure immunity as a term of appointment.³²² There are, however, two potential problems. First, in some jurisdictions, liability for gross negligence or intentional wrongs cannot be excluded in advance by contract.³²³ Second, the fact that one party agrees to hold an

318. International Bar Association, *Rules of Ethics for International Arbitrators*, Introductory Note, 26 I.L.M. 583 (1987), 12 Y.B. COMM. ARB. 199, 199 (1987).

319. International Chamber of Commerce, *Rules of Arbitration*, art. 34 (effective Jan. 1, 1998). Although they were eliminated from later versions of the Rules, the ICC was one of the first institutions to have a provision on the liability of arbitrators. In particular, in art. 18 of the 1922 Rules, the rule provided that "it was understood and agreed that any such decision [regarding provisional measures] shall not carry with it any personal responsibility on the part of such arbitrators." Eric A. Schwartz, *The Practices and Experience of the ICC Court*, in ICC, CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION 45 (1993), ICC Pub. No. 519.

320. Netherlands Arbitration Institute Rules, art. 66 (effective Jan. 1, 1993).

321. Hassan Radhi et al., *Law on International Commercial Arbitration Center Amended*, 10 MIDDLE E. EXECUTIVE REP. 19 (1996).

322. Even in the United States, it may be possible for arbitrators to make an indemnity agreement with the parties. See Hausmaninger, *supra* note 8, at 20.

323. See *id.* at 20. For example, in Austria, according to the Austrian Civil Law Code, an exclusion agreement concerning intent or gross negligence would be considered invalid. See LEW, *supra* note 5, at 15 citing AUSTRIAN CIVIL LAW CODE Art. 879(1) and BGB § 276(2)

arbitrator immune does not mean that both parties will hold the arbitrator harmless for any wrongdoing. For example, in *Fal Bunkering of Sharjah v. Grecale Inc. of Panama*, an English court determined that special appointment terms requested by one arbitrator were not binding upon all of the parties.³²⁴ Consequently, an arbitrator who accepts his appointment with a contractual-immunity condition can probably only enforce it against the appointing party.³²⁵

There are significant benefits for arbitrating under an institution with rules for arbitral immunity. Specifically, once the parties and the arbitrators have agreed that pre-existing arbitration rules of an arbitration association govern the proceedings, these rules become an implied term of the arbitrator's appointment³²⁶ and the parties consent to hold the arbitrator harmless when incorporating the rules by reference.³²⁷ This solves the *Fal Bunkering* problem and creates a term of immunity binding upon both parties. Consequently, the arbitrators have created their own contractual immunity and will be nearly impervious to suits from disgruntled parties.

IV. LAW APPLICABLE TO THE ISSUE OF IMMUNITY

Because of the lack of uniformity among national laws and the extreme variations in the potential scope of liability, the law applicable to the immunity issue can have a profound impact upon the ultimate determination of an arbitrator's susceptibility to suit. How then should courts determine which law is applicable to an arbitrator's immunity?

Some merely assert that the law applicable to the immunity issue will either be that of (1) an arbitrator's domicile, (2) the seat of the arbitration, (3) the proper law of the arbitration agreement, or (3) the place where the injured party is located.³²⁸ In contrast, others suggest a more reasoned analysis and

in GOREN, *supra* note 39 (preventing parties from contracting out of wilful misconduct); see also BERGER, *supra* note 12, at 236 n.247 (noting that it follows from normal principles of contract law that the waiver for gross negligence or intentional acts or omissions in the decision making process is forbidden). Even under English law, an arbitrator's contractual grant of immunity must be "reasonable" and not induced by fraud. See SANDERS, *supra* note 307.

324. See *Fal Bunkering of Sharjah v. Grecale Inc. of Panama*, 1 Lloyd's Rep. 369, 372-73 (Eng. 1990).

325. See SMITH, *supra* note 29, at 25.

326. See Hausmaninger, *supra* note 8, at 43.

327. See THOMAS OEHMKE, *THE INTERNATIONAL LAW OF ARBITRATION* 282-83 (1990).

328. See BERGER, *supra* note 12, at 233 (asserting that an arbitrator's rights, duties, and liabilities flow from the law of the seat of the arbitration); REDFERN & HUNTER, *supra* note

an application of the appropriate choice of law rules. The latter approach is preferable as it involves a reasoned analysis instead of a blanket categorization.³²⁹

The first issue is one of characterization and whether the breach of duty is based upon contract or tort. If the action is based upon tort, the applicable law will probably be that of the *lex loci delicti commissi*—where the defendant's wrongful action occurred. In the United States, a court usually applies the law of the jurisdiction where the tort occurred.³³⁰ In Germany, courts will probably also apply the *lex loci delicti commissi*.³³¹ For arbitration, although it is subject to the particularities of the individual case, the place of the arbitrator's misconduct will probably be the situs of the arbitration. Therefore, the law of the situs may apply.

In contrast, a different result might occur if the action were based on contract. The next issue is whether: (1) there is a distinct contract between the parties, i.e. the *receptum arbitri*, that is subject to one law; or (2) the arbitrators are merely third parties to the arbitration agreement which is potentially subject to a different law.³³²

8, at 266 (noting that the relevant system of law may confer immunity from liability and the applicable law "is usually the law of the place of arbitration, but may be the proper law of the arbitration agreement"); and Hoellering, *supra* note 129, at 106 (asserting, without any supporting sources, that "the immunity accorded to an arbitrator will also depend on the place of arbitration and country in which the complaint is lodged").

329. In a discussion regarding the liability and immunity of false testimony by a witness, one commentator suggested the following approach towards determining the applicable law: "First a court with the competence to hear the case must be found and jurisdiction established. Next, one must consult the jurisdiction's choice of law rules which eventually refer to the appropriate substantive law . . . A common basis of jurisdiction, apart from the defendant's habitual domicile or residence, is the place where the defendant committed the tortious act or where the injured persons or property is located." Marianne Roth, *False Testimony in International Commercial Arbitration: A Comparative View*, 7 N.Y. L. SCH. J. INT'L & COMP. L. 147, 148-49 (1994).

330. See RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 377 (1934). Different states, however, apply different choice of law procedures. The First Restatement focused on the law of the place of the wrong. See *id.* However, if it is a malpractice action involving the application of the standard of care, the standard will be taken from the place of the arbitrator's conduct. See *id.* at § 380(2). This may also be the situs.

In the Second Restatement, in contrast, there is more of a focus on the "center of gravity"—the place with the most significant relationship. For torts, courts will consider factors such as the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile and residence of the parties involved, and the place where the relationship of the parties is centered. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 187, 188 (1971).

331. See LEW, *supra* note 5, at 47.

332. Currently, there is a great deal of confusion regarding which law governs the

Initially, if a court characterizes the *receptum arbitri* as making the arbitrator a third party to the arbitration agreement between the parties, the law governing immunity will probably be the law applicable to the arbitration agreement. Although there is significant variation and opportunities for the parties to vary this by agreement, the law applicable to the arbitration agreement is often the law applicable to the primary dispute.³³³

The court may, however, characterize it as a separate contract, and therefore it is necessary to determine which law was applicable to the *receptum arbitri*. German law, for example, distinguishes between the law applicable to: (1) the main contract underlying the original dispute, (2) the arbitration agreement, and (3) the arbitrator's contract to arbitrate.³³⁴ Similarly, common law countries recognize distinctions among the law applicable to: (1) the main contract, (2) the arbitration agreement, and (3) the curial law governing the procedure of the arbitration.³³⁵

Under German law, parties are entitled to choose the law applicable to the contract and are allowed to choose a different law for the main contract than one for the arbitration agreement.³³⁶ Similarly, under the common law, the law governing the procedure of an arbitration is not necessarily the one as the law governing the arbitration agreement and substantive contract.³³⁷ Therefore, arbitrators are free to include a choice of law clause to clarify which law governs their *receptum arbitri*. Unfortunately, this is rarely done and courts must continue in their choice of law analysis.

Under German law, there are certain instances when there is an implied choice of law for the *receptum arbitri*. Specifically: (1) when the law for the arbitration procedure is expressly chosen, this is also the law applicable to the arbitrator's contract; (2) if the arbitration agreement expressly chooses an

arbitration agreement. This will probably vary from case to case. See Adam Samuel, *The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate*, in THE PLACE OF ARBITRATION 46-57 (Marcel Storme et al. eds., 1992).

333. The proper law of the arbitration agreement also might be the law of the place of arbitration. Again, however, this is largely dependent upon the facts of the particular case and the substance of the arbitration agreement. See generally Michael Pryles, *Choice of Law Issues in International Arbitration*, 63 ARB. 200 (1997).

334. See LEW, *supra* note 5, at 47.

335. See PRYLES, *supra* note 333, at 201-8.

336. See LEW, *supra* note 5, at 47 citing 15 BGHZ 12 (1954).

337. See *Channel Tunnel Group v. Balfour Beatty Constr.*, [1993] App. Cas. 334, 357 and *Naviera Amazonica Perunca v. Cia Int'l de Sesuros del Peru*, [1988] 1 Lloyd's Rep. 116, 120. Section 1-105(1) of the Uniform Commercial Code allows parties to a commercial transaction to choose a law that has a reasonable relationship to the forum; otherwise if the parties do not make a choice of law, the law applied must have an appropriate relation to the state. See U.C.C. § 1-105(1).

arbitrator, the governing law is impliedly the law of the arbitrator's domicile; and (3) where there is an express choice of forum, this is conclusive as to the law to be applied to the proceedings.³³⁸ This German law will only govern where: (1) German law governs the procedure, (2) German arbitrators have been appointed, and (3) Germany has been chosen as the forum.

If there has been no express or implied choice, then ordinary conflict of law principles apply and the contract will be governed by the law of the state with which it has the closest connection.³³⁹ As the party with the characteristic performance³⁴⁰ has the closest connection and it is the arbitrator's actions and obligations that make the contract distinctive, the habitual residence of the arbitrator is quite likely to determine the applicable law.

Similarly, although different states employ different choice of law analyses, under U.S. law, if there was no express or implied choice of law, courts tend to focus on the place with the "most significant relationship." Under the Second Restatement, courts will look for factors such as: (1) place of contracting, (2) place of negotiation, (3) place of performance, (4) location of the subject matter, (5) domicile of the parties, and (6) ease of the determination of the applicable law.³⁴¹ Although the precise balancing to find the most significant relationship will vary from case to case, two of the strongest indicators are the place of the arbitration³⁴² and domicile of the arbitrator.³⁴³

From a policy perspective, it is particularly difficult to apply the law of the arbitrator's domicile. In a multiple-member tribunal where most arbitrators are probably from different countries, this creates great potential variability. The application of different laws to the same contractual relationship between the parties and the arbitrators would contravene the idea

338. See LEW, *supra* note 5, at 48.

339. See *id.* at 48-49.

340. See Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable and Contractual Obligations*, 1980 O. J. (C 282) 20-21 (1980). The Giuliano & Lagarde Report describe characteristic performance as an objective method for determining the "closest connection" as performance refers to the functions which the legal relationship involved fulfills. The payment of money is usually not the characteristic performance; instead, it is "the performance for which the payment is due." For example, the characteristic performance in a sale contract is that of the person delivering the goods and for an agency contract it is the act of the agent.

341. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 188.

342. Place of arbitration is important because it addresses where an arbitrator's allegedly inappropriate conduct took place. See *id.* at cmt. e.

343. Domicile of the arbitrator is important as it addresses which law she might reasonably expect to govern her behavior and whether she has conformed to those standards. See *id.*

of uniform treatment of these contracts.³⁴⁴ This could result in unjustifiable discrimination against arbitrators where they live in countries with higher standards of liability. If the domicile is the applicable law, however, there is a greater probability that the arbitrator will be familiar with the proper standard of liability and act accordingly. Ultimately, this slight increase in certainty does not justify the significant variations in arbitrator liability. Particularly as it could result in variations among the behavior of arbitrators, there could be unacceptable varying levels of arbitrator performance. For example, within the same panel, U.S. arbitrators could covertly engage in fraud without fear of repercussions while Saudi Arabian arbitrators adhered to the strictest letter of the law. Although not all arbitrators behave in the same way, this startling inconsistency in behavior significantly undermines the respect for and integrity of the international arbitration process.

If, by contrast, immunity is determined by the place of arbitration, it will be easier to ascertain. In one sense, it is the center of gravity of the arbitration and closely connected with the conduct of the arbitrator because significant activities occur there such as hearings and the making of the award.³⁴⁵ Moreover, it allows for a readily ascertainable law which will increase certainty, and assists arbitrators considering this factor in the course of deciding whether to accept an appointment. Importantly, the application of the place creates uniformity of result, where the same law will be applied, and different arbitrators will not be attacked merely because they act internationally but are domiciled in a country with high standards of liability. Although *lex fori* alone should not be determinative, it must play a significant role in a court's determination of the applicable law.³⁴⁶

Ultimately, however, the law applicable to an arbitrator's immunity will depend upon: (1) a court's characterization of the issue, (2) the parties' agreement, and (3) balancing of the competing interests.

344. See BERGER, *supra* note 12, at 234 n.235.

345. This may be less true, however, if the parties do not determine the place but instead leave it to the choice of an institution.

346. However, there may be problems at the enforcement stage if there is a money judgment against the arbitrator. See Hausmaninger, *supra* note 8, at 44-45. It may be possible to fail to enforce a judgment because it is against public policy. This is particularly likely in the United States where individual states follow the Uniform Foreign Money Judgments Recognition Act, 13 UNIF. LAW. ANN. 417 (Master ed. 1980).

V. PROPOSED SCOPE OF ARBITRATOR LIABILITY

In order to safeguard the integrity of the arbitration process, arbitrators are entitled to some form of immunity. Because the precise scope of this liability may be uncertain, arbitrators should try to provide themselves with immunity through contract and should also consider expressly designating the law applicable to the *receptum arbitri*. This can be done in one of two ways: (1) by only accepting appointments from arbitral institutions which have rules regarding arbitrator immunity, or (2) expressly making arbitral acts immune in the *receptum arbitri* with both parties. Unfortunately, arbitrators rarely obtain immunity in their appointment contract with the parties. Instead, courts and legislatures of different nations address the issue differently. At heart, the granting of immunity is a matter of public policy that balances the social utility of immunity against the loss of being unable to attack an allegedly wrongdoing defendant.

Unlimited liability is undesirable because of its potential impact upon the integrity of the arbitration process. When disgruntled parties know that arbitrators can be liable, it is reasonable to assume they could use intimidation and subtle threats to influence the decision-making process. Immunity provides arbitrators with a defensive shield that enables them to come to principled decisions without fear of repercussions. In addition, complete liability will spawn even more lawsuits, clog up courts, and present losing parties with an opportunity to challenge the finality of the arbitral process. As immunity is a deterrent for parties to sue, if immunity were completely eradicated, there would be even more cases challenging awards and arbitrator decisions. Since finality is one of the primary objectives of arbitration, this result is clearly undesirable.

Absolute immunity, however, is also inappropriate. Cases finding arbitrators are immune despite their flagrant and intentional misconduct are wrongly decided. Although Mettler argues creating an exception for fraudulent conduct would create a glut in lawsuits,³⁴⁷ this is not necessarily true as even broad immunity is attacked. It would be better to recognize a legitimate injury and bring countries like the United States into conformity with international practice. Overly broad immunity fails to create an incentive for arbitrators to be responsible for their actions, to the parties who are paying the fees, or to the integrity of the international arbitration system. Instead, with absolute immunity, arbitrators are completely protected if they choose to abuse their discretion. This is particularly dangerous because,

347. See Mettler, *supra* note 101, at 28-29.

unlike judges, review of arbitral awards is much narrower³⁴⁸ and abuses of discretion are not necessarily checked by appellate courts.³⁴⁹ Moreover, there is no professional association of arbitrators that can discipline arbitrators for their inappropriate conduct.³⁵⁰

However, there may be informal methods for professional associations to address the misconduct of arbitrators. China and Spain, in particular, prevent arbitrators found guilty of reprehensible behavior from being appointed in future cases.³⁵¹ Similarly, in one unreported case in England, *Regina v. The Chartered Institute of Arbitrators Ex Parte Armstrong*,³⁵² an arbitral institution was sued for trying to monitor an arbitrator who had engaged in inappropriate conduct. In that case, although an arbitrator's actions were not sufficient to be deemed "professional misconduct," because of his failure to give adequate reasons in a written award, he was required to

348. See Sponseller, *supra* note 4, 423–24 (noting that when U.S. courts are faced with an award, they will not review the merits of the controversy, the nature and sufficiency of the evidence, the nature and credibility of the parties, the merits of the case, or the alleged errors of law). In contrast, even agencies within the United States review issues of law de novo although their factual determinations are subject to great deference. See *supra* note 168 and accompanying text.

349. See generally Daniel M. Kolkey, *Attaching Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 INT'L L. 693 (1988) (describing the bases for vacating arbitral awards in the U.S., France, Sweden, Switzerland and the narrow bases for vacatur); see Ware, *supra* note 146, at 71 (stating that courts "do not ensure arbitrators apply the law" and "even if a court discovers that an arbitral award does not apply the law, the court will be unlikely to confirm the award"); see also New York Convention, *supra* note 3, art. V (providing a discretionary basis for failing to recognize an award where (1) the arbitration agreement was not valid under the applicable law or the law of the country where it was made, (2) a party was not given proper notice of the arbitration or was unable to present its case, (3) the dispute was not arbitrable or beyond the scope of the arbitration agreement, (4) composition of the tribunal was not in accordance with the arbitration agreement or the law of the country where it took place, (5) the award has been set aside elsewhere, (6) the award is not arbitrable under the country where enforcement is sought, or (7) enforcement of the award is contrary to the public policy of the enforcement forum; but see Stephen T. Ostrowski & Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650, 1679 n.133 (1998) (noting that U.S. courts appear to be creating a doctrine where awards that "manifestly disregard" the law create a basis for non-recognition upon review but suggesting this violates the New York Convention by creating an additional defense to enforcement).

350. Yat-Sen Li, *supra* note 11, at 54–55.

351. See PETER SANDERS, *National Report on Spain and National Report on China*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (1998).

352. The actual decision was rendered on June 17, 1997, before Mr. Justice Owen of the High Court of Justice in the Queen's Bench Division CO/1893/96. A copy of this decision is on file with the New York Law School *Journal of International and Comparative Law*.

submit all further awards to the institute.³⁵³ In essence, the institute sanctioned the arbitrator by requiring him to get pre-approval of the award.³⁵⁴ The court held this was a legitimate action by the arbitral institution and quashed the arbitrator's action for damages.³⁵⁵ In the absence, however, of uniform regulation of the arbitral profession, liability for flagrant misconduct is a viable method of preventing inappropriate behavior.

There are, however, some methods used to address this issue. Although the model of China and Spain suggest removal from future cases is a sufficient incentive to make arbitrators behave properly in their current cases, not all countries have this standard. Moreover, it is somewhat questionable that a mistake in *one* case justifies removal from *all* subsequent cases for the duration of the arbitrator's career. There are, however, more informal sanctions in the small community of international arbitration. In particular, there is a sense of an unwritten agenda where arbitrators who are unpopular for any number of reasons will not be appointed by their colleagues. However, because this method is largely informal, there is a significant possibility for an abuse of discretion. It would be preferable to have a professional association expressly regulating this issue rather than leaving it to the discretion of private individuals.

Ultimately, if there is one common thread running through international private law, it is that arbitrators should be liable, at the very least, for their bad-faith and intentional misconduct. Within the international context, harmonizing international arbitration law is of critical importance. Although a compromise law splitting the proverbial baby is not desirable, it is crucial to create arbitration law that recognizes international standards and avoids appearing parochial, frightening off parties who are concerned about arbitrating under unfamiliar standards, and making the place an undesirable one within which to arbitrate. This is not necessarily to say that a country's domestic arbitration law should be changed, but rather, within the international setting, different rules are needed to recognize different international realities.

Because absolute immunity and complete liability are thus untenable options, qualified immunity is a more appropriate solution. The analogy to "functional comparability" of judges is a helpful starting point. As in *Stump*, arbitrators should be immune when they (1) perform functions normally done by a judge, and (2) when parties deal with the arbitrator in a decision-making

353. See *R. v. Chartered Inst. of Arbitrators ex p. Armstrong*, *17, 21, 31.

354. See *id.*

355. See *id.*

capacity.³⁵⁶ However, there are two situations in which this quasi-judicial immunity should be limited.

First, arbitrators should be liable if they utterly fail to perform functions that are essential to their appointment. As in *Baar v. Tigerman*,³⁵⁷ if an arbitrator fails to render an award, such a decline to do the job for which he was hired should result in liability. Since the entire purpose of arbitration is to create a final decision, nonfeasance of this type is sufficiently fundamental to render immunity inappropriate. Similarly, sufficiently long delay that is not justified could also result in the loss of immunity.³⁵⁸ Many countries recognize this as an express basis of liability or at least imply a duty through their arbitration law. However, liability is only appropriate if the delay is so long that it demonstrates that performance of an essential function is unlikely. Courts should be cautious, however, in interpreting a missed deadline as nonfeasance. Delay of this sort is something of which any arbitrator might be guilty and does not mean that an arbitrator has completely abandoned his mandate. Immunity should therefore extend to arbitrators who are merely tardy.

Second, like the standards in England, Australia, Bermuda and institutions like the AAA and WIPO, arbitrators should be liable for their intentional misfeasance and bad-faith conduct. Although advocates of absolute immunity correctly note that it is important to keep arbitrators from being influenced by the mere threat of liability, this concern is outweighed by two factors. First, there is an overriding concern for compensating injured parties who have exhausted all other administrative alternatives and have no other remedy.³⁵⁹ Second, there is an overarching need to monitor the discretion of the arbitration profession to ensure that its members, at a minimum, act in good faith and without intentional wrongdoing.

With the increase in number of arbitrations and the specialized educational institutions designed to train arbitrators, arbitration is becoming

356. *Stump v. Sparkman*, 435 U.S. 349 (1978).

357. 140 Cal. App. 3d 979 (Cal. Ct. App. 1983).

358. See *Nolan & Abrams*, *supra* note 83, at 253.

359. Various commentators suggest that a successful appeal against an award should be a necessary precondition for a suit against an arbitrator for inappropriate decision-making. See BERGER, *supra* note 12, at 237 and Hausmaninger, *supra* note 8, at 46-49. Berger goes on to argue that courts should be wary of actions where a party accuses an arbitrator of misconduct but did not use remedies that were available to attack through the proper national law. Ultimately, a party "has to be suspected of using the suit against the arbitrator as a surrogate for the missed opportunity to have the award set aside. See BERGER, *supra* note 12, at 237. Where an arbitrator fails to act, however, this precondition is not an option, as the failure to act will lead to the non-existence of the required award.

a specialized professional service. It nearly amounts to “legalized fraud” to provide immunity to an arbitrator who intentionally acts in bad faith.³⁶⁰ Assuming that arbitrators are rational actors, excluding intentional misconduct from immunity merely provides an incentive for arbitrators to act in good faith. Ensuring that arbitrators do not abuse their power and act fairly is a desirable goal for the parties, the arbitration community, and the public at large.

Even strong advocates of arbitrator liability still note that “arbitrators must be protected from harassment by litigation from disgruntled parties and must be free to make decisions solely on the basis of the merits and their independent judgment.”³⁶¹

Before suing an arbitrator directly, however, parties should be required to exhaust all other administrative remedies and ensure that they have not waived their objections.³⁶² Therefore, I propose a model statute for adoption by various countries in their international arbitration statutes. The statute recognizes the desire for immunity in common law countries, but properly balances this against the need of civil and Islamic law jurisdictions to address the issue of bad-faith misconduct and concerns about the failure to perform essential arbitration functions.

Proposed Statute: Qualified Immunity for International Arbitrators

Generally. International Arbitrators shall be immune from civil liability to parties to the arbitration agreement for anything done or omitted to be done in their capacity as arbitrators, except as qualified in section (2).

Exceptions. (a) An arbitrator shall be liable if she/he unjustifiably fails to render an arbitral award. (b) An arbitrator shall be liable for bad-faith conduct done in his/her capacity as an arbitrator. Bad-faith conduct may involve an intentional act that is based upon, but not limited to, fraud or corruption.

360. See Okekeifere, *supra* note 184, at 135.

361. Yat-Sen Li, *supra* note 11, at 57.

362. Moreover, complaints of an arbitrators' misfeasance and nonfeasance may be subject to waiver. This is particularly true where the parties involved know of a reason for complaint, such as a relationship between a party and an arbitrator, and fail to make a timely complaint. See Leslie A. Glick, *Bias, Fraud, Misconduct and Partiality of the Arbitrator*, 22 ARB. J. 161, 169 (1967).

Only a happy medium between the extremes of denying recovery in all circumstances under an absolute immunity rule and opening up to limited bases of liability will serve the general goal of fostering arbitration. Ultimately, a balance must be struck between imposing sanctions on arbitrators to deter them from wilfully or recklessly abusing their functions and simultaneously making it possible for them to fulfill their quasi-judicial role without fear of non-meritorious attacks. Overall, this proposed statute recognizes the importance of making impartial decisions while avoiding delay and moving the arbitration process forward for the benefit of all. Moreover, creating a statute³⁶³ that addresses the concerns of countries and parties within the international contract leads to international harmonization and predictability within the commercial setting.

VI. CONCLUSION

Arbitrators currently have immunity from complaints regarding their arbitral actions. The scope of this immunity largely depends upon the law of the relevant jurisdiction and the applicable institutional rules. The United States is the only country that has nearly absolute immunity for arbitral acts. In contrast, most other countries have forms of qualified immunity while others appear to have liability limited only by the terms of the *receptum arbitri* and the applicable law.

Arbitrators should have qualified immunity. For nonfeasance, arbitrators should only be liable when they have unjustifiably abandoned their arbitral mandate. For affirmative misconduct, arbitrators should only be liable to an injured party where they have engaged in bad-faith, intentional misconduct. Ultimately, this qualified immunity strikes an appropriate balance between the needs of international commercial actors, private arbitrators, and the public.

363. In countries such as the United States, it might be necessary to include a provision that expressly derogates the common law. See *International Union, United Auto., Aerospace and Agric. Implement Workers of Amer. and its Locals 656 and 985 v. Greyhound Lines, Inc.*, 701 F.2d 1181 (6th Cir. 1983).