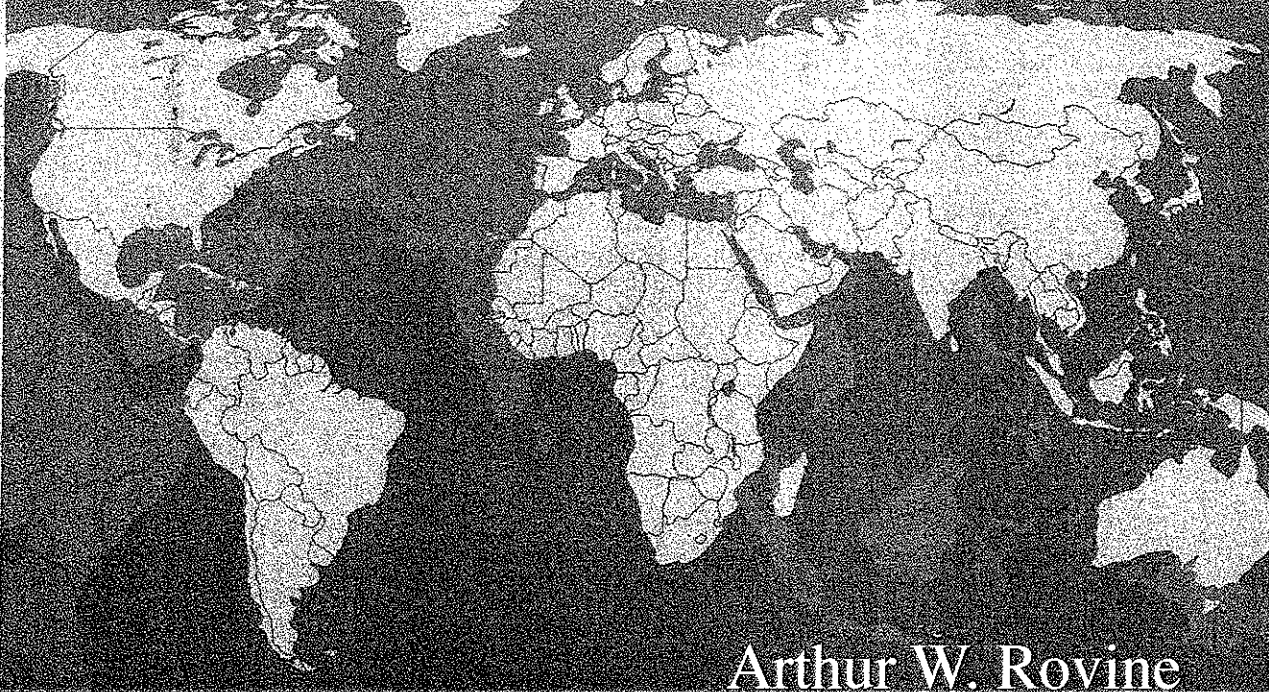


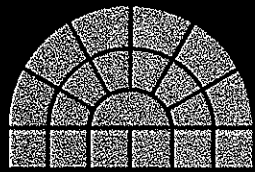
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# Contemporary Issues in International Arbitration and Mediation

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## Claims Against Arbitrators for Breach of Ethical Duties

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### INTRODUCTION

Arbitral immunity is a well-established principle in international arbitration. Excluding arbitrators from certain liabilities aims to prevent frivolous lawsuits brought by parties who are dissatisfied with the merits of the arbitral award and uphold the administration of justice. The immunity of arbitrators limits the opportunity for aggrieved parties to hold the arbitrators personally liable and claim damages against them. However, arbitral immunity is not absolute. Arbitrators have a duty to act fairly and impartially in arbitration proceedings.<sup>1</sup> Arbitral institutions and State courts recognize that arbitrators owe ethical duties to the parties. National arbitration laws and institutional rules contain provisions that either extend immunity to arbitrators or set out the liabilities of arbitrators.<sup>2</sup> The ethical duties of

<sup>1</sup> See United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), as amended in 2006 [hereinafter *Model Law*], available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html). Model Law Article 18 provides that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

<sup>2</sup> American Arbitration Association/American Bar Association (AAA/ABA) Code of Ethics for Arbitrators in Commercial Disputes (2004), available at <http://www.adr.org>. See also the codes of ethics prescribed by the Chartered Institute

arbitrators generally include (1) a duty to act fairly and uphold the integrity of the arbitration process, (2) a duty to act impartially and disclose any conflicts of interest,<sup>3</sup> (3) a duty to act independently and avoid impropriety or the appearance of impropriety in communicating with parties, and (4) a duty to conduct the proceedings diligently. The arbitration rules or legislation of certain jurisdictions may have more specific duties, like conducting the proceedings or rendering an award expeditiously,<sup>4</sup> and not to withdraw from the arbitration except in stipulated circumstances.<sup>5</sup>

#### **IMMUNITY OF ARBITRATORS: COMMON LAW JUDGE IMMUNITY ANALOGY**

The common law jurisdictions adopt a functional analysis of the role of arbitrators. Under this view, arbitrators exercise judicial or quasi-judicial functions that render them comparable to judges. The English courts have consistently recognized that arbitrators are in a quasi-judicial position and enjoy immunity from negligence and mistakes in law or fact.<sup>6</sup> The immunity of arbitrators in the exercise of their judicial functions is an exception to the general principle that a person with professional expertise may be liable in damages for negligence if he fails to exercise due care and skill. Such

of Arbitrators (CIARB), available at [http://www.arbitrators.org/joining/ethical\\_conduct.asp](http://www.arbitrators.org/joining/ethical_conduct.asp); Singapore International Arbitration Centre (SIAC), available at <http://www.siac.org.sg/cop-ethics.htm>; Chamber of National and International Arbitration of Milan (CNIAM), available at <http://www.camera-arbitrale.com/show.jsp?page=169945>; the IBA Guidelines for Conflicts of Interest available at [http://www.ibanet.org/images/downloads/pubs/Ethics\\_arbitrators.pdf](http://www.ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf); the Cairo Regional Centre for International Commercial Arbitration, available at [http://www.crcica.org.eg/code\\_ethics.html](http://www.crcica.org.eg/code_ethics.html).

<sup>3</sup> Model Law, *supra* note 1, Article 12(1) provides that, "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him."

<sup>4</sup> Austrian Civil Procedure Code § 595(4) (Zivilprozessordnung)

<sup>5</sup> Under English Arbitration Act 1996, Section 25, available at [http://www.opsi.gov.uk/ACTS/acts1996/ukpga\\_19960023\\_en\\_1](http://www.opsi.gov.uk/ACTS/acts1996/ukpga_19960023_en_1), the parties are free to agree with the arbitrator as to the consequences of resignation with regards to his entitlement to fees or expenses, and any liability thereby incurred by the arbitrator. If there is no such agreement, the arbitrator may apply to the court to grant him relief from any liability thereby incurred. The arbitrator will not be held liable if he had reasonable cause for his resignation.

<sup>6</sup> *Lendon v. Keen*, [1916] 1 K.B. 994, 999 (K.B.) per Sankey J.; *Arenson v. Casson Beckman Rutley & Co.*, [1977] A.C. 405 (H.L.)

immunity is also "vital to the efficient and speedy administration of justice and therefore necessary on grounds of public policy."<sup>7</sup>

The Irish courts have also recognized the quasi-judicial role of arbitrators. In *Patrick Redahan v. Minister for Education and Science*,<sup>8</sup> the High Court of Ireland held that the defendant arbitrator was acting in a quasi-judicial capacity sufficient to attract immunity from suit at common law, save for any acts in bad faith, which was conceded not to have been the case. The Court drew support for its decision from other common law jurisdictions (e.g., England, Australia, and the United States), and stated that an arbitrator performs duties of a judicial character, and as a result, enjoys quasi-judicial status. The Irish Supreme Court has also recognized that arbitrators and judges enjoy the same immunity on the basis that they both perform an adjudicative function.<sup>9</sup>

In Australia, Section 51 of the Commercial Arbitration Act 1984 excludes liability for negligence but expressly imposes liability for fraud. However, there have been some strong statements from the Australian courts supporting the liability of arbitrators. In *Najjar v. Haines*,<sup>10</sup> Kirby P. listed four reasons why arbitrators should not ordinarily be immune at common law: (1) such immunity would be exceptional (compared to the standards to which other professionals are held), (2) parties help select the arbitrator, and hence his position is distinguishable from a judicial one, (3) the ordinary rule in society is that a person wronged should have redress, and (4) arbitrators have a financial and vested interest in conducting cases and thus should not be immune.

In *Sinclair v. Bayly*,<sup>11</sup> the Court held that arbitral immunity applies where an arbitrator takes into account material not in evidence, and renders the award invalid. The arbitrator is also immune from liability to pay costs. However, the Court opined that upholding the liability of arbitrators would provide parties redress and ensure a proper system of loss distribution. It also observed that, where the lapse is so gross that a lack of good faith can

<sup>7</sup> *Id.*

<sup>8</sup> *Patrick Redahan v. Minister for Education and Science*, [2005] I.E.H.C. 271.

<sup>9</sup> In *Beatty v. The Rent Tribunal*, [2005] I.E.S.C. 66, a statutory rent tribunal had determined the rent of a "controlled dwelling," which was even less than the valuation of the tenant. After the landlords successfully quashed the tribunal's decision, the landlords sued tribunal for damages for loss caused by an invalid decision of the tribunal. The Irish High Court allowed the claim and awarded damages. The Irish Supreme Court allowed the tribunal's appeal on the basis that the immunity of a statutory tribunal arises at common law. The Supreme Court also applied and approved *Arenson v. Casson Beckman Rutley & Co.*, *supra* note 6.

<sup>10</sup> *Najjar v. Haines* (1991) 25 N.S.W.L.R. 224.

<sup>11</sup> *Sinclair v. Bayly*, unreported, Supreme Court of Victoria, Justice Nathan, Oct. 19, 1994.

be inferred, and where the lapse is not negligent but results in an award being aborted, an arbitrator may become personally liable for costs (given that the statute only excludes liability for negligence), as bad faith was not necessarily negligence.

Arbitrators and arbitral institutions in the United States enjoy the broadest degree of immunity from suit for actions taken within their duties.<sup>12</sup> Judgments made by arbitrators are "functionally comparable to those of a judge,"<sup>13</sup> and arbitrators are granted the same immunity as courts because of the nature of their decision-making power, even though they do not hold a federal office.<sup>14</sup> The immunity of arbitration institutions in the United States is parasitic on the immunity of arbitrators; without the latter an arbitral institution can be held liable in place of the arbitrator.<sup>15</sup> All circuits recognize the doctrine of arbitral immunity,<sup>16</sup> and most U.S. courts take the view that recourse to the Federal Arbitration Act (FAA)<sup>17</sup> for any breach of the duties of an arbitrator (i.e., vacatur or rehearing) should be the exclusive remedy.<sup>18</sup> If an arbitrator defaults on his contractual duty by

<sup>12</sup> Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* ¶ 5-18 (4th ed. 2004) [hereinafter Redfern & Hunter].

<sup>13</sup> *Butz v. Economou*, 438 U.S. 478, 511-12 (1978) (U.S. Supreme Court), establishing the principle that the extension of judicial-like immunity to non-judicial officials is properly based on the "functional comparability" of the individual's acts and judgments to the acts and judgments of judges.

<sup>14</sup> *Corey v. New York Stock Exchange (NYSE)*, 691 F.2d 1205, 1209 (6th Cir. 1982). See also *Stasz v. Schwab*, 121 Cal. App. 4th 420, 17 Cal. Rptr. 3d 116, 04 Cal. Daily Op. Serv. 7169; *Austern v. Chicago Board of Options Exch.*, 898 F.2d 882, 885-86 (2d Cir. 1990); *Butz v. Economou*, *supra* note 13; *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987).

<sup>15</sup> W.C. Moffitt, "Choice of Governing Rules of Arbitration under the Doctrine of Arbitral Immunity in *Strategic Resources, Inc. v. BCS Life Insurance, Inc.*," 5 *J. Am. Arb.* 179 (2006). In *Cort v. American Arbitration Association*, 795 F. Supp. 970 (N.D. Cal. 1992), a disgruntled party sued the AAA, alleging that the selection of arbitrators was an administrative function and not quasi-judicial in nature. The court held that the AAA was immune from suits arising from the selection of arbitrators. The U.S. District Court for the Northern District of California also held in *Alexander v. American Arbitration Association*, WL 868823 (N.D. Cal. July 27, 2001) that the AAA was immune when it uses its discretion to choose the applicable rules governing an arbitration proceeding.

<sup>16</sup> In a recent decision delivered on February 20, 2007, the Tenth Circuit Court of Appeals, in *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155 (10th Cir. 2007), observed (citing cases from nine other circuits), that "[e]very other circuit that has considered the issue of arbitral immunity recognizes the doctrine."

<sup>17</sup> 9 U.S.C. §§ 1-14, 43 Stat. 883 (Feb. 12, 1925).

<sup>18</sup> *Higdon v. Constr. Arb. Assocs.*, Court of Appeals of Kentucky 71 S.W.3d 131 (Ky. App. 2002) (proper remedy for any violation of terms and conditions of arbitration agreement stemming from the arbitrator's alleged entertaining of untimely counterclaim and gross underestimation of complainant's damages was an

failing to render a timely decision, he loses his claim to immunity because he loses his resemblance to a judge. In *E.C. Ernst v. Manhattan Construction Company of Texas*,<sup>19</sup> the court recognized the contractual duty to render a timely decision and held the arbitrator liable for damages for the loss caused by his failure to render an award. However, arbitral immunity in the United States does not appear to be broad enough to cover a withdrawal from an arbitration without reasons. The rationale appears to be that an arbitrary withdrawal would be inconsistent with ethical strictures and an arbitrator's quasi-judicial role, and amounts to a breach (or non-performance) of the arbitrator's contractual duty to conduct a binding arbitration.<sup>20</sup>

### CIVIL LAW CONTRACTUAL ANALYSIS

The civil law jurisdictions adopt a contractual analysis of the role of arbitrators.<sup>21</sup> Under the contractual approach, the arbitrator performs the service of resolving a dispute for a fee. The terms of the arbitrator's contract may be set out in the submission to arbitration, the relevant rules of arbitration, the terms of reference or terms of appointment. Other terms may be imposed by operation of law, for example, the duty to act with due diligence and the duty to act judicially.<sup>22</sup> The immunity of an arbitrator is therefore a contractual term negotiated between the parties and the arbitrator. The extent of arbitral liability is subject to modifications but within the limits of mandatory provisions of the national law.<sup>23</sup> It may be worthwhile to note that the judge immunity analogy does not apply in civil law jurisdictions. Unlike common law judges who enjoy judicial immunity, civilian judges can be held liable for all culpable and wrongful acts, including adjudicatory acts. To a variable extent and under specific

action for review of the award, not damages. Such decisions were the sort of procedural and factual determinations an arbitrator is commonly called upon to make.)

<sup>19</sup> *E.C. Ernst v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026 (5th Cir. 1977).

<sup>20</sup> In *Morgan Phillips v. JAMS/Endispute*, 140 Cal. App. 4th 795 (2006), the California Court of Appeals (Second Appellate District, Division 4) stated that arbitral immunity cannot be used to "immunize the unprincipled abandonment and refusal to make a decision." See also *supra* notes 15, 16, 18, and 19.

<sup>21</sup> Redfern & Hunter, *supra* note 12, at ¶ 5-16.

<sup>22</sup> Austrian Civil Procedure Code Section 595(4) imposes liability on an arbitrator for damages for failure to act in a timely manner.

<sup>23</sup> C. Hausmaninger, "Civil Liability of Arbitrators—Comparative Analysis and Proposals for Reform," 7(4) *J. Int'l Arb.* 7, 11 et seq., 19 (1990).

circumstances, parties to a judicial proceeding can recover damages caused by judicial wrongdoing.<sup>24</sup>

### **EXAMPLES OF STATUTES GRANTING IMMUNITY OR IMPOSING LIABILITY**

The Model Law contains no provision on the liability of an arbitrator for misconduct or error, and so there is no uniform approach to immunity. It is notable that, in the drafting of the Model Law, there was general agreement among members of the Working Group on International Contract Practices that the question of the liability of an arbitrator could not appropriately be addressed in a model law on international commercial arbitration.<sup>25</sup> That was because the liability issue was not widely regulated and remained highly controversial. National arbitration laws therefore have different formulations either granting immunity or imposing liability on arbitrators.

Statutes that grant immunity to arbitrators include Section 25 of the Singapore International Arbitration Act (Cap. 143A) (IAA)<sup>26</sup> and Section 29 of the English Arbitration Act 1996.<sup>27</sup> Under Section 25A of the IAA, the appointing authority and arbitral institutions are only liable for acts or omissions in bad faith. In the United States, Section 14(a) of the Revised Uniform Arbitration Act 2000 is a broad provision that grants immunity to an arbitrator or arbitration organization to the same extent as a judge of a state court acting in a judicial capacity. In Hong Kong, although Section 2GM of the Hong Kong Arbitration Ordinance (Cap. 341) (1997)<sup>28</sup> imposes liability on arbitrators, it is in effect a blanket immunity, save for dishonesty.

Statutes that impose liability on arbitrators include Section 51 of the Australian Commercial Arbitration Act 1984,<sup>29</sup> which expressly imposes liability for fraud. In England, upon the removal of an arbitrator under

<sup>24</sup> *Id.* at 13-14.

<sup>25</sup> *Report of the Working Group on International Contract Practices on the Work of Its Third Session*, U.N. Doc. A/CN.9/216, at III(5), available at <http://www.uncitral.org/uncitral/en/commission/sessions/15th.html>. See also *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/207, ¶ 70, available at <http://www.uncitral.org/uncitral/en/commission/sessions/14th.html>.

<sup>26</sup> IAA Section 25, available at <http://www.statutes.agc.gov.sg>, excludes the liability of arbitrators for negligence or mistakes in law, fact or procedure.

<sup>27</sup> Under English Arbitration Act 1996, *supra* note 5, Section 29, an arbitrator is only liable for acts or omissions in bad faith. Under Section 25 of the same act, an arbitrator can be liable for resignation without reasonable cause (*see supra* note 3).

<sup>28</sup> Available at <http://www.hkllii.org/hk/legis/ord/341/>.

<sup>29</sup> Available at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/caa1984219](http://www.austlii.edu.au/au/legis/vic/consol_act/caa1984219).

Section 24(4) of the English Arbitration Act 1996,<sup>30</sup> a court may order the arbitrator to repay any fees or expenses already paid.

### EXAMPLES OF ARBITRAL RULES GRANTING IMMUNITY OR IMPOSING LIABILITY

The International Chamber of Commerce (ICC) Rules,<sup>31</sup> AAA Commercial Arbitration Rules and Mediation Procedures,<sup>32</sup> and the International Centre for the Settlement of Investment Disputes (ICSID) Rules<sup>33</sup> grant blanket immunity, but under the provisions of the latter, ICSID itself may waive the immunity.<sup>34</sup> The London Court of Arbitration (LCIA) Rules<sup>35</sup> and the World Intellectual Property Organization (WIPO) Arbitration Rules<sup>36</sup> grant immunity save for conscious and deliberate wrongdoing. The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce grant immunity save for "wilful misconduct or gross negligence."<sup>37</sup> Article 584(2) of the Stockholm Rules also imposes general liability for damages caused by an arbitrator's wrongful refusal or delay, and allows the parties to claim rescission of the arbitration agreement.<sup>38</sup>

<sup>30</sup> *Supra* note 5.

<sup>31</sup> Available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf). ICC Rules Article 34 states that, "Neither the arbitrators, nor the Court and its members, nor the ICC and its employees nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration."

<sup>32</sup> Available at <http://www.adr.org/sp.asp?id=22440>. Rule 48(b) states that, "Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party to judicial proceedings relating to the arbitration."

<sup>33</sup> Available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

<sup>34</sup> ICSID Rules Article 20, available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>, states that: "The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity." See also Article 21(a). To date, there have been two applications to ICSID to waive immunity, but both were refused because the party in the respective cases sought annulment of the award as well.

<sup>35</sup> Available at [http://www.lcia.org/ARB\\_folder/ARB\\_DOWNLOADS/ENGLISH/rules.pdf](http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf).

<sup>36</sup> Available at <http://www.wipo.int/amc/en/arbitration/rules/>.

<sup>37</sup> Available at <http://www.sccinstitute.com/uk/About/>. Stockholm Rules Article 48 states that "neither the SCC Institute nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes wilful misconduct or gross negligence."

<sup>38</sup> Stockholm Rules, *id.*, Article 584(2) states that, "An arbitrator who does not fulfil in time or at all the obligations assumed by his acceptance of office is liable to the parties for all the loss caused by his wrongful refusal or delay, without prejudice to the parties rights to claim rescission of the arbitration agreement."

## INSTITUTIONAL POWERS OF SUPERVISION

Arbitral institutions may impose penalties for breach of the institutions' code of ethics. This shows that arbitrators do not, in practice, enjoy absolute immunity. ICSID, for example, may waive arbitral immunity if an arbitrator is found liable for wilful misconduct (e.g., actual bias or corruption). The HKIAC Court of Arbitration, a supervisory body that investigates complaints against arbitrators on its Panel of Arbitrators, has Terms of Reference that deal with complaints against members of the HKIAC Panel. The HKIAC Court reviews any decision of the HKIAC Panel Selection Committee that a complaint does not warrant an investigation by the Court, and has the discretion to override the decision of the Panel Selection Committee.

The Chamber of National and International Arbitration of Milan (Chamber of Arbitration) also has a Code of Ethics that empowers the Chamber of Arbitration to replace an arbitrator who fails to comply with the Code. The additional sanction is that the Chamber of Arbitration may refuse to confirm subsequent appointments of the errant arbitrator because of that violation.<sup>39</sup> Members of the Chartered Institute of Arbitrators (CIARB) are subject to the Royal Charter and its Bye-laws. A disciplinary tribunal may be set up by the CIARB to decide upon any violations of the code of ethics in the conduct of an arbitration. Sanctions may vary from reprimands and censure, on the one hand, to expulsion from the Institute, on the other.<sup>40</sup> In contrast, the Singapore International Arbitration Centre (SIAC) Code of Ethics for Arbitrators provides that breach of the Code is not intended to provide grounds for the setting aside of an award and does not appear to impose any penalty for violations of the Code.<sup>41</sup> The SIAC Code therefore makes it clear that an appropriate remedy for a party dissatisfied with the merits of an award is to attempt to set it aside or resist enforcement under the Model Law. To impose personal liability on an

<sup>39</sup> Chamber of Arbitration's Code of Ethics Article 13, available at <http://www.camera-arbitrale.com/show.jsp?page=169945>, states that, "The arbitrator who does not comply with this Code of Ethics shall be replaced by the Chamber of Arbitration, which may also refuse to confirm him in subsequent proceedings because of this violation. The arbitrator shall not accept any direct or indirect arrangement on fees and expenses with any of the parties or their counsel."

<sup>40</sup> Royal Charter and Bye-Laws of the CIARB Bye-Law 15.2, available at [http://www.arbitrators.org/joining/charter\\_bye-laws.asp](http://www.arbitrators.org/joining/charter_bye-laws.asp), sets out what constitutes "misconduct," for example "(3) falling significantly below the standards expected of a competent Practitioner or a competent professional person acting in the field of private dispute resolution."

<sup>41</sup> SIAC Code of Ethics for Arbitrators art. 7.2, available at <http://www.siac.org.sg/cop-ethics.htm>.

arbitrator on the pretext of a breach of the institutional code of ethics is not a substitute remedy for challenging the merits of the award.

### CLAIMS AGAINST ARBITRAL INSTITUTIONS

Although this paper seeks to focus on the claims against arbitrators for breach of ethical duties, it is useful to note that arbitral institutions have also become targets for aggrieved parties who have lost an arbitration. The general view is that there is a contractual relationship between parties to the arbitration and the arbitral institution administering the arbitration.<sup>42</sup> Arbitral institutions in common law jurisdictions have immunity, at least against negligence or errors of procedure, on the basis that they operate as quasi-judicial organizations to protect those functions that are closely related to the arbitral process and sufficiently related to the adjudicative phase of the arbitration. For example, Section 74 of the English Arbitration Act 1996 grants immunity to an appointing authority, and imposes liability for acts or omissions in bad faith.<sup>43</sup>

In the United States, arbitral immunity is absolute and covers acts by an arbitral institution that are associated with the judicial phase of the proceedings. In *Austern v. Chicago Board of Options Exchange*,<sup>44</sup> the investors (Austern) were parties to an arbitration. The investors had successfully set aside the arbitral award but went on to sue the Chicago Board of Options Exchange (as the sponsoring organization) for mental anguish and expenses of defending against the confirmation of the award. The court held that the administrator of an arbitration was immune from suit for the alleged failure to notify the investor of pending arbitration proceedings. The investors had already obtained the exclusive remedy of defeating the confirmation of the award.

In an Austrian case,<sup>45</sup> an arbitrator in the Vienna International Arbitral Centre (VIAC) was successfully challenged on the grounds of failure to

<sup>42</sup> Redfern & Hunter, *supra* note 12, at ¶ 5-21.

<sup>43</sup> Section 74 of the English Arbitration Act 1996, *supra* note 5, states that: "(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith. (2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted to be done by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator."

<sup>44</sup> *Austern v. Chicago Board of Options Exch.*, *supra* note 14.

<sup>45</sup> OGH Nov. 30, 2006.

disclose a material conflict of interest. The arbitrator then asked for his fees, but the Secretary-General of the VIAC decided not to pay out any fees to the arbitrator because he breached his duty of disclosure. The arbitrator sued the VIAC. The VIAC defended the case and won, so no fees were payable to the arbitrator who was removed for conflict of interest.

The French courts have affirmed the contractual relationship between the parties and the institution, and find it unnecessary to treat institutions as judicial bodies.<sup>46</sup> In *Société Cubic Defense System v. Chambre de Commerce Internationale*,<sup>47</sup> the French Cour de Cassation recognized a contract between the parties to the arbitration and the ICC. Under that contract, it was held, the ICC is contractually obligated to fulfill its essential function as an arbitral institution, that is, to follow the rules applicable to the arbitration, and is potentially liable for any breach of the arbitration agreement.

## CLAIMS AGAINST ARBITRATORS FOR BREACH OF ETHICAL DUTIES

### Claims for Delay by Arbitrators

National arbitration laws or institutional rules may stipulate a requirement to render a timely award or act without unnecessary delay,<sup>48</sup> which forms part of a tribunal's duty to act with due diligence. The ICC Rules fixes a time limit of six months for an arbitral tribunal to make an award,<sup>49</sup> though it may be extended by consent of the parties or at the initiative of the institution.<sup>50</sup> The English Arbitration Act 1996 provides that an arbitrator who fails to proceed with reasonable speed in conducting the arbitration, and making his award, may be removed by a competent court.<sup>51</sup> However,

<sup>46</sup> M. Rasmussen, "Overextending Immunity: Arbitral Institutional Liability in the United States, England and France," 26 *Fordham Int'l L.J.* 1824, 1863 (2003).

<sup>47</sup> *Société Cubic Defense System v. Chambre de Commerce Internationale*, 1997 *Rev. Arb.* 417.

<sup>48</sup> Model Law, *supra* note 1, Article 14(1) states that, "If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal."

<sup>49</sup> ICC Arbitration Rules art. 24.1, *supra* note 31.

<sup>50</sup> *Id.*, art. 24.2.

<sup>51</sup> English Arbitration Act 1996, *supra* note 5, Section 33(1)(b)

some caution must be taken against imposing liability for delay that is not excessive,<sup>52</sup> as what is "reasonable despatch" depends on the circumstances of the case.<sup>53</sup> Even if an arbitrator is found liable for being dilatory, it seems that his obligation to proceed with reasonable speed will not be enforced by specific performance.<sup>54</sup>

Under certain arbitration laws, the time limit is a "drop-dead" provision that terminates the authority of the arbitral tribunal and makes it *functus officio*, and the award will be null and void. Article 1456 of the French New Code of Civil Procedure (the French Code)<sup>55</sup> stipulates a period of six months for an arbitral tribunal to render an award in the absence of other provisions in the arbitration agreement. If the parties had not agreed to an extension of time or sought an extension from the court, the tribunal would have to request an extension of time to render the award. If the tribunal fails to do so, the award rendered out of time may be set aside under Article 1456. In the *Juliet* case in the First Civil Chamber of the Cour de Cassation,<sup>56</sup> the three-member tribunal published its award out of time in breach of Article 1456 of the French Code. The Court of Appeal annulled the award, as the tribunal failed to request an extension of time. A party to the arbitration brought a claim for breach of contract against the arbitrators. The Cour de Cassation found that the arbitrators were liable for damages for breach of contract. The tribunal had an obligation under Article 1456 of the French Code to obtain an extension of time from the court for delivering the award out of time, where the parties had not agreed to such an extension.

The AAA Commercial Arbitration Rules have a more restrictive time limit: the arbitral tribunal has to render the award no later than 30 days from the date of closing the hearing.<sup>57</sup> In *Baar v. Tigerman*,<sup>58</sup> the arbitrator (Tigerman) failed to render an award within 30 days from the date of closing the hearing and in fact had yet to make an award seven months after

<sup>52</sup> S. Franck, "The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity," 20 *N.Y. L. Sch. J. Int'l & Comp. L.* 1, 57 (2000).

<sup>53</sup> D. Sutton & J. Gill, *Russell on Arbitration* ¶ 7-083 (22d ed. 2003)

<sup>54</sup> Sir M.J. Mustill & S.C. Boyd, *Commercial Arbitration* 231 (2d ed. 1989).

<sup>55</sup> Available at [http://www.lexinter.net/ENGLISH/code\\_of\\_civil\\_procedure.htm](http://www.lexinter.net/ENGLISH/code_of_civil_procedure.htm).

<sup>56</sup> *Louis Juliet, Benoît Juliet v. Paul Castagnet (arbitrator), Pierre Couilleaux (arbitrator) and Adolphe Biotteau (arbitrator)*, Case 1660 FS-P+B (Dec. 6, 2005).

<sup>57</sup> Rule 41 of the AAA Commercial Arbitration Rules states that, "The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing of the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator."

<sup>58</sup> *Baar v. Tigerman*, 140 Cal. App. 3d 979, 211 Cal. Rptr. 426 (1983).

the submission. The authority of the arbitrator vested in him by the AAA contract and statutory law to make an award terminated. One party to the arbitration brought an action against the arbitrator and the AAA. That party alleged breach of contract, negligence, and breach of the implied covenant of good faith. That party also argued that the AAA failed to exercise reasonable care in the selection of Tigerman as an arbitrator, and therefore the AAA failed to administer the arbitration properly. The California Court of Appeals (Second District, Division 3) held that an arbitrator who breaches his contract to render a timely award was not entitled to judicial immunity. Further, it held that arbitration immunity did not extend to a private arbitration association for its administrative action. Following *Baar v. Tigerman*, the California Legislature adopted Section 1280.1 of the Code of Civil Procedure<sup>59</sup> to expand arbitral immunity to conform to judicial immunity and supersede the holding in that case. In *Thiele v. RML Realty Partners*,<sup>60</sup> the Court of Appeals (Second District, Division 7) extended arbitral immunity to the AAA on the basis that arbitral immunity should be liberally construed. The court stated that the act of sending out the arbitral award was sufficiently associated with the adjudicative phase of the arbitration to justify immunity. In *Morgan Phillips v. JAMS/Endispute*, the California Court of Appeals held that an arbitrator's failure to render an arbitral award is "not integral to the arbitration process; [but] a breakdown of that process." A refusal to render an award is in effect a "complete non-performance" of the ultimate object of the arbitration agreement.<sup>61</sup>

The Austrian Civil Procedure Code imposes an obligation on arbitrators to act without undue delay. In an Austrian case before the Austrian Supreme Court<sup>62</sup> concerning two arbitrators who had been sued by the losing party, the Court set out two pre-conditions for the arbitrators to be held liable for breach of the duty to act without undue delay: (1) the award must have been successfully challenged, and (2) there had been some kind of negligent behavior on the part of the arbitrators.

The cases show that, where there is a strict time limit that must be adhered to, it would seem that there is no defence in a contractual claim for the failure to conduct the arbitration without undue delay in jurisdictions that recognize such a contractual claim against the tribunal. The award may be rendered null and void in such circumstances, but any damages inflicted

<sup>59</sup> California Code of Civil Procedure Section 1280.1 provides that "[a]n arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract."

<sup>60</sup> *Thiele v. RML Realty Partners*, 14 Cal. App. 4th 1526 (1993).

<sup>61</sup> *Morgan Phillips v. JAMS/Endispute*, *supra* note 20.

<sup>62</sup> OGH (June 6, 2006).

through the conduct of the arbitrators would be difficult to quantify.<sup>63</sup> However, the arbitral rules of the main institutions do not impose liability to compensate the parties for delay. In those jurisdictions that do not recognize such a contractual claim, there is no compensation in damages for a party who has suffered loss as a result of delay in proceeding with the arbitration.

### Claims for Failure to Disclose Conflicts of Interest

The obligation to disclose conflicts of interest is essential to the independence and impartiality of the arbitrator. Article 12(1) of the Model Law imposes on an arbitrator a continuing obligation of disclosure of any conflicts of interest that may arise from the time of his appointment and throughout the arbitral proceedings.<sup>64</sup> The IBA Guidelines on Conflicts of Interest in International Arbitration set out an objective test for the disclosure of any conflicts of interest: an arbitrator should disclose circumstances that, "from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence."<sup>65</sup> The IBA Guidelines also enumerate various categories of specific situations in respect of which disclosure is made, and specific consent by the parties or a presumption of consent, if no timely objection is made, is required.<sup>66</sup>

Claims against arbitrators for failure to declare conflicts of interest can lead to the award being vacated or at least the termination of the arbitration.<sup>67</sup> The French courts have found arbitrators liable to compensate parties for losses incurred through a breach of the duty of disclosure that leads to a successful challenge of the award. In *Raoul Duval v. V*<sup>68</sup> (Tribunal

<sup>63</sup> Julian D.M. Lew, Loukas A. Mistrelis & Stefan Kröll, *Comparative International Commercial Arbitration* ¶ 12-59 (2003).

<sup>64</sup> See also AAA/ABA Code of Ethics for Commercial Arbitrators, *supra* note 2, Canon II (2004)

<sup>65</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, *supra* note 2, General Standard 2(b) (2004).

<sup>66</sup> See *id.* Part II and the Non-Waivable Red List, Waivable Red List, Orange List and Green List.

<sup>67</sup> *Id.*, ¶ 5. The Working Group on the IBA Guidelines is of the view that a later challenge based on the fact that an arbitrator did not disclose facts or circumstances giving rise to justifiable doubts as to his impartiality or independence should not result automatically in either non-appointment, later disqualification, or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.

<sup>68</sup> *Raoul Duval v. V*, 1996 *Rev. Arb.* 41.

de Grand Instance; Paris),<sup>69</sup> the chairman of the arbitral tribunal started working for one of the parties the day after the award was rendered. The chairman failed to disclose this fact to the parties. The arbitral award was set aside on the ground of unlawful constitution of the tribunal. Duval then sued the arbitrator for loss caused by his conduct. The court held that the arbitrator was liable on a contractual basis to pay damages for the fees paid to the arbitrators and the arbitral institution, as well as costs incurred for the defense.

The Finnish courts have also found arbitrators liable to compensate parties for losses incurred through a failure to disclose conflicts of interest. In *Urho, Sirkka and Jukka Ruola v. X*,<sup>70</sup> the plaintiff had successfully annulled the arbitral award in a prior action in which he challenged the award on the ground of bias. In this subsequent action before the Finnish Supreme Court, the plaintiff sued the arbitrator directly for the costs and expenses of the arbitration. The arbitrator had failed to disclose the fact that he had given several legal opinions to the defendant company and financial institutions who were intervening parties in the arbitration. The Finnish Supreme Court held that the arbitrator's non-disclosure constituted a breach of contract and awarded the plaintiff the costs and expenses of the arbitration.

In the United States, claims against arbitrators for failure to disclose conflicts of interest do not result in any loss of arbitral immunity. Under Section 14(c) of the Revised Uniform Arbitration Act 2000, an arbitrator's failure to make a disclosure required by Section 12 does not cause any loss of immunity under this section. The typical remedy for a failure to disclose conflicts of interest is *vacatur* under Section 23 of the act.

There is a positive duty on arbitrators to investigate possible conflicts of interest.<sup>71</sup> In *HSMV Corp. v. ADI Ltd.*,<sup>72</sup> the arbitrator's law firm had an indirect professional relationship with the defendant. The plaintiff discovered this conflict of interest only after two awards were rendered and brought an action to vacate the second award. The arbitrator claimed that he was unaware of this relationship. The District Court for the Central District of California vacated the second award and held that arbitrators have an affirmative duty to investigate possible conflicts.

<sup>69</sup> Confirmed by Cour d'appel Paris in Rev Arb. 324 (1999) and Cour de Cassation.

<sup>70</sup> *Urho, Sirkka and Jukka Ruola v. X*, KKO 2005:14.

<sup>71</sup> *Commonwealth Coatings Corp. v. Continental Cas.*, 393 U.S. 145, 151-52 (1968); the U.S. Supreme Court held that arbitrators "should err on the side of disclosure" as "it is better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship."

<sup>72</sup> *HSMV Corp. v. ADI Ltd.*, 72 F. Supp. 2d 1122 (C.D. Cal 1999).

Although an award may be vacated on the basis of apparent partiality, the doctrine of arbitral immunity in the United States ensures that arbitrators are not held personally liable for failure to disclose conflicts of interest. In *Blue Cross Blue Shield of Texas v. Juneau*,<sup>73</sup> Juneau was an arbitrator on the arbitration panel in a dispute between HealthCor Liquidation Trust (HealthCor) and Blue Cross Blue Shield of Texas (Blue Cross). The panel rendered a unanimous decision in favor of HealthCor. Blue Cross filed suit against HealthCor and two arbitrators, alleging "gross mistake," and sought modification or vacation of the award. Blue Cross subsequently sued Juneau for evident partiality. Juneau had previously worked in the same law firm as the attorney who worked for HealthCor. However, Juneau did not have much contact with this attorney, and so he thought the relationship was trivial and not worth disclosing. The Court of Appeals of Texas held that arbitral immunity covers an arbitrator's failure to disclose conflicts of interest, even though the award might be vacated on the grounds of failure to disclose, because the disclosure requirement was directly related to the functions of an arbitrator.

In *Positive Software Solutions Inc. v. New Century Mortgage Corp.*,<sup>74</sup> the sole arbitrator had been co-counsel with the defendant's counsel in the arbitrator's prior law firm more than ten years prior to the arbitration. The arbitrator and the defendant's counsel failed to disclose this relationship in the course of the arbitration. The arbitrator ruled in favor of the defendant. The plaintiff discovered this relationship and sought to vacate the arbitral award. The district court (affirmed by the court of appeals) vacated the award on the ground that the prior professional relationship might create a reasonable impression of possible bias and that the arbitrator's failure to disclose that prior relationship deprived the plaintiff of the opportunity to make an informed choice of arbitrator. On the defendant's petition, the Fifth Circuit Court of Appeals reversed its own decision in a rehearing of the case *en banc*. The U.S. Supreme Court affirmed the court of appeals' decision and held that a failure to disclose trivial or insubstantial relationships is not a sufficient basis to vacate an award. The relationship must involve a "significant compromising connection to a party."

Parties to an arbitration have a duty to exercise due diligence in investigating possible conflicts of interest. A disgruntled party that wants to set aside the award on the basis of apparent bias may end up being time barred if it fails to discover information revealing bias (if any) within the

<sup>73</sup> *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126 (Ct. App. Tex. 2003).

<sup>74</sup> *Positive Software Solutions Inc. v. New Century Mortgage Corp.*, 337 F. Supp. 2d 862, 865 (N.D. Tex. 2004), *aff'd*, 436 F.3d 495 (5th Cir. 2006); *rev'd in reh'g*, 476 F.3d 278 (5th Cir. 2007) (*en banc*), *cert. denied*, June 11, 2007.

statutory time limit for vacating an award. In *Pullara v. American Arbitration Association, Paxson & Associates, P.C., and Stephen B. Paxson*,<sup>75</sup> the plaintiff (Pullara) sued the arbitrator and the AAA for damages for the arbitrator's failure to disclose his professional relationship (as general counsel) with a trade association. The plaintiff alleged that the arbitrator's professional relationship with the trade association was a material fact that he was entitled to know when he chose the arbitrator from the AAA's list of arbitrators. The plaintiff could not apply to vacate the award as it was time barred under the Texas Civil Practice and Remedies Code,<sup>76</sup> having discovered the arbitrator's undisclosed professional relationship only one year after the award was rendered. The Court of Appeals of Texas held that the arbitrator and the AAA were both immune against claims for evident partiality.

### Claims for Being Corrupt

The national arbitration laws of common law jurisdictions and arbitral rules of the main arbitral institutions exclude immunity for fraud, dishonesty, or actual bias. If there are circumstances that give rise to justifiable doubts as to the impartiality of an arbitrator, the national court has the power to remove the arbitrator and institutional rules set out a procedure to challenge the arbitrator.<sup>77</sup> Some national arbitration laws may impose an additional sanction by giving the court the power to order the arbitrator to repay any fees or expenses already paid.<sup>78</sup> Allegations of actual bias go to the jurisdiction of the tribunal and should be remedied by challenging the arbitrators and seeking their removal or withdrawal,<sup>79</sup> or challenging the arbitral award.

<sup>75</sup> *Pullara v. Am. Arb. Ass'n, Paxson & Assocs., P.C., and Stephen B. Paxson*, 191 S.W.3d 903 (Tex. App.—Texarkana 2006).

<sup>76</sup> Texas Civil Practice & Remedies Code Section 171.088, Alternate Methods of Dispute Resolution (Cap. 171) provides that any application to vacate an award must be made within 90 days from the date of delivery of a copy of the award to the applicant. An award may be vacated on the basis of, for example, corruption, fraud, evident partiality, and misconduct or willful misbehavior.

<sup>77</sup> Lew, Mistelis & Kroll, *supra* note 63, ¶ 12-33. See ICC Rules, *supra* note 31, art. 11; LCIA Rules, *supra* note 35, art. 10; Model Law, *supra* note 1, arts. 12-13.

<sup>78</sup> See, e.g., English Arbitration Act 1996, *supra* note 5, § 24(4).

<sup>79</sup> Lew, Mistelis & Kroll, *supra* note 63, ¶ 12-34. The U.S. courts take this approach; see, e.g., *Int'l Union, United Auto. Workers. v. Greyhound Lines*, 701 F.2d 1181, 1185-87 (6th Cir. 1983); *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir.1999); *Saavedra v. City of Albuquerque*, 859 F. Supp. 526, 532 (D. N. Mex.), *aff'd*, 73 F.3d 1525 (10th Cir. 1996), *Stasz v. Schwab*, 121 Cal. App. 4th 420 (2004); *Garland v. US Airways*, 153 Lab. Cas. ¶ 10,762 (W.D. Pa. 2006).

Arbitral immunity in the United States extends to challenges of the arbitrators' authority to resolve a dispute and allegations of misfeasance by arbitral institutions. Immunity may extend to allegations of fraud, corruption, and conspiracy, and it is likely that, in such cases, the arbitral award would be vacated.<sup>80</sup> An arbitrator is also immune from allegations of libel and slander if the statements are made in the course of arbitral proceedings.<sup>81</sup> In *Tamari v. Conrad*,<sup>82</sup> the U.S. Court of Appeals for the Seventh Circuit held that arbitral immunity applies where the arbitrator's authority is challenged because arbitrators will be dissuaded from serving if they can be embroiled in a dispute and be saddled with the burdens of defending a lawsuit. In *International Medical Group, Inc. v. American Arbitration Association*<sup>83</sup> (IMG), the U.S. Court of Appeals for the Seventh Circuit upheld *Tamari v. Conrad*. In IMG, the respondents in the arbitration were clearly not interested in the arbitration proceedings as they sued the claimant, his lawyers and their law firm, the AAA and its employees, alleging malicious prosecution, abuse of process and "bad faith arbitration" (the last being a cause of action that the court did not recognize), and sought a stay of the arbitration proceedings. The court dismissed the claim on the basis of arbitral immunity and found that the causes of action were unsubstantiated.

#### Claims for Negligence

Allegations of negligence against arbitrators are premised on the arbitrators' incompetent handling of the arbitration and do not amount to the arbitrators' willful misconduct. An arbitrator may be liable for breach of contract or the tort of negligence if he is extravagant or dilatory, but the remedy is limited to his removal as an arbitrator and a forfeiture of his fees. Such sanctions are similar to those that are imposed on professionals who have a duty of care and skill.<sup>84</sup>

Arbitrators are immune against claims for negligence under national arbitration laws of common law jurisdictions and the rules of the main arbitral institutions.<sup>85</sup> Arbitration institutions in the United States are also immune against tortious claims based on wrongful exercise of jurisdiction over parties who are not parties to the arbitration agreement. The

<sup>80</sup> *Jones v. Brown*, 54 Iowa 140, 142-43 (Iowa 1880). In a subsequent case, the arbitrators were not allowed to recover their arbitral fees.

<sup>81</sup> *Kabia v. Koch*, 186 Misc. 2d 363, 713 N.Y.S.2d 250 (N.Y. Civ. Ct. 2000).

<sup>82</sup> *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977).

<sup>83</sup> *Int'l Med. Group, Inc. v. Am. Arb. Ass'n*, 312 F.3d 833 (7th Cir. 2002).

<sup>84</sup> *Sutton & Gill*, *supra* note 53, ¶ 4-203.

<sup>85</sup> *See also Stasz v. Schwab*, *supra* note 14.

appropriate remedy for parties who raise jurisdictional objections is to seek an injunction in an appropriate court against the party initiating the arbitration.<sup>86</sup> In a controversial English case, the arbitrator was removed by the court and held liable for the costs of the court hearing, and was awarded only £10,000 in arbitral fees. The court held that the arbitrator had no power under the English Arbitration Act 1996<sup>87</sup> to obtain double security for his anticipated fees and expenses and exercised the wrong principles in ordering the parties to give security for each other's costs.<sup>88</sup>

Jurisdictions that adopt a contractual approach to arbitral immunity are more likely to find arbitrators liable for claims for negligence. Arbitrators are contractually liable for loss and damages for the failure to perform their duties. For example, Argentinean arbitration law takes the view that the arbitral contract renders arbitrators liable for losses caused by any failure to perform duties.<sup>89</sup> In France, arbitrators have duties and obligations to both parties once they accept an appointment. If an arbitrator breaches any term in the agreement, he may be liable for damages.<sup>90</sup> However, the French courts have held that arbitrators can only incur liability in the event of gross fault, fraud, or connivance with one of the parties. In *Floragne v. Brissart et Corgie*,<sup>91</sup> a party brought an action against the arbitrators seeking to recover the loss suffered as a result of the arbitral award. The court held that the party's arguments implied that the arbitrators reached the wrong decision. The court dismissed the action, as no misfeasance was alleged or justified, and considered the action to be abusive and offensive. The court awarded the arbitrators the nominal damages that the arbitrators sought in their counterclaim.

<sup>86</sup> *Int'l Med. Group, Inc. v. Am. Arb. Ass'n*, *supra* note 83, *Stasz v. Schwab*, *supra* note 14.

<sup>87</sup> *Supra* note 5.

<sup>88</sup> *Wicketts v Brine Builders*, [2002] C.I.L.L. 1805, [2001] App. L.R. 06/08.

<sup>89</sup> *Redfern & Hunter*, *supra* note 12, at ¶ 5-17. National Code of Civil and Commercial Procedure Article 745 in Argentina states that "acceptance by arbitrators of their appointment shall entitle the parties to compel them to carry out their duties and to hold them liable for costs and damages derived from the non-performance of arbitral duties." Peruvian General Arbitration Law Article 18 is virtually identical to Article 745.

<sup>90</sup> *Ceckolovenska Obcendi Banka v. ICC*, 1987 *Rev. Arb.* 367; P.B. Rutledge, "Towards a Contractual Approach for Arbitral Immunity," 39 *Ga. L. Rev.* 151-214 (2004).

<sup>91</sup> French case; No. 482/77 (unpublished).

inappropriate unless the arbitrator becomes a participant in the litigation or is guilty of collusion and dishonesty.<sup>96</sup>

Arbitrators may choose to expressly contract out of participating in any judicial proceedings in their terms of appointment. In the United States, the Revised Uniform Arbitration Act (2000) states that an arbitrator is neither competent to testify or required to produce any documents pertaining to an arbitration, except where it is necessary to determine the claim of an arbitrator or in a hearing to vacate an award.<sup>97</sup> The Act also aims to curb frivolous lawsuits against arbitrators by imposing liability for legal fees and other expenses of litigation on parties that commence civil action against an arbitrator, arbitral organization, or representative of an organization, and it is subsequently found that arbitral immunity applies.<sup>98</sup> Recent case law also demonstrates that judicial policy is moving towards imposing sanctions on parties who bring spurious lawsuits.<sup>99</sup>

Conflict-of-laws issues arise where an unhappy litigant who is unable to set aside an award in the local courts of the seat of arbitration attempts to vacate the award by bringing an action in the jurisdiction of the arbitrators on the basis of corruption or other grounds of public policy. In a famous case in the United States District Court in Beaumont, Texas, the unhappy litigant failed twice in Switzerland, the seat of the arbitration, to set aside the award given by the three-member tribunal. He then sued everyone he could think of, including the arbitrators, to vacate the award on the grounds that the tribunal had taken \$25 million in bribes. The arbitrators did not take any active part in the proceedings, so no issue of arbitral immunity arose. The Texas judge made a finding that the court must have the jurisdiction to set aside the award before it could decide on the issue of corruption. Because the seat of the arbitration was Geneva and not Texas, he declined to do so.<sup>100</sup> That case is still on appeal, and there is now a joint *amicus* brief submitted jointly by the AAA and the Swiss Arbitration Association, presumably to support the dismissal of that particular claim.<sup>101</sup>

<sup>96</sup> *Lendon v. Keen*, *supra* note 6. *See also* *Najjar v. Haines*, *supra* note 10. The court held that arbitrators should be immune because of the overriding importance of the need for a judge to act independently and without fear of harassment by action.

<sup>97</sup> Section 14(d) of the Revised Uniform Arbitration Act (2000) and see commentary on the provision.

<sup>98</sup> Section 14(e) of the Revised Uniform Arbitration Act (2000) and see commentary on the provision.

<sup>99</sup> *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, WL 462368 (11th Cir. 2006).

<sup>100</sup> *Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp.*, 2006 U.S. Dist. LEXIS 86493 (E.D. Tex. 2006).

<sup>101</sup> The authors would like to note that on January 7, 2008, the U.S. Fifth Circuit Court of Appeals affirmed the dismissal of *Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp.* on the basis that it was a collateral attack on the foreign (Swiss)

Claims against arbitrators give rise to the question of the kinds of relief that can be obtained against them. In the *Beaumont* case mentioned above, the party claimed for the costs of arbitrating, lost revenue, profits that allegedly should have been awarded at the arbitration proceedings, damage to reputation from losing in the arbitration, and loss of business opportunities from losing the award. As the court decided it did not have jurisdiction, the court did not have to decide on the relief sought. In the Finnish case of *Urho v. X* (mentioned above), the claimant sought to recover the costs and expenses of arbitration. The court held that the arbitrator was liable to pay such damages as the arbitrator's failure to disclose conflicts of interest (which may have influenced his award) constituted a breach of contract.

### SHOULD ARBITRAL INSTITUTIONS INTERVENE WHEN ITS ARBITRATORS ARE SUED?

Most arbitral institutions do not provide any protection for arbitrators who come under their purview, and arbitrators who are sued are generally left to fend for themselves. The ICC, which gets sued quite regularly around the world, together with their arbitrators, and the Swiss Arbitration Association<sup>102</sup> take this approach. Interestingly, the Netherlands Arbitration Institute (NAI) purchases professional indemnity insurance for arbitrators on its General Panel, but only if the arbitration is conducted under its rules and auspices. By contrast, the AAA actively assists its arbitrators in resisting claims but stops short of indemnifying them out of its own pocket.

### CONCLUSION

Most jurisdictions recognize that immunity is necessary to ensure that the arbitrator acts independently and impartially. The degree of immunity available under the national laws of different jurisdictions and arbitral rules varies according to whether they accept the judge immunity analogy or the contractual analysis of the role of arbitrators. The formulation of arbitral

arbitral award in the underlying arbitration. The opinion of the U.S. Fifth Circuit Court of Appeals can be found at <http://www.ca5.uscourts.gov/opinions/pub/06/06-40713-CV0.wpd.pdf>. For a commentary on the case, see also "Etat-Unis: United States Court of Appeals, Decision No. 06-40713, 7 January 2008. Appeal from the US District Court for the Eastern District of Texas. Gulf Petro, Plaintiffs-Appellants v Nigerian National Petroleum Corporation and other individuals, Defendants-Appellees," 26 *ASA Bull.* 167-80 (Jan. 2008).

<sup>102</sup> *Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp.*, *supra* note 100.

### SHOULD ARBITRATORS APPEAR AS DEFENDANTS IN AN ACTION?

Claims against arbitrators for breach of ethical duties are fetters to their independence and ability to administer justice without fear of reprisals from disgruntled parties and "arbitration guerillas" who simply refuse to play the game by the rules.<sup>92</sup> Unmeritorious actions against arbitrators have a retrogressive effect on international arbitration as a dispute resolution mechanism<sup>93</sup> and increase costs for the parties and the arbitrators involved. Even if an arbitrator is found to be immune from suit, he is certainly not immune from the additional legal fees that he has to pay to counsel defending him.<sup>94</sup> The costs of professional indemnity insurance will consequently increase and is likely to be passed down to the parties.

Another concern that arises from litigation against arbitrators is whether arbitrators should appear in actions in which they are joined as defendants. Arbitrators may choose not to take full part in the proceedings as an active party. In the alternative, arbitrators may take a limited part in the proceedings by filing an affidavit setting out any facts that he considers may be of assistance to the court.<sup>95</sup> Appearing in such actions would mean that the arbitrators may be cross-examined on matters that pertain to the merits of the award, and lead to a relitigation of the merits of the arbitral award that undermine its *res judicata* effect. Not taking an active part in proceedings to set aside an award, for example, may be advantageous to the arbitrator, as an award of costs in such proceedings will ordinarily be

<sup>92</sup> M. Hwang, "Why Is There Still Resistance to Arbitration in Asia?," in *Global Reflections on International Law, Commerce and Dispute Resolution* 401-11 (2005).

<sup>93</sup> *Id.* The principal author of this paper was a member of a tribunal in an arbitration in which the respondent not only challenged the jurisdiction of the tribunal in its local court, but also filed an action against the claimant for the tort of "wrongful arbitration," claiming huge damages and a conservatory order seizing the claimant's assets. As a co-arbitrator, he had some difficulty persuading the other members (who were both from the jurisdiction of the local court) to issue orders while these court proceedings were pending, as they were fearful that any action taken by the tribunal to advance the hearing would result in similar court proceedings being taken against the members of the tribunal.

<sup>94</sup> The civil procedure rules of most common law jurisdictions require parties to pay their own solicitor and client costs. See also J.M. Townsend, "Recourse against the Arbitrator after the Arbitral Award: An American Perspective, in *The Status of the Arbitrator—Special Supplement*," *ICC Int'l Court of Arb. Bull.* 115 (1995); M.L. Smith, "Costs in International Commercial Arbitration," in *AAA Handbook on International Arbitration & ADR* (T.E. Carbonneau & J.A. Jaeggi eds., 2006).

<sup>95</sup> *Port Sudan Cotton Co. v. Govindaswamy Chettiar & Sons*, [1977] 1 Lloyd's Rep 166 (Q.B. Comm. Ct.).

inappropriate unless the arbitrator becomes a participant in the litigation or is guilty of collusion and dishonesty.<sup>96</sup>

Arbitrators may choose to expressly contract out of participating in any judicial proceedings in their terms of appointment. In the United States, the Revised Uniform Arbitration Act (2000) states that an arbitrator is neither competent to testify or required to produce any documents pertaining to an arbitration, except where it is necessary to determine the claim of an arbitrator or in a hearing to vacate an award.<sup>97</sup> The Act also aims to curb frivolous lawsuits against arbitrators by imposing liability for legal fees and other expenses of litigation on parties that commence civil action against an arbitrator, arbitral organization, or representative of an organization, and it is subsequently found that arbitral immunity applies.<sup>98</sup> Recent case law also demonstrates that judicial policy is moving towards imposing sanctions on parties who bring spurious lawsuits.<sup>99</sup>

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<sup>96</sup> *Lendon v. Keen*, *supra* note 6. See also *Najjar v. Haines*, *supra* note 10. The court held that arbitrators should be immune because of the overriding importance of the need for a judge to act independently and without fear of harassment by action.

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<sup>99</sup> *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, WL 462368 (11th Cir. 2006).

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immunity can be seen clearly in the grounds relied on in successful claims against arbitrators that are brought, more often than not, by an aggrieved party. While the personal liability of arbitrators for acts of bad faith in the exercise of their judicial functions provides some redress to the losing party, this cannot be used as an additional weapon or a substitute remedy for the setting aside of the award. Arbitrators ought to be protected from frivolous claims so that they can render awards judiciously and unaffected by potential lawsuits.