

**International Bar Association
Commission on Arbitration
Chicago, 21 September 2006**

The liability of Arbitrators: a survey of current practice

By Ramón Mullerat¹

I. Arbitrators' relationships

The arbitrator has a relationship with the parties involved in the arbitration, with the arbitration institution (unless the arbitration is “ad hoc”), and the arbitrator also enters into a relationship with witnesses, expert witnesses and others involved in the proceedings. These relationships impose obligations on the arbitrator the breach of which may raise legal liability for the arbitrator and the obligation to pay any damages.

My purpose in this paper is to analyze the arbitrator’s liability vis-à-vis the parties in the arbitration. I will not deal here on the arbitral institution’s liability.

¹ Ramon Mullerat OBE is a lawyer in Barcelona and Madrid, Spain; Avocat à la Cour de Paris, France; Honorary Member of the Bar of England and Wales; Honorary Member of the Law Society of England and Wales; Professor at the Faculty of Law of the Barcelona University; Adjunct Professor of the John Marshall Law School, Chicago; Former President of the Council of the Bars and Law Societies of the European Union (CCBE); Member of the American Law Institute (ALI); Member of the American Bar Foundation (ABF); Member of the Board of the North American Studies Institute; Immediate Past Co-Chairman of the Human Rights Institute (HRI) of the International Bar Association (IBA); Member of the London Court of International Arbitration (LCIA); Member of the Council of Justice of Catalonia; Former Chairman of the Editorial Board of the European Lawyer.

II. Nature of the relationship

The nature of the relationship between the arbitrator and the parties is important since it determines the rights and obligations in the proceedings and the parties' options should problems result, for example the ability to initiate an action for damages or compensation.

1. With the parties

A. Different positions

There are two main schools of thought with regard to the nature of the relationship between the arbitrator and the parties. The first school considers that this relationship is established by contract. The second school may be identified as the "status" school, which considers that the judicial nature of the arbitrator's function results in a treatment assimilated to that of a judge.

The contractual school sustains that an arbitrator is appointed by the parties to an arbitration to perform a service consisting in resolving a dispute between the parties for a fee. The contractual approach finds favour in most civil law jurisdictions.

The "status" school is based on the performance by arbitrators of a judicial or quasi-judicial function, which grants an element of "status" entitling them to treatment similar to that of a judge. This approach is acceptable in most common law jurisdictions². The authors who follow this doctrine consider that contractualists misanalyse the nature of arbitration by failing to recognize that the arbitral process is a function of the power conceded by the State to arbitrators³.

² Redfern, Alan and Hunter, Martin, Law and practice of international commercial arbitration, 2004, p. 285 and ss. Mustill and Boyd, Commercial Arbitration, 1989, p. 220.

³ Hong-Lin Yu and Laurence Shore, Independence, impartiality and immunity of arbitrators. US and England perspectives, 2006.

B. Contract

In spite of the indisputable quasi-judicial function of the arbitrator, in my view there is a clear contract between the arbitrator and the parties. The arbitrator is employed by the parties in seeking to resolve their dispute and for this he is paid a remuneration. It is evidently a contractual relationship, which has been widely recognized, although the contractual approach is not exempt of questions. For instance, if the contractual relationship between the parties and the arbitrators appointed by them is clear, does the contract extend to the third arbitrator appointed by the party-appointed arbitrators, without direct contact with the parties?⁴

If there is a contract between the arbitrator and the parties, there lies the possibility for the arbitrator to be liable to the parties in contract law for a breach of this contract.

The contract between the arbitrator and the parties contain – both explicit and implicit – obligations that are negotiated with the parties, but it also includes certain mandatory terms, for instance, the obligation to perform in good faith and to apply mandatory rules in the performance of the arbitration.

The main obligation of the arbitrator is to settle the dispute between the parties. That is the reason for which an arbitrator is appointed and his primary function. This includes the duty to ensure that the arbitration results in a valid award being made, which is not open to challenge⁵. Subsequently, under the IBA Guidelines on conflicts of interests in international arbitration and the ICC Rules, the arbitrator has a duty to examine all possible avenues which might lead to his final award being challenged in order to avoid this eventuality⁶.

⁴ Manfred Arnold, “What price immunity of arbitrators?”, Arbitration, 8 July, 1999.

⁵ Julian D M Lew, Loukas A Mistelis & Stefan M Kröll quoting various in Comparative International Commercial Arbitration, 2003, p.276

⁶ ICC Rules of Arbitration, Article 35.

B. Contractual obligations of the arbitrator

The duties of the arbitrator may be divided into three categories: duties imposed by the parties, duties imposed by law, and ethical duties⁷. The main duties are as follows:

- a) To settle the dispute between the parties and to give a valid award not open to challenge.
- b) To be independent and impartial with the parties and to act in an independent and impartial way, treating the parties equally during the entire proceedings, and giving each party a reasonable opportunity of putting his case.
- c) To carry out his function within the fixed time limit created by law or by contract.
- d) To carry out his function in good faith, with diligence and avoiding undue delays (since justice delayed is justice denied), abstentions and withdrawals.
- e) To carry out his function to the point of delivering the award and not to resign without good cause before the award is rendered. Therefore, his functions cannot cease unless there are very solid reasons for this. This rule is present in a great number of legal systems, particularly detailed in French⁸, Italian⁹, Belgian¹⁰ and Dutch¹¹ law. Likewise, the majority of the regulations on arbitration forbids the arbitrator from withdrawing without grounds (CIRDI, CEPANI, CCI, etc.).
- f) To respect and maintain the confidentiality of the arbitration (this principle being recognized across the board of the regulations on arbitration).

⁷ Alan Redfern and Martin Hunter op. cit., 2004, p. 283.

⁸ Art. 1462 NCPC

⁹ Art 813 Code of Procedure

¹⁰ Art. 1689 Code of Procedure

¹¹ Art. 1029 Code of Procedure

C. Theories on the nature of the contract

a) Contract of mandate or commission

One theory is that the contract entered into by the parties and the arbitrator is a mandate or commission, which is conferred on the arbitrator by both parties. The mandate is conceived “*intuitu personae*”, and it cannot be revoked unless both parties agree.

Adam Samuel¹² summarized the contractual theory as follows: “it is the agreement to arbitrate that alone gives the arbitrators the authority to make the award. They, in turn, in resolving the dispute, are acting as agents or “mandatories” of the parties”.

Pursuant to art. 1884 of the French Civil Code, the commission (“*mandat*” or “*procuration*”) is an act whereby a person gives another person the power to do something for the “*mandant*” and in his name¹³. However, French jurisprudence has refused to qualify the arbitrator as a “mandatee” (T.G.I. Paris 22 March 1983) since the jurisdictional function of the arbitrator is kept independent from the parties¹⁴.

The arbitrator does not represent the parties, nor must he follow the instructions of the parties nor performance of a mandate.

¹² Cited by Anastasia Tsakatoura, “The immunity of arbitrators”, Inter-lawyer. Law firms directories, 20 June 2002.

¹³ Act 1984 CCF: “Le mandat ou procuration est un acte par lequel une personne donne à un autre le pouvoir de faire quelque chose pour le mandant et en son nom”.

¹⁴ Fouchard, Gaillard, Traité de l'Arbitrage Commercial Institutionnel, Litec 1996.

b) Provision of services

For a good part of the civil law authors the relationship between the arbitrator and the parties is a contract for a provision of services. The mission of the arbitrator is to lend his services of an intellectual nature, which meet the interests of the parties, in an independent manner and in return for certain remuneration for such.

c) “Sui generis” contract

Others consider that the contractual relationship which joins the arbitrator and the parties cannot be likened to any type of contract typified in the civil codes.

This relationship reflects the ambiguous nature of arbitration, contractual in origin and jurisdictional in its objective. This is the case of the approach taken by the authors with regard to the contract between the arbitrator and the parties in many civil law countries.

Bernard ¹⁵ defines the nature of the relationship between the arbitrator and the parties as a “special contract” or “a contract *sui generis*, governed by the rules appropriate to it and which must be dealt by taking into account both the principles of the contract and the particular nature of the function exercised by the arbitrator”.

2. With the arbitration institution

In institutional arbitration, the arbitrator is likely to be employed by or at least closely associated to an institution administering arbitration. He therefore has a contractual relationship with them either expressly or impliedly.

The important point to note is that there is a tripartite relationship between the parties who submit their dispute to arbitration, the arbitrator himself and the arbitration institution. The

¹⁵ Cited by Anastasia Tsakatoura, op. cit.

parties in theory would therefore have a cause of action against the arbitration institution should they be dissatisfied with the arbitrator's handling of their case. But, based on the relationship between the arbitrator and the arbitration institution, the arbitrator may be held liable for wrongful act if breaching the rules of such relationship.

3. With third parties

The arbitrator has no contract with third parties such as witnesses and expert witnesses. However, the arbitrator can cause damage to these third parties. For example, the arbitrators decide to hold hearings and depose witnesses, who may come from a distant place and the arbitrator cancels the hearing without good reason obliging the witnesses to travel again.

III. The liability of arbitrators

In the exercise of his function, the arbitrator may breach some obligations derived from his relationship with the parties during the course of proceedings. Examples of breaches of arbitrator's obligations are: if the arbitrator does not declare the existence of a fact or circumstance which affect his independence or impartiality, if he refuses substantial means of evidence, if he incurs on undue delays, if he resigns his position without a good cause, etc. For instance, Pieter Sanders¹⁶ considers that, although neither the Uncitral Arbitration Rules 1976 nor the Model Law 1985 deal with the withdrawal for good cause or the liability of the arbitrator who withdraws without good cause, the arbitrator should be liable for the extra costs caused by his replacement.

There are various types of liability in which the arbitrator may incur:

¹⁶ Pieter Sanders, The work of UNCITRAL on arbitration and conciliation, 2004, p. 96.

1. Civil liability:

Independently of the immunity which some jurisdictions grant to the arbitrator in a general or limited fashion as we will see, the arbitrator is subject to civil liability for damages caused in the following ways:

- i) To the parties for breach of his legal or contractual obligations with the parties
- ii) Towards the arbitration institution if he fails to comply with the institution's rules.
- iii) Towards all those who are involved in the arbitration process; lawyers, experts, witnesses (for instance, for breach of confidence).
- iv) Towards third parties who may suffer damage as a consequence of the culpable actions of the arbitrator.

2. Disciplinary liability:

Some experts argue that breaches on the part of the arbitrators of the instructions of the arbitration institution would generate a disciplinary responsibility which could result in their dismissal or failure to receive payment.

3. Criminal liability:

Criminal liability of arbitrators is found in the crimes which specifically typified as such for arbitrators in the exercise of their quasi-judicial functions. In Spanish law the crimes are *cohecho* (bribery) (arts. 385 and 388 of the Criminal Code) and illegal negotiations with the parties (art. 297-298 Criminal Code). In Argentina, arbitrators may be criminally liable in certain instances of misconduct (art. 269 Criminal Procedure Code).

Criminal liability for arbitrators is harder to establish than say, civil liability, since it has to be proven that an arbitrator had acted in a criminally illegal manner. There is no abundant case law on such liability since the instances of such are few and far between.

IV. Arbitrators' immunity

The judges enjoy full immunity. The UN Basic Principles on the Independence of the Judiciary¹⁷ provide that:

“(16) Without prejudice to any disciplinary procedure or any right of appeal or to compensation from the State, in accordance to national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions”.

Judges' immunity is founded upon the need to protect their independence and impartiality and freedom from undue influence.

The immunity or exclusion of liability of the arbitrator, fully or partially is based upon the immunity of judges. This school of thought sustains that as much as the judge the arbitrator should remain immune from the pressures of the parties during and after the trial in order that they can make their decision with calmness of mind and see that justice be done.

It is common law jurisdictions that generally have supported this exclusion of liability for the arbitrators. They have traditionally based the justification for it on the ground that arbitrators should be treated akin to judges. In *Bremer Schiffban v. South India Shipping Corp. Ltd.*, Donaldson J. asserted that “courts and arbitrators are in the same business, namely the administration of justice”¹⁸.

However, there are a number of differences between judges and arbitrators: a) a judge's power derives directly from the state and the general law of the nation; while an arbitrator's jurisdiction derives directly from the agreement of the parties; b) a judge is neither

¹⁷ Adopted by the 7th UN Congress and endorsed by the General Assembly in 29 November 1985.

¹⁸ J. Donaldson, *Bremer Schiffban v. South India Shipping Corp. Ltd.*, 1981, AC 909-921.

nominated nor remunerated by the parties; while an arbitrator is; c) a judge is only accountable to the state, while arbitrators are accountable to the parties and the arbitral institution; and d) the judge's decision can be revised or rectified upon appeal, while the arbitrator's award cannot. However, since the arbitrator has an adjudicatory function and has the same obligation of independence and impartiality like a judge, and the judge in doing so should be immune of liability, commentators assimilate the two and conclude that, an arbitrator should be immune as well.

There are in fact good arguments against immunity: immunity may encourage carelessness; the finality of the decision is giving priority over individual justice; disciplinary remedies are generally unavailable against arbitrators; and alternative remedies such as *vacation* of the award and withholding of fees are inadequate¹⁹.

International instruments are not coherent and sometimes even silent on the question of the arbitrator's liability, the legal rules regulating the immunity of arbitrators are mainly dependent upon the different legal systems and much still remains to be determined by the area of law designated as "conflicts of laws" and of private international law^{20 21}.

The extent of an arbitrator's immunity from liability varies then from country to country. It depends on the legislative provisions which have been passed and also on the agreement with the parties or the arbitration institution. It is possible to group the different approaches to of immunity into three types. There are some countries which offer their arbitrators absolute immunity, some which offer them a limited or qualified form of immunity and others who offer no immunity whatsoever.

1. Absolute immunity

Pursuant to this approach, arbitrators enjoy total or absolute immunity for suit of actions taken within their duties. They are free from civil liability from their decisions, and this

¹⁹ Alan Redfern and Martin Hunter, *op. cit.*, p. 288.

²⁰ Anastasia Tsakatoura, *op. cit.*, 20 June 2002.

²¹ Martin Hunter, *Arbitration International*, vol. 9 no. 3, 1993, pp. 329-333.

even includes a failure to disclose. Their actions and decisions cannot be challenged in the courts or before their arbitration institution.

As we have seen, this position is based on the proposition that the interest of public policy supports that a person who exercises a quasi-judicial function should be able to perform that function without looking over his shoulder to assess which result is least likely to lead to him being sued.

The key of arbitral immunity is then the “functional comparability” between judges and arbitrators and “the performance of the function of resolving disputes between parties authoritatively adjudicating private rights”²².

In the immense majority of countries, judges enjoy absolute immunity from civil liability with regard to their actions in their capacity as judges. But in some countries, like the United States, such immunity is not limited to judges but is extended to those who carry out judicial functions, and this group is found the arbitrator. Although federal arbitration law does not deal with this matter of immunity, American practice grants the arbitrator a similar immunity.

In the the United States the immunity of arbitrators has its roots in the federal law. On the handful of occasions on which claims against arbitrators have reached the US courts, the judges have been quick to reaffirm the immunity of the arbitrators and ensure that they are protected from all liability. The courts have expressed their reluctance to look behind arbitrators’ deliberations and decisions. Arbitration awards can be set aside, but not on the grounds of erroneous finding of facts or misshortcomings of the system, which would cover perceived errors of the arbitrators²³.

²² *Antoine v. Bryer & Anderson*, 429, 435-36 (1992).

²³ Manfred Arnold, “What price immunity of arbitrators?”, *Arbitration*, 8, 1999.

Indeed one US judge apparently told a recent conference of arbitrators: “Arbitrators may act with impunity, For theirs is a favored community, Though losers may whine, And even malign, Judges will guard your immunity”²⁴.

So the position of the US courts is clear. Parties submit their dispute to arbitration, and the arbitrator is therefore given free reign in his handling of the matter, safe in the knowledge that he enjoys complete freedom from liability from claims filed by the parties or others involved in the case. The general motive for this is that the arbitrator is viewed by the courts and by legislation as exercising a quasi-judicial function, and therefore it is in the interest of public policy that he be given the freedom to carry out this function and to handle the matter to the best of his ability without having to be permanently conscious of the threat of being sued should his actions be called into question²⁵. It is important that arbitrators be able to make their decisions and handle the matters without being subject to excess pressure, but granting them complete immunity raises the concern that the parties have absolutely no rights to challenge an arbitrator should they be unhappy with his handling of their dispute. On the other hand, fewer skilled persons would be prepared to act as arbitrators if they carried risk of incurring substantial liability²⁶.

The Uncitral Model Law 1985 keeps silence with regard to the arbitrator’s liability. The Secretariat suggested that the matter should not be dealt within the Model Law “in view of the fact that the liability problem is not widely regulated and remains highly controversial” and the Working Group entrusted with preparing a draft text expressly decided that this subject should not be covered²⁷.

The ICC, the LCIA and the AAA have adopted the common law approach excluding liability from arbitrators. For example, the ICC Rules of Arbitration, in article 34, establishes a total exclusion of liability for arbitrators and related institutions: “Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC

²⁴ Cited by Martin Hunter, *Arbitration International*, vol. 9 no.3, 1993, p.329

²⁵ Martin Hunter, *Arbitration International*, vol. 9, no.3, 1993, p.330

²⁶ *Cort v AAA*, 795, *F Supp.* 970, at 973. Cited by Alan Redfern and Martin Hunter, *op. cit.*, p. 288, n. 60.

²⁷ See UN Docs. A/CN. 9/207 and 9/216, cited by Alan Redfern and Martin Hunter, *op. cit.*, p. 289, n. 63.

National Committees shall be liable to any person for any act or omission in connection with the arbitration". The ICC recommends that parties in their agreements include a reference to the ICC Rules, stating that they will apply should a dispute need to be submitted to arbitration. Therefore, for those parties who include this clause in their contracts, in theory, they would grant total immunity to the arbitrator and related institutions and thus relinquish their right to subsequently make a claim if dissatisfied.

Other arbitration rules grant immunity to arbitrators (for instance, art. 8c of USA Arbitration and Mediation Midwest Inc., art. 35 of the Rules of the Better Business Bureau of Update New York, etc.).

2. Absolute liability (no immunity)

The second group of countries is the one in which the arbitrator enjoys no immunity, where parties or others involved in the dispute can challenge his handling of the matter for any reason and he can be held accountable by the national courts or the institution to which he is affiliated. The reasoning behind this being, as advanced in the previous paragraph, that the arbitrator is a professional, and that he is therefore expected to carry out his function with a professional duty of care²⁸. The parties are paying the arbitrator for his services and therefore they have a legitimate right to see that he handles their dispute in a professional manner and be liable for any damage he may cause.

However, according to Julian Lew²⁹, there really seems to be no jurisdiction in which arbitrators are fully liable for any error of view or judgment in the decisions they reach.

3. Limited or qualified immunity

The most common form of immunity granted to arbitrators is that of a limited nature. Arbitrators can be held liable for their actions during an arbitration and on the granting of

²⁸ Martin Hunter, *Arbitration International*, vol. 9, no.3, 1993, p.330

²⁹ Julian Lew, *The immunity of arbitrators*, 1990.

the award but only in very limited circumstances and for acts or omissions which are deemed avoidable on a reasonable level. For example, an arbitrator would be granted sufficient immunity to be able to perform his functions without the constant fear of judicial reprisals, but would still be liable for avoidable actions or errors on his part, such as undue delay in granting an award. Again the extent of the limited immunity given to arbitrators in each country is dependant on national legislative provisions.

In the United Kingdom, arbitrators enjoy immunity only to a certain point. Under s.24 of the Arbitration Act 1996, an arbitrator can be removed from his post if he fails to act impartially or fails to conduct the proceedings properly. This requirement for impartiality means that any bias or prejudice shown by the arbitrator towards or against either of the parties may result in his removal. Immunity in the United Kingdom is therefore total except when the arbitrator acts in bad faith.

Under Spain's *Ley de Arbitraje*, an arbitrator has total immunity except from damages caused by fraud or negligence.

V. Legal approach to arbitrators' liability country by country³⁰

Argentina:

The arbitration law of Argentina considers that the arbitral contract renders arbitrators liable for losses caused by any failure to perform duties, without distinguishing if such losses are caused by simple or gross negligence.

Act 745 of the Argentinean National Code of Civil and Commercial Procedure provides 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 cost and damages derived from the non-

³⁰ This section basically adapted J. William Rowley QC, Arbitration world: Jurisdictional comparisons, The European Lawyer.

performance of arbitral duties”. Art. 756 makes also arbitrators liable for damages for failing to release an arbitration award within the appropriate time limit³¹.

Australia:

In Australia, arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators. But they can be liable for fraud in that respect under s.28 of the International Arbitration Act 1974 (which was amended in 1992 to incorporate the Uncitral Model Law) and s.51 of the Commercial Arbitration Act 1985 of each state. Art. 51 of the Commercial Arbitration Act provides that “An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity”. The matter has not come before the courts as yet, but as it stands the arbitrator enjoys a high degree of immunity unless guilty of gross misconduct amounting to fraud.

Austria:

In Austria, a civil law country, the contract between the arbitrator and the parties (*Schiedsrichtervertrag*) is considered to be a *sui generis* contract.

Art. 584(2) of the Austrian Code of Civil Procedure establishes liability for arbitrators through a failure to comply with their duties. These can include the duty to conduct the proceedings in the appropriate manner, the duty to render an award and the duty to give leave for enforcement of the award. An arbitrator was held liable by the Austrian courts for declining to act for the parties once the arbitration had begun without specifying his grounds for doing so. A judgment of the Supreme Court of 6 June 2005 ruled that damages can only be claimed from arbitrators if the conduct giving rise to claim for setting aside the award and the award has been set aside.

³¹ Doak Bishop and James Etri, “Internacional comercial arbitration in South America”.

Under art. 594(4) of a new arbitration act soon to come into force, liability is established for an arbitrator's delay or refusal to comply with his obligations made to the parties upon his appointment.

Canada:

Canadian legislation does not establish civil liability for arbitrators in a domestic or international context. However the legislation of various provinces such as Alberta, Columbia and Ontario does provide that an arbitrator who is removed for a fraudulent or corrupt act or undue delay may be denied payment for his services and may be required to compensate the parties for all or part of their costs. As a general rule, however, arbitrators are immune from claims of negligence or breach of contract under Canadian law. This was established in the case *Zittner v Sport Mask Inc.*³². However, those acting as valuers or experts do not enjoy immunity³³.

However, some authors predict that the Canadian courts may soon move away from the concept of absolute immunity, allowing claims for professional negligence³⁴.

Chile:

Chilean judges are protected by art. 84 of the Chilean Constitution, which states that "judges are personally liable for any bribery, breach of procedural rules and generally for any malfeasance of office or miscarriage of justice." Arbitrators are considered likewise liable. Arbitrators are liable criminally for offenses they commit, in tort for fraudulent or negligent acts, for administrative errors and in civil law for breach of any obligation imposed by the arbitration agreement.

³² *Zittner v Sport Mask Inc.*, 1988, 1 SCR 564.

³³ William Roley, David Kent and Markus Koehnen, "Recent developments in international commercial arbitration".

³⁴ Alan Redfern and Martin Hunter, *op. cit.*, p. 287, n. 56, who cite David Bristol, "The gathering store of arbitrators' and mediators' liability", in *Alternative Dispute Resolution Journal*, 2000, 4, pp. 312-315.

England and Wales:

S.29 of the Arbitration Act 1996 provides that “an arbitrator is not liable for anything done or omitted to do in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith”. This is a mandatory provision which the parties cannot derogate.

Under s.25, an arbitrator may also be liable to the parties for resigning as arbitrator, but may apply to the court for relief from this. Therefore, the Arbitration Act 1996 limits the immunity to acts and decision taken in bad faith.

Finland:

The relationship under Finnish law between the arbitrators and the parties is considered to be a contractual one. For this reason the arbitrator is contractually bound to provide an effective and proficient service. Therefore any mistakes in his performance of the service he provides to the parties or obstruction to the proceedings would constitute an act worthy of liability.

The Finnish Supreme Court has ruled³⁵ that the chairman of an arbitration tribunal had breached his duty to disclose circumstances that were likely to give rise to justifiable doubts as to the arbitrator’s impartiality and independence and found him liable for damages caused to the plaintiffs. The Supreme Court ruled that the compensation payable (80.730 euros) should not be based on the Tort Liability Act, but on contractual liability³⁶.

France:

There is no legal provision concerning the liability of the arbitrators in France. Therefore, an arbitrator is fully liable for his acts. However, there is a condition as to the admissibility

³⁵ Supreme Court judgment of 31 December 2005.

³⁶ [The Maritime Advocate Online](#), Issue 243.

of a claim for liability against an arbitrator: there should be no other remedy against the award. The full liability is based on the contractual nature of the relationship between the parties and the arbitrator³⁷.

Germany:

S. 839 of the German Arbitration Act (the BGB) provides liability for breach of an official duty. Arbitrators are accountable for willful conduct and negligence.

Greece:

In Greece, the recent law in International Commercial Arbitration, which implements Uncitral Model Law, (arts. 12 and 13) provides that an “arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualification agreed on by the parties to the arbitration agreement”.

Holland:

There is no Dutch law dealing with the liability of arbitrators.

Ireland:

S.12 of the Irish Arbitration Act 1998 provides that an arbitrator in an international arbitration shall not be liable for any act or omission committed in the performance of his duties unless it is done so in bad faith. This is in an international context. In a domestic context, however, the arbitrator is governed by the 1954 Arbitration Act, and does not enjoy such express immunity. For this reason, most arbitrators include a freedom from liability clause in their retention agreement.

³⁷ Anastasia Tsakatoura, “The immunity of arbitrators”, [Inter-lawyer directory](#), 20 June 2002.

Italy:

Under Italian law, art. 813 of the Code of Civil Procedure, the arbitrator is liable to the parties for any delay or omission through fraud or gross negligence in taking actions during proceedings, through refusal to act as arbitrator once the proceedings have started without grounds, and for failure to grant the award on time owing to fraud or gross negligence. Arbitrators liable to the parties through fraud or gross negligence on their part must compensate the parties and will not receive the fees or other reimbursement for their services. Should the arbitrator be liable for damage not caused through fraud or gross negligence, there will be a cap on the level of compensation he has to pay to the parties, which will be a maximum of three times the amount of fees.

Japan:

Japanese law is silent on the issue of liability for arbitrators in a civil law context. However, art 644 of the Japanese Civil Code imposes a professional duty of care of persons handling matters for others in a professional context. This therefore, in theory, applies to arbitrators. The Japan Commercial Arbitrator Association Rules for Commercial Arbitration amended on 1 March 2004 provide in Rule 13 that “Neither the arbitrator, nor the Association... shall be liable to any person for any act or omission in connection with the arbitrator unless such act or omission is shown to constitute willful or gross negligence”.

New Zealand:

Following the common law main trend, s. 13 of the New Zealand Arbitration Act provides that arbitrators in New Zealand cannot be held liable for negligence.

Peru:

In Peru, art. 18 of the Peruvian General Arbitration Act provides that the parties can hold the arbitrator liable for any damages or costs derived from the breach of the arbitrator's duties.

Spain:

In Spain, under art. 21.1 of the new *Ley de Arbitraje* of 2003, it is established that the acceptance of the position of arbitrator creates an obligation for the arbitrator to act in good faith in the performance of his function, and states that if he fails to do so, then he will be liable for the damages which he causes through bad faith, misconduct or recklessness. Thus there is potential for civil liability before the Spanish courts in terms of negligence.

The criminal liability of arbitrators is established in article 422 of the Criminal Code for accepting bribes and in article 439 for forbidden negotiations with one of the parties. The provision of the act reinforces the public function of the arbitrator, ensuring that he is seen as a responsible and faithful public servant³⁸. Article 439 refers specifically to the acts of civil servants and places the arbitrator within this group.

Switzerland:

Swiss law does not deal with liability of arbitrators in a direct sense. The relationship between the arbitrator and the parties is considered a contract for the provision and reception of services. In the case of an arbitration tribunal, the arbitrators will be jointly and severally liable for breach of their duties of diligence, including treating the matter fairly and in good time, and not to withdraw without grounds for doing so.

Importantly, under Swiss law, gross negligence cannot be excluded from a contract, whereas simple negligence can be so.

³⁸ Julio González Soria, *Comentarios a la Nueva Ley de Arbitraje*, p.207

The Swiss Rules of International Arbitration came into force on 1 January 2004. Under art. 43(3), none of the arbitrators or staff of an arbitration institution can be held responsible for any act or omission unless “deliberate wrongdoing or extremely serious negligence” can be shown.

The Netherlands:

In Dutch law, of civil law tradition, an arbitrator is held to be in contractual relationship with the parties and may be liable for damages in the event of committing “gross negligence”³⁹.

United States:

As previously indicated, the USA grants absolute immunity to arbitrators. Section 14 of the Revised Uniform Arbitration Act 2004 provides that:

“S.14 (a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

S.14 (c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.”

Section 14 (a) regarding an arbitrator’s immunity is based in the language of 1280, 1 of the California Code of Civil Procedure. Other states, like Florida and Utah provide arbitral immunity in their arbitration statutes⁴⁰.

³⁹ Van der Berg, *The immunity of arbitrators*, p. 59.

⁴⁰ In California there is a bill awaiting the signature of the governor (AB 3030) whereby any contract provisions, policies or rules that purport to immunize private arbitration companies from consumer arbitration are void. Provides that private arbitration companies may be immune from civil liability for acts or omissions of arbitrators provided by companies to the same extent that arbitrators may be immune.

However, the courts have been setting out limitations to such immunity. For instance, a recent judgment⁴¹ ruled out that an arbitrator who withdraws from a case for no stated reason after hearing evidence and argument is not protected by arbitral immunity because the failure to render an award is not integral to the arbitration process. The court rejected the arbitrator's defense finding that his early withdrawal "defeats rather than serves the adjudicatory purposes of arbitration".

VI. Should arbitrators insure?

Bearing in mind the existing variety of systems and the issue of immunity to various extents begs the question whether or not arbitrators should protect themselves financially from potential civil claims by taking out a relevant insurance policy. Arbitrators need to be sure of the rules governing arbitrators' liability in the relevant arbitration before accepting the appointment.

Apart from the cost of such insurance that finally should be assumed by the parties, the fact that arbitrators were known to hold insurance would naturally result in more claims being submitted since it is common knowledge that insurance companies tend to settle claims rather than enter into lengthy legal proceedings⁴².

Another viable option is for arbitrators to write specific and lengthy exclusion clauses into their contracts with the parties or the arbitral institutions in order to protect themselves from any potential liability. But as it has been pointed out, this could be demeaning for the arbitrator and does not give the best impression of an industry whose purpose is to attempt to solve disputes in an informal fashion⁴³.

⁴¹ *Morgan Phillips Inc. V. JAMS/Endispute, LLP* No B 183934, 2006 WL 1681344, 20 June 2006.

⁴² Martin Hunter, *op. cit.*, vol. 9, no.3 (1993), p.331.

⁴³ Martin Hunter, *op. cit.*, vol. 9, no.3 (1993), p.331.

VII. Some conclusions

As we have seen, there is not an unanimous approach on the contrary as to the extent of civil liability for arbitrators. The positions are very different from jurisdictions which apply an absolute immunity to jurisdictions which do not recognize any immunity. The reasons for this variety of attitudes towards arbitrators' liability may be several but the main reason is the discrepancy among the jurisdictions in their conception of the nature of the relationship between the arbitrator and the parties and namely if it is a contractual or semi-judicial relationship.

Some voices have been raised in favor of a uniformity approach on the arbitration's liability, which understand that it would be helpful if some overriding principles could be established at an international level to provide comfort to the arbitrators in the exercise of their functions⁴⁴. These voices recommend the adoption of a qualified immunity standard, which balances the needs of arbitrators to function independently and render just decisions without concern for personal reprisal against the need to avoid bad-faith conduct by arbitrators who do not wish to follow the rule of law⁴⁵.

I fully agree with these wishes.

⁴⁴ Alan Redfern and Martin Hunter, *op. cit.*, p. 288.

⁴⁵ Susan Frank, "The liability of international arbitrators: a comparative Analysis and proposal for qualified immunity" *New York Law School Journal of International and Comparative Law*, vol. 20, n° 1, 2000.

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