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International Commercial Arbitration Law

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Arbitrator Liability: Should arbitrators be immune from liability under 'abuse of process' claims?

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Contents

ABSTRACT

There is generally no recognised standard for arbitrator liability in either the common law or civil law. This research shows that arbitrators should be held liable in cases where their actions result in a manifest disregard of the law, the applicable rules and procedure. However the two legal systems have passed down different standards of liability when arbitrators are confronted with abuse of process claims.

Some literature suggests that arbitrators should be cloaked in immunity similar to that of the judiciary. However, other voices in the literature suggest a more balanced approach. There is also a general consensus that the standards for arbitrator liability should be more harmonised, as liability issues currently depend solely on jurisdiction. In agreement with the majority of the literature referenced in this thesis, the author asserts that uniformity of arbitrator liability across both the civil and common law systems is needed to add a higher level of transparency and certainty to an increasingly important area of international commercial arbitration.

This thesis answers the question, should arbitrators be immune from liability under abuse of process claims? Abuse of process claims captures claims raised by parties to an arbitration where they felt that the arbitrators conducted themselves in a way which amounts to misconduct. If claims such as these are made against an arbitrator, the issue turns to liability and at what point are arbitrators liable for inappropriate behaviour which could impact the entire arbitral process, including enforcement of any award.

This question was chosen by the author because the issue of arbitrator liability does not merely relate to the arbitrator's performance of duties but touches upon the very foundation of arbitration itself. If arbitrators are not correctly held to account, it could undermine the trust between arbitration practitioners and those that chose to use this mechanism of dispute resolution. On the other hand, arbitrators need to feel protected from unmeritorious claims against them so as not to make international commercial arbitration unappealing to future arbitrators.

ABBREVIATIONS

ACCP	Austrian Code of Civil Procedure
DCCP	Dutch Code of Civil Procedure
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
KIAC	Kigali International Arbitration Centre
LCIA	London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
OGH	Oberster Gerichtshof - Supreme Court of Justice in English
OHADA	Organisation for the Harmonization of Business Law in Africa
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitration Centre

CHAPTER 1: INTRODUCTION

International arbitration is a legal process in which parties to a dispute agree to refer that dispute to a tribunal of one or more independent and impartial arbitrators chosen by or on behalf of the parties to the exclusion of the domestic courts.[1] The essential goal of any arbitrator or arbitral tribunal is to render an enforceable award. They do this by giving equal consideration to the claims and defences of the parties and arrive at a decision on the dispute pursuant to the applicable legal framework.[2] These decisions are in writing in the form of a binding award which the parties are obligated to perform without delay and which, in the absence of voluntary compliance, is underpinned by an international system of recognition and enforcement through local courts.[3]

ARBITRATOR IMMUNITY

In the past few decades, there has been a notable change in the use of arbitration as a dispute resolution mechanism. The increasing number of international disputes has led to a growth in the demand for arbitration and consequently, professionalisation or arbitration as a business activity.[4]

Over the decades, arbitration has become more complex and time-consuming – often leading to significant arbitration costs including arbitrator fees. One of the effects of this changing nature of arbitration has been an increase in the parties' expectations to the arbitration and the fulfilment of the arbitrator task.[5] Since the parties place their trust and confidence in the arbitrator, the expectations to their skills, experience and integrity are often considerably high.

If an arbitrator negligently or fraudulently disregards their duties, not only the confidence in the arbitrator will be lost, but the parties might sustain significant economic loss.[6] This could also have a flow on effect to the broader arbitration community as the public trust in having their disputes resolved through this dispute resolution mechanism could be called into disrepute. The available remedies in case of such arbitrator misconduct are generally

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[1] Blackaby, N, Partasides, C and Redfern, A, '*Redfern and Hunter on International Arbitration* (7th ed, Kluwer Law International; Oxford University Press, 2023) at paragraph 1.04.
[2] Ibid.
[3] Ibid.
[4] Lew, J.D.M (ed) *'The Immunity of Arbitrators'*, 1 (1990) (Lloyd's of London Press Ltd) as cited in Schaeffer, S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?' (2020) (Stockholm Arbitration Yearbook 2020) at page 249.
[5] Ibid at page 250.
[6] Ibid.

limited to the removal of the arbitrator, vacating the award or potential criminal liability (in the case of corruption).[7]

As none of these sanctions give any account to economic losses or damages suffered by an aggrieved party, such redress is often considered inadequate or ill-suited.[8] Prompted by the high economic risks at stake in arbitration, civil liability claims against arbitrators have emerged in recent years, and debates about whether arbitrators should be immune in certain instances has been called into question.

Similarly, parties to arbitration proceedings have initiated claims against arbitrators where they felt the arbitrators abused the arbitral process in some way. This thesis delves into these cases to set out what these 'abuse of process' claims are and whether arbitrators were found personally liable. As this thesis uncovers, differing standards of liability are imposed on arbitrators depending on jurisdiction when claims are made by parties that arbitrators abused the arbitration process in some way. This sparks an active and current debate: which standards of liability are correct.

OBJECTIVES AND RELEVANCE OF THE THESIS

If parties to a legal dispute elect arbitration as their preferred dispute resolution mechanism, they usually do so because it appears to be more expeditious, less expensive, more confidential and more informal than litigation.[9] Parties to a dispute may also chose arbitration over litigation because it offers them more or less extended influence on the selection of the person(s) empowered to resolve the conflict at hand: the arbitral tribunal.[10] These individuals are selected by the parties and the parties subsequently give powers to the elected arbitral tribunal to preside over the proceedings and render an enforceable award which is binding and supported by international legal instruments.

The parties' power to choose their elected arbitral tribunal becomes an important element when discussing liability. Generally, the individuals are selected by the parties for two main reasons: because they are the persons in whom the parties place their trust and confidence

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[7] Ibid.
[8] Ibid.
[9] Domke, M, '*The Law and Practice of Commercial Arbitration'*, (1984) (Rev. Ed. Wilner) as cited in Christian Hausmaninger, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990) (Kluwer Law International, Volume 7, Issue 4) at page 7.
[10] Graving, R. J, '*The International Commercial Arbitration Institutions: How Good a Job Are They Doing'*, (1989) 4 Am. U. J. International Policy 319, at 324 as cited in Christian Hausmaninger, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990) (Kluwer Law International, Volume 7, Issue 4) at page 7.

and because they are generally experts in the specific field and therefore, more qualified than a judge to resolve the dispute at hand.[11]

In cases where an arbitrator's integrity is frustrated during arbitral proceedings, national legal systems and arbitration rules of organisations administering arbitration provide for procedural remedies against arbitral misconduct. However, although the issue of civil liability of arbitrators is of concern to parties and arbitrators, national legal systems, and arbitration rules as well as international arbitration frameworks often fail to address, or do not deal with sufficient clarity, the question of arbitral liability.[12]

To further break down the research question, the author analyses whether parties to an arbitration should be able to bring civil claims against arbitrators directly in cases where arbitrators act in a way which could see the eventual award be challenged or set aside.

METHODOLOGY

Legal Doctrinal Method

This thesis uses the legal doctrinal method as it is most suited to achieve the proposed aim of the thesis. The literature outlines the following points which postulate the aims and objectives of doctrinal legal research:

1. It formulates new ideas, doctrines, and concepts for the purpose of building, applying an assessing knowledge to contemporary legal issues.
2. It provides clarity, consistency, and accuracy.
3. It aims to discover the purpose of existing laws and policies.
4. It provides a better understanding of the legal issues and provisions[13].

Having regard to the above, this method is appropriate because it allows for a review of the current rules, legal frameworks and principles which are used to assess the advantages and disadvantages of arbitrator immunity.[14] This method also allows for filling gaps in the

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[11] Bedjaoui, '*The Arbitrator: One Man- Three Roles'* (1988) 5 J. Int. Arb. 1, at 7, 10 as cited in Hausmaninger , C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990, Kluwer Law International, Volume 7, Issue 4) at page 8.

[12] Hausmaninger, C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990, Kluwer Law International, Volume 7, Issue 4) at page 8.

[13] Malhotra, N, '*A Critical Analysis of Underlying Concepts of Doctrinal Research'*, International Journal of Legal Developments and Allied Issues, Vol. 8, Issue 1 (2021) at pages 79-80.

[14] Smits J.M, '*What is legal doctrine? On the aims and methods of legal-dogmatic research'*, Maastricht European Private Law Institute, Working Paper No. 2015/06, 1 September 2015, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088> accessed 23 February 2024.

existing legal frameworks to identify whether there are instances where immunity should not apply, as is discussed using a recent English court case touching on this issue.

The literature further divides this methodology into two sub categories: *de lege lata* (how the law is) and *de lege ferenda* (how the law should be).[15] It allows for a critique of competing or inconsistent sources and allows for the systematic exposition, analysis and critical evaluation of legal rules, principles or doctrines and their inter-relationships.[16] As such, this method can be used to provide an outlook into the future of any developments in this field.

SCOPE

This thesis addresses the important, but often neglected issues which parties and arbitrators should be aware of before commencing a national or international arbitration process, as they can have wide reaching consequences, such as the enforceability of the final award. These issues include the pre-requisites, scope, and limits of arbitral liability; the possibility of immunity against such liability and whether arbitrators should be held liable when claims against them are made on abusing the arbitral process.

This thesis reviews case law which refines the scope of arbitral liability and compares various jurisdictions where arbitration has become an extensively used alternative to court litigation and where a number of civil liability suits were brought against arbitrators. This paper does not compare civil and common law legal systems. Rather, the paper provides an overview of how various jurisdictions across both the common law and civil law systems address arbitrator liability. As the thesis uncovers, regulation of arbitrator liability is seen across both the civil and common law systems. Other jurisdictions across both the civil and common law have left the question of liability in the hands of developing case law.

As arbitrators are performing arguably quasi-judicial functions, this thesis examines the civil liability of judges to determine whether the same liability standard applied to judges should equally be applied to arbitrators.

This follows by an assessment of problems of arbitral liability arising specifically in the context of international commercial arbitration and recent developments of case law on this issue.

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[15] Hutchinson, T, *'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law'* (2015) 3 Erasmus L. Rev 130, at page 132.

[16] Sanjeyvignesh, J, *'Types of Legal Research needed for Law Reform'* (2014) <https://www.academia.edu/7146989/TYPES_OF_LEGAL_RESEARCH_NEEDED_FOR_LAW_REFORM> accessed 23 February 2024.

The thesis concludes by a comparative evaluation of the law of arbitral liability in the light of solutions found by various common and civil law systems and it will advance a proposal for uniform regulation of the liability of international arbitrators.

STRUCTURE

This thesis will follow the three main goals of legal doctrinal research: description, prescription, and justification.[17] These aims are closely interrelated and even reinforce each other, which aligns with the proposed aim of this thesis topic.

The ***first*** chapter, being this section, introduces the thesis topic, why it has been selected by the author and the relevant research method the author has chosen to write the thesis.

The ***second*** chapter determines the status of the arbitrator by looking into the relationship that arbitrators have with the relevant parties involved. It sets out the three fundamental approaches which are paramount to questions concerning arbitrator liability and whether they are shielded by immunity. These principles are important to set out because the bulk of arbitration laws and rules do not regulate the relationship between arbitrators and the parties. Furthermore, different theories have been proposed by national courts and legal commentators on the standards of liability for arbitrators. These range from blanket immunity against suits to full liability.

The ***third*** chapter assesses the various liability standards, ranging from full immunity to qualified or limited liability. This distinction is important because it flows from the principles laid out in the second section, giving insight into how the various liability theories work in practice.

The ***fourth*** chapter reviews how various jurisdictions across both the common law and civil law systems approach the issue of arbitral liability. The thesis uncovers that some jurisdictions regulate arbitrator liability in its national law, while others look to cases to determine the extent and scope of arbitrator liability.

The ***fifth*** chapter proposes reforms in this area by supporting the idea of an international harmonised approach or uniform approach to arbitrator liability. By reviewing how various jurisdictions determine the scope of arbitrator liability, it becomes apparent that this is still an area in international commercial arbitration which remains ambiguous. The thesis

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[17] Smits J.M, '*What is legal doctrine? On the aims and methods of legal-dogmatic research*', Maastricht European Private Law Institute, Working Paper No. 2015/06, 1 September 2015, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088> Last Revised 19 March 2017, accessed 23 February 2024, at page 8.

proposes a qualified immunity standard of liability for arbitrators as it limits arbitrator liability without providing a blanket immunity against wrongdoing. It also touches on how this legal area is both influencing and influenced by the wider community, as this is a discussion often left unaddressed in the literature research.

Finally, the ***sixth*** and final chapter concludes the thesis with an overall summary.

CHAPTER 2: ARBITRAL LIABILITY: THE STATUS OF THE ARBITRATOR

Determining the status of the arbitrator aims at defining the legal relationship between the arbitrator and the parties, and thus, concerns the source of the arbitrator's rights, obligations, and powers in relation to the parties. For this reason, the determination of the arbitrator's status is paramount for questions concerning liability and immunity.[18] As noted above, arbitrator liability is a silent topic amongst many national laws and arbitration rules relied on by arbitral institutions. As they do not regulate the relationship between the arbitrator and the parties, different theories have emerged through national courts and legal commentators which seek to define the status of the arbitrator.[19]

THE CONTRACTUAL RELATIONSHIP APPROACH

The 'Contractual Status Approach' is arguably the most widely accepted theory especially amongst the civil law legal systems. This approach states that the status of an arbitrator is based upon a contractual relationship that the arbitrator has with the parties.[20] According to this approach, the arbitrator's liability is based on the terms of the appointment as an arbitrator, including agreed arbitration rules and terms of payment of arbitrator fees and costs, and not the adjudicatory function which the arbitrator performs.[21] In applying this relationship, an arbitrator could be held liable for breaching a contractual relationship they have with the parties and therefore, redress would fall under the rules of contract law when determining arbitrator liability.[22] It flows therefore that the arbitrator incurs liability for breach of contract in the event of documented faults committed during the arbitration proceedings which may violate the terms of the appointment.

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[18] Born, G B, '*International Commercial Arbitration*,' (1963, 2nd ed, Kluwer Law International) as cited in Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?', in Calissendorff, A and Schöldström, P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 251.

[19] Ibid.

[20] Lew, J.D.M, Mistelis, L.A and Kröll S.M, '*Comparative International Commercial Arbitration'* (2003) (Kluwer Law International) as cited in Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?', in Calissendorff, A and Schöldström, P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 251.

[21] Ibid.

[22] Schwarz, F.T and Konrad, C.W '*The Vienna Rules: A Commentary on International Arbitration in Austria'*, (2009, Kluwer Law International) as cited in Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?', in Calissendorff, A and Schöldström, P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 251.

These violations could constitute acts of misconduct,[23] or a breach of duty to act fairly towards the parties.

The term 'misconduct' has been refined through prior cases involving questions of misconduct by arbitrators during arbitral proceedings.[24] According to *Melbourne Harbour Trust Commissioners v Hancock,*[25] the word 'misconduct' was taken to mean a mistake in the arbitration procedure which has or may unjustly prejudice a party. *E Rotheray and Sons Ltd v Carlo Bedarido and Co*[26] later confirmed that on the basis of such irregularities or misconduct, parties are free to set arbitral awards aside. These cases illustrate that the Contractual Status Approach does not necessarily exclude liability on legal principles that are non-contractual. The arbitrator might – despite the contractual relationship with the parties – be held liable for misconduct based on national rules of tort law at the seat of arbitration if they fail to demonstrate the care and skill required by their profession.[27]

THE FUNCTIONAL STATUS APPROACH

An alternative to the Contractual Status Approach is based on the adjudicatory functions performed by arbitrators rather than the contract that an arbitrator has with the parties.[28] This approach places arbitrators in the same category as judges, in that, arbitrators perform quasi-judicial roles in the administration of justice. It flows then that the obligations and rights conferred upon arbitrators are similar to those conferred upon the judiciary when presiding over litigious proceedings. While the Contractual Status Approach is generally the principle adopted by civil law system, the Functional Status Approach is generally applied by common law systems.[29]

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[23] *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* (1968) 1 Ll. L. Rep 16, Queen's Bench Division, Commercial Court before Mr Justice Donaldson.
[24] *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 571 – Supreme Court of Victoria (Australia); *Adams v Great North of Scotland Railway Company* (1891) AC 31 – House of Lords (UK); *London Export Corporation Ltd v Jubilee Coffee Roasting Company Ltd* (1958) A.W.L.R 661 – Court of Appeal (UK); *E Rotheray and Sons Ltd v Carlo Bedarido and Co* (1961) L.R. 220 – Queens Bench Division (UK).
[25] (1927) 39 CLR 571 – Supreme Court of Victoria (Australia).
[26] (1961) L.R 220 – Queen's Bench Division (UK).
[27] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020, Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 251.
[28] Hausmaninger C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*' (1990) 7 J. Int'l Arb. 7 at page 8.
[29] Alessi D, '*Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability'* (2014) 31 J. Int'l Arb. 735 at page 742.

The Judicial Arbitrator

When comparing the essential roles of arbitrators and judges, it becomes evident why proponents of the Functional Status Approach advocate for this principle when it comes to arbitrator liability.[30] Both arbitrators and judges review documentary and oral evidence on issues in dispute. Both weigh up the evidential information to decide on an appropriate outcome (court order for judges and an arbitral award for arbitrators). Both judges and arbitrators follow strict guidelines when conducting proceedings, albeit the sources of the procedures to be followed differ between judges and arbitrators. Both arbitrators and judges apply the correct law to reach a final decision. Both the decisions made by a judge and an arbitral tribunal are binding on the parties.

While there are ample similarities between the core functions of both judges and arbitrators, there are fundamental differences which casts doubt in the literature over whether arbitrators should be held liable at the same standard as judges.[31]

A central distinction is the mandate; the arbitrator derives their authority from the parties while judges derive their jurisdiction from the State.[32] As the parties to a contract give the arbitral tribunal their powers, the parties also select the procedure to be followed and whether the arbitration should be held through an arbitral institution or through ad-hoc arbitration proceedings.[33] Judges, however, are strictly bound by the rules of civil procedure and evidence where arbitrators have the discretion (subject to the parties' agreement) to decide on the applicable rules of the procedure.[34] Finally, arbitrators and judges differ in respect of how they are remunerated. While parties are in control of the appointment procedure of arbitrators and solely responsible to pay their fees, judges are randomly assigned to cases and their salaries are paid by the State.[35]

As a result of the fundamental differences between judges and arbitrators, a range of aspects of the arbitrator's rights and duties can only be explained by a contract between

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[30] Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at pages 105 – 124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 108.
[31] Ibid.
[32] Hasan, Md. M and Arifuzzaman, Md, '*A Comparative Study between Arbitration and Judicial Settlement as Means of Maritime Boundary Dispute Settlement*,' (2018) Beijing Law Review, 9, pages 75-86 at page 75; Austrian Code of Civil Procedure (ACCCP), article 611(2), No. 8.
[33] Blackaby N, Partasides C and Redfern A, '*Redfern and Hunter on International Arbitration'* (7th ed) (Kluwer Law International; Oxford University Press, 2023) at paragraph 5.06.
[34] Ibid.
[35] Alessi D, '*Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability'* (2014) 31 J. Int'l Arb. 735 at page 745.

the arbitrator and the parties.[36] It has therefore been argued that the Functional Status Approach does not provide sufficient legal basis for the differences between arbitrators and judges. Authors have therefore concluded that it would be erroneous to characterise the status of the arbitrator as strictly functional.[37]

THE HYBRID STATUS APPROACH

The author agrees that the better view is that the legal basis for the arbitrator's relationship with the parties derives from both theories. The Hybrid Status Approach classifies the arbitrator's status as a *sui generis* contract (as opposed to an agent contract or a contract for the provision of services) which provides a unique set of rights and duties of the arbitrator.[38]

It further recognises the function of an arbitrator as dual and views the arbitrator as both a service provider and a private judge, thus coining the term, 'quasi-judicial'.[39] The effect here is that the arbitrator's rights and obligations are derived not only from the terms of appointment, but also from national and international law, and the rules applicable to the state judges to the extent necessary to protect the arbitrator's impartial and independent judgment of the dispute.[40]

Thus, the duties conferred upon arbitrators are based on various sources including the contract between the parties, national law, institutional rules, and ethical obligations. The role of the arbitrator is to then perform a 'quasi-judicial' role, using these powers and obligations to render an enforceable award which is binding on the parties. The Hybrid Status Approach recognises that there are differences between judges and arbitrators, but their core responsibility and obligation is the same, to finally settle the dispute between the parties.

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[36] *Baar v Tigerman* (1983) 140 Cal. App. 3rd 979, 189 Cal. Rptr 834 at page 835 – California Supreme Court (US).
[37] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020, Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 252.
[38] Oyre T, '*Professional Liability and Judicial Immunity*' (1998) 64 Arbitration 45 as cited in Franck, S, '*The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity'* (2000, NYLS Journal of International and Comparative Law, Volume 20, No. 1, article 2) at page 5.
[39] Born G.B, '*International Commercial Arbitration'* (1963, 2nd ed, Kluwer Law International) at page 1979.
[40] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 253.

LINK BETWEEN STATUS AND LIABILITY

The terms appropriate to each contract type were those terms realizing the parties' purposes while at the same time maintaining equality.[41] Equality in the sense that the arbitrator should provide both parties with an equal opportunity to present their case and respond to each claim and counterclaim. Since the arbitrator's contract entails an exchange in reliance of a benefit, there is nothing to prevent application of these principles to the arbitrator's contract.[42] Immunity amounts to an absence of legal sanction for the arbitrator's obligations, as a consequence, the arbitrator's promise cannot be enforced. As the literature suggests, this would be contrary to basic contract law principles and would further produce inequality because one party to the contract (the parties) would be bound by certain obligations while the other party to the contract (the arbitral tribunal) would not be bound. In the views of the author, this would produce unfairness and inequality if arbitrators are immune from liability by taking a strictly contractual law principle.

If immunity does not survive the contract law theory, the status of the arbitrator could make a case that arbitrators (like judges) ought to be protected from civil liability. However, trying to base arbitrator's impunity on the status of the arbitrator seems flawed because the policy arguments for immunity meet the powerful counterargument that no entitlement to contractual exchange can be prevented by reason of the risks of abuse.[43]

The question of arbitrators' liability does not merely relate to the arbitrator's performance of duties but touches upon the very foundation and nature of arbitration.[44] The way the relationship between the parties and arbitrator is perceived is determining for the legal basis for potential liability or immunity.[45] The legal relationship is hybrid in nature, which entails that the arbitrator's rights and obligations are not only derived from the contract and applicable arbitration rules and laws, but also by analogy from principles applicable to state judges, particularly under the common law system.[46] If the relationship between arbitrator and the parties is hybrid in nature, then arbitrators ought to attract both immunity in some respect while also ensuring they are accountable for severe breaches of

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[41] Alessi D, '*Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators*' Liability' (2014) (Journal of International Arbitration, Kluwer Law International, Vol. 31, Issue 6) pages 735-784 at page 782.
[42] Ibid.
[43] Ibid.
[44] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 271.
[45] Ibid.
[46] Ibid.

their duties. The Hybrid Status Approach could therefore provide a sliding scale which is both practical (based upon the severity of mistakes made by arbitrators and their intention) and applicable on a case-by-case basis. For instance, a party should have the right to hold an arbitrator liable where they intentionally disregard the arbitral process and procedures that the parties agreed to. At the same time, the arbitrator should be immune from claims where a losing party is simply unhappy with the arbitral award and wants to bring an action against the arbitrator. In the views of the author, the way you define the relationship between an arbitrator and the parties correlates to the standards of liability that are imposed, be it full immunity, full liability or qualified (limited) liability.

CHAPTER 3: IMMUNITY OR LIABILITY

TYPES OF ARBITRATOR MISCONDUCT

Before embarking on an assessment of liability, a quick summary of the various types of arbitrator misconduct is necessary. Understanding what amounts to misconduct sheds light on whether parties should be able to bring civil claims against arbitrators for any alleged misconduct. Inappropriate behaviour of arbitrators can be separated into two categories: affirmative misconduct (**misfeasance**) and failure to act (**nonfeasance**).[47]

Misfeasance involves affirmative actions such as: inappropriate withdrawal from the arbitral process, fraud, corruption, and bad-faith actions.[48] While fraud and corruption cases could also attract criminal liability, affirmative arbitrator conduct is slightly more elusive. These could be cases where an arbitrator inappropriately contacts parties directly, withdraws from the proceedings without justification, refuses to abide by Court orders, writes directly to judges, and refuses to appear in Court at requested times.[49] This was the case faced by the Supreme Court of Victoria in Australia.

'Bad faith' behaviour could also attract civil claims, unless the arbitrators believed they were acting honestly, and the bad faith behaviour was due to some error which was not intended by the arbitrator.[50] This grey area could involve claims of misconduct but is generally not punishable if the arbitrator made an honest mistake.

In contrast, **nonfeasance** includes behaviours such as failing to disclose conflicts of interest, failing to abide by party requests, failing to abide by the duties imposed by the arbitral rules, failing to take part in arbitral deliberations, or failing to render an award. Arguably, the most common form of misconduct, according to the literature, falls into this category. Because liability for inaction is a more complex issue, the preceding section further breaks down the concept of arbitrator immunity to determine whether there is a line between immunity and liability for acts involving abuse of process claims.

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[47] Franck S, '*The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*' (2000, New York Law School Journal of International and Comparative Law, Volume 20, No. 1), at page 11.
[48] Ibid.
[49] *Road Rejuvinating and Repair Services v Mitchell Water Bd.,* from Supreme Court of Victoria, 15 June 1990, reprinted in 1992 Arbitration and Dispute Resolution Journal L.J. 46, at paragraph 47.
[50] *Jones v Brown* (1880) 54 Iowa 140, 142-143 – Superior Court of Cedar Rapids (US).

IMMUNITY VERSUS LIABILITY

Depending on how the duties of an arbitrator and the resulting tasks are defined, the arbitrator's liability can range from complete immunity to full liability.[51]

Full Immunity

In common law legal systems, the traditional justification for granting arbitrators full immunity is based on an analogy with judges, akin to the Functional Status Approach.[52] Judicial immunity is well preserved in case law as it has been stated that *"judicial independence is essential [and] would entirely be swept away if civil actions could be maintained…against the judge"*[53] and *"it is well settled that judges enjoy an absolute immunity from any form of action being brought against them."*[54] It has been argued that the roles of judges and those of arbitrators are so similar that full immunity ought to be applicable to both judges and arbitrators.[55]

It seems that policy reasons justify full judicial immunity, especially amongst common law jurisdictions.[56] A system which allows dissatisfied parties to bring civil actions against judges and thereby threatens them with possible liability, could have two effects: firstly, a decrease of individuals being prepared to accept judicial offices and second, judges may be influenced by the thought that they would be more likely to be sued as a consequence of their decision in favour of one party over the other.[57] Thus, allowing judicial liability against judges could be tantamount to opening the door to intimidation and would contribute to

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[51] Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at pages 105 – 124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 114.

[52] Li, '*Arbitral Immunity: A Profession Comes of Age*' (1998) (Arbitration 51-53); Oyre T, *'Professional Liability and Judicial Immunity'* (1998) 64 Arbitration 45; Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at pages 105 – 124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 114.

[53] *Bradley v Fisher* (1872) 80 US 335, 346, 20 L. Ed. 649 at paragraph 650 – Supreme Court of the US.

[54] *Sutcliffe v Thackrah* (1974) AC 757 – Court of Appeal (UK).

[55] *Bremer Schiffbau v South India Shipping Corp Ltd* (1981) AC 909 per Donaldson J at 921 – House of Lords (UK); *Hoosac Tunnel Dock and Elevator Co v O'Brien* (1884) 137 Mass 424 – Supreme Judicial Court of the State of Massachusetts (US); *International U United Auto Workers v Greyhound Lines Inc* (1983) 701 F. 2nd 1181 – Supreme Court (US); *Bradley v Fisher* (1872) 80 US 335 – Supreme Court (US), 346, 20 L. Ed. 649; Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at pages 105 – 124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 114.

[56] Adedoyin Rhodes-Vivour San, CArb, *'Immunity of Arbitrators'* (2020) <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://drvlawplace.com/wp-content/uploads/2020/09/Immunity-of-Arbitrators-PDF-Version.pdf> accessed on 6 April 2024, at page 1.

[57] *Sutcliffe v Thackrah* (1974) AC 757 – House of Lords (UK).

fearless decision making.[58] As a consequence of these policy reasons, judges enjoy full immunity from lawsuits. This does not apply to corrupt acts (such as bribery), as these do attract criminal charges and not even judges are immune.[59]

Full Liability

The argument for not affording any special liability to arbitrators has been made in a dissenting opinion by Lord Kilbrandon in *Arenson v Cassson Beckmann Rutley and Co*.[60] Lord Kilbrandon stated that arbitrators should be liable in the manner of any other professional selected for their expertise: to perform their duties with skill and care.[61] When reviewing the obligations of an arbitrator under the Hybrid Status Approach, it was established that arbitrators perform quasi-judicial functions but they also provide a service which they were selected to provide by the parties in a contract.[62] A distinction can therefore be made between the arbitrator's performance of the adjudicatory functions on one hand, and other functions on the other.[63] If an arbitrator were viewed simply as an expert, they could potentially be held liable for being unable to perform at the level typical of their profession.[64] It would mean unrestricted liability for any error committed by the arbitrator in the course of performing their functions. In practice, it could mean that any party who lost the arbitration might try to recover their loss by way of a claim for damages against the arbitrator.[65] This fear of being sued if an award is issued against a losing party who is dissatisfied with the outcome goes against the principles which arbitration stands for, an expedient and cost effective dispute resolution mechanism which is an alternative to litigation.

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[58] Li, '*Arbitral Immunity: A Profession Comes of Age'* (1998) (Arbitration 53) as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 115.
[59] *Bribery Act 2010* (UK), section 2.
[60] (1975) 3 All ER 901, House of Lords.
[61] Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 115.
[62] Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at pages 105-124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 115.
[63] Ibid at page 114; Li, '*Arbitral Immunity: A Profession Comes of Age*' (1998) (Arbitration 53) as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 115.
[64] Li (1998), at page 115.
[65] Ibid.

Qualified (Limited) Liability

If arbitrators do not enjoy the protection of full immunity but it is also not practicable to make them fully liable, the 'Qualified Liability' concept strikes a balance between the two extremes.[66] The concept of qualified immunity does not grant the arbitrator full immunity, but it does not expose the arbitrator to a full liability in a manner comparable to an expert or a service provider.[67] Rather, a distinction is made between the arbitrator's performance of the adjudicatory functions on the one hand, and other functions on the other.

Limiting the parties' ability to sue arbitrators for damages to cases in which no valid award exists (either because the award has been set aside or a 'non award' has been rendered) may be a middle ground between the arbitrators' position as independent and impartial decision makers and the parties' need for legal protection.[68] It is stated that arbitrators should be immune from suit regarding their capacity as decision makers. This view is also supported by the fact that most jurisdictions do not allow for a review of the arbitral award on merits and will only set aside an arbitral award where serious misconduct has occurred.[69] This immunity is limited as the arbitrator may be liable if the arbitral award has been set aside because of substantial errors or corruption.[70]

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[66] Ibid.

[67] Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at pages 105-124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page116.

[68] Ibid.

[69] *Arbitration Act 1996* (UK), section 68(3); Austrian Code of Civil Procedure, article 611.

[70] *Federal Republic of Nigeria v Process and Industrial Developments Limited* [2023] EWHC 2638 – High Court of Justice, the Business and Property Courts of England and Wales, King's Bench Division, Commercial Court.

CHAPTER 4: ARBITRAL LIABILITY IN ACTION

REGULATED JURISDICTIONS

The United Kingdom (UK) has granted arbitrators immunity at a statutory level through section 29(1) of the *English Arbitration Act 1996*. This mandatory provision provides an arbitrator with general immunity for any act or omission in the discharge or purported discharge of his or her functions as an arbitrator, unless the act or omission is shown to have been in bad faith.[71] Other countries have adopted similar statutory provisions in their national arbitration legislation.[72] Arbitrator immunity can also be found in international instruments (despite the UNCITRAL Model Law and the UNCITRAL Arbitration Rules containing no provisions on the immunity of the arbitrator).[73] Rules of arbitral institutions also provide for the limitation of the liability of arbitrators, the arbitral institutions, their employees, and other organs of the arbitral institutions.[74]

Many jurisdictions cited in this paper acknowledge a form of immunity either absolute or qualified for arbitrators and/or their agents for either judicial acts only and/or procedural errors.[75] It is important to note that arbitrator immunity (or the limits placed on their liability) does not extend to criminal matters including bribery, corruption, and embezzlement of funds in both common law and civil law jurisdictions. Neither does it extend to non-judicial acts nor omissions in excess of the arbitrator's mandate.

In Spain, article 21(1) of the *Spanish Arbitration Act*[76] states that arbitrators can be considered professionally liable for their conduct if their actions were carried out in bad faith, recklessness, or wilful misconduct. However, the issue of which standard of liability

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[71] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 257.

[72] Singapore International Arbitration Act 2012, section 25; Scotland Arbitration Act 2010, section 73; International Arbitration Act 1974 (Cth) (Aust.), section 28.

[73] Organisation for the Harmonization of Business Law in Africa (OHADA), article 49; International Bar Association (IBA) Rules of Ethics for International Arbitrators 1987.

[74] International Chamber of Commerce (ICC) Rules 2021, article 41; Singapore International Arbitration Commission (SIAC) Arbitration Rules 2017, rule 38; Kigali International Arbitration Centre (KIAC) Arbitration Rules 2012, article 47; London Court of International Arbitration (LCIA) Arbitration Rules 2021, article 31; Stockholm Chamber of Commerce (SCC) Arbitration Rules 2023, article 52; Rules of Arbitration of the Vienna International Arbitral Centre (VIAC) 2013, article 46.

[75] Argentinian National Code of Civil and Commercial Procedure, act 745; International Arbitration Act 1974 (Cth), section 28 (Australia); Chilean Constitution, article 84; German Arbitration Act, section 839; Irish Arbitration Act 1998, section 12; Italian Code of Civil Procedure, article 813; Japanese Civil Code, article 644; New Zealand Arbitration Act, section 13; Peruvian General Arbitration Act, article 18.

[76] 60/2003 of 23 December 2003.

applies is largely left silent in the legislation. This standard of liability has since been observed through cases where arbitrators were found to be professionally liable.

Austria provides an example of adopting a dual approach to arbitral liability in its Austrian Code of Civil Procedure (ACCP). Article 594(4) of the ACCP states that an arbitrator is liable to the parties in cases where they negligently refuse to act or do so with unreasonable delay. An example could be delaying rendering an award without excuse or through sheer negligence. In such a case, a party could hold the arbitrator personally liable for any damages this will cause. For breaches which do not amount to the arbitrator's non-fulfilment or delay, the Austrian Supreme Court of Justice has found that the general rules of contractual liability and tort law applies.[77]

In this case, the *Oberster Gerichtshof* (OGH – or the Supreme Court of Justice in English translation) reiterated that arbitrators may become liable for wrongful refusal to perform their duties and for delays in doing so.[78] It went on to state that an arbitrator may also be held liable for breaches of duties other than those defined in article 594(4) of the ACCP provided the acts were intentional or negligent.[79]

In 1998, the OGH explicitly recognised that the arbitrator is obliged to treat the parties fairly and equally.[80] If an arbitrator secretly contacts one of the parties or does not disclose all relevant facts as to their independence or impartiality, they may be personally liable for a civil suit by the parties.[81] This decision was later reaffirmed by the OGH in 2005 when it repeated that an arbitrator's liability is not limited to situations of 'refusal or delay' and clarified that the parties are entitled to damages for procedural breaches and defective arbitral awards provided that the actions or omissions of the arbitrator resulted in the setting aside of the award.[82]

However, the OGH also held that article 594 must be viewed in conjunction with article 611, which limits the liability of arbitrators to situations which give rise for the setting aside of an arbitral award. Thus, Austria provides two pre-requisites for arbitrator liability in its ACCP. First, a successful challenge of the arbitral award leading to either annulment or

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[77] OGH 17 October 1928, ZBl 1929/79.
[78] Riegler S, Petsche A, Fremuth-Wolf A, and Liebscher C, '*Arbitration Law of Austria: Practice and Procedure*' (2007, Juris Publishing Inc) at page 687.
[79] Ibid, OGH 17.10.1928, ZBl 1929/79.
[80] Ibid.
[81] Ibid, OGH 28.4.1998, 1 Ob 253/97f, SZ 71/76; RdW 1998, 551.
[82] OGH 26.10.1915, GUINF 7623; OGH 6.6.2005, 9 Ob 126/04a, JBl 2005, 800.

non-recognition is necessary to succeed with a liability claim against an arbitrator.[83] Secondly, the arbitrator's misconduct shall amount to intentional harm or gross negligence, which has been defined by Austrian commentators as negligence so severe that a diligent person would never act like this in the circumstances.[84]

This two-step process laid down by Austrian courts arguably provides for a high degree of protection for arbitrators as the conduct of the arbitrator must be linked to the annulment or non-recognition of the award. In the author's view, this is a cleaner approach as compared to a pure judicial approach on immunity. This is because it does not provide a blanket immunity against abuse of process claims against arbitrators, but their conduct must directly be linked to the reason why an award cannot be recognised.

UNREGULATED JURISDICTIONS

The jurisdictions mentioned above have incorporated arbitrator liability in some manner within their national laws. Thereby almost regulating the issue of arbitral liability when claims are made that arbitrators abused the process. In other countries, arbitrator liability has been largely left up to developing case law to establish the limits of arbitral liability.

Spain: *Puma v Estudio*

In the case of *Puma v Estudio*,[85] the Spanish Supreme Court dismissed the cessation challenge against a decision the Court of Madrid has issued in October 2017. This case upheld civil liability of two arbitrators because they infringed the arbitral collegiality principle. It was infringed by not inviting the third arbitrator to the deliberations and issuing the award without giving the third arbitrator an opportunity to participate in the deliberations.[86]

The dispute related to a distribution agreement between Puma and Estudio. Puma elected not to renew the agreement and Estudio commenced arbitration proceedings.[87] An award

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[83] OGH 17 October 1928, ZBl 1929/79; OGH 6 June 2005, JBl 2005, 800/9 Ob 126/04a; OGH 28 February 2008, 8 Ob 4/08h; OGH 22 March 2016, 5 Ob 30/16x.
[84] Franz T.S and Konrad C.W, '*The Vienna Rules: A Commentary on International Arbitration in Austria*', (2009, Kluwer Law International) as cited in Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 260.
[85] *Puma S.E. (Puma) v Estudio* 2000 S.A (Estudio), Spanish Supreme Court judgment dated February 15, 2017 (Judgment No. 102/2017).
[86] Andersen M.B, '*Chapter 8: The Accused Arbitrator: New Roles and Dilemmas in the Era of Arbitration Litigation*' as cited in Schöldström P and Danielsson C (eds) (2023, Stockholm Arbitration Yearbook 2023, Stockholm Arbitration Yearbook Series, Volume 5, Kluwer Law International) pp. 115-130 at page 121.
[87] *Puma S.E. (Puma) v Estudio* 2000 S.A (Estudio), Spanish Supreme Court judgment dated February 15, 2017 (Judgment No. 102/2017) (Centre for Judicial Cooperation, Robert Schuman Centre) at page 3.

was issued which gave Estudio EUR 98.19 million in compensation. However, only two of the three arbitrators signed this award. As a result, Puma applied to have the award set aside, which the Superior Court of Madrid eventually did in its final judgment. The court considered that the two arbitrators had improperly excluded the third arbitrator from the discussions and deliberation of the award and that the award had been rendered improperly.[88]

Of importance in this thesis, Puma began a liability claim against the two arbitrators, requesting reimbursement of their fees including interest and costs. Puma based its claim on the fact that the pair of arbitrators infringed the arbitral collegiality principle, as they have excluded the third arbitrator that Puma has appointed.[89] This claim was accepted, however, later challenged by the two arbitrators.[90] They filed an appeal with the Madrid Court of Appeal which upheld the decision of the Superior Court of Madrid. The case eventually went before the Supreme Court under article 21.1. of the Spanish Arbitration Act – the provision governing liability of arbitrators and arbitral institutions.

The Spanish Supreme Court rejected the arbitrators' arguments stating that the issue to be discussed was the content and scope of the arbitrators' behaviour. In this regard, article 21.1 of the Spanish Arbitration Act limits arbitrators' liability to the damages caused by bad faith, recklessness, or wilful misconduct. It was concluded that the two arbitrators were liable under article 21.1 because their behaviour showed that they had intentionally excluded the third arbitrator from participating in the final deliberations.[91]

This case is significant because it established the standard of liability for arbitrators, in that, arbitrators will only be liable for bad faith, recklessness or wilful misconduct.[92] As there are no rules or laws providing arbitrator privilege or immunity, this case sets a high standard of liability towards arbitrators. In the author's view, this case highlights why broad immunity applied towards arbitrators is inappropriate. Had the arbitrators in this case been afforded general immunity against civil actions, the award would have been binding despite

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[88] *Puma S.E. (Puma) v Estudio* 2000 S.A (Estudio), Spanish Supreme Court judgment dated February 15, 2017 (Judgment No. 102/2017) (Centre for Judicial Cooperation, Robert Schuman Centre) at page 3.
[89] *Puma S.E. (Puma) v Estudio* 2000 S.A (Estudio), Spanish Supreme Court judgment dated February 15, 2017 (Judgment No. 102/2017) (Centre for Judicial Cooperation, Robert Schuman Centre) at page 4.
[90] Ibid.
[91] *Puma S.E. (Puma) v Estudio* 2000 S.A (Estudio), Spanish Supreme Court judgment dated February 15, 2017 (Judgment No. 102/2017) (Centre for Judicial Cooperation, Robert Schuman Centre) at page 4.
[92] Olortegui J, '*Puma v Estudio 2000: Three Learned Lessons'*, (2017, Kluwer Arbitration Blog, Wolters Kluwer) <https://arbitrationblog.kluwerarbitration.com/2017/05/29/puma-v-estudio-2000-three-learned-lessons/#:~:text=Back%20in%202010%2C%20an%20arbitral,did%20not%20sign%20the%20award> accessed on 8 May 2024.

the two arbitrators wilfully and deliberately excluding the Puma appointed arbitrator from deliberations.[93] This would erode the fundamental principles of party autonomy including the parties' power to elect their arbitrator.[94]

Finland*: Ruola* Case

On 10 October 1997, the Finnish Supreme Court gave its judgment in a case relating to arbitrators' liability.[95] Prior to the assessment of the case, it is worth noting that in Finland, there are no provisions on arbitrator liability in the Finnish Arbitration Act.

In this case, a dispute arose out of a sale of shares in 1993. The sellers of the shares were Unto, Sirkka and Jukka Ruola (the Ruolas). The purchaser of the shares was Rakennustoimisto A. Puolimatka Oy (Puolimatka). The Ruolas commenced arbitration proceedings as claimants against Puolimatka, the facts of which are not as important to this thesis as is what came afterward. The arbitral tribunal rendered its award in 1995 dismissing all the Ruolas' claims and ordered that they compensate Puolimatka (and the banks as intervening third parties) for their legal costs.[96] The Ruolas requested that the competent court set aside the award. In support of their application, they alleged that after the award was rendered, they had become aware of circumstances which were grounds for challenging Professor Tepora, one of the arbitrators in the tribunal.[97] The grounds for challenge were that he had, before and during the arbitral proceedings, provided legal opinions to Puolimatka, the banks and companies belonging to the same group of companies, and thus had acted as their consultant in addition to his role as arbitrator.[98]

In its judgment, the Helsinki Court of Appeal found that the arbitrator has been disqualified to act as an arbitrator in the case and therefore set aside the award on the basis of section 41(1) of the Finnish Arbitration Act, which states that *"an arbitral award may be set aside by the court upon request of a party if the arbitral tribunal has exceeded its authority."*[99] Leave

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[93] Ibid.
[94] Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at pages 105-124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 113.
[95] *Ruolas v Professor J Tepora* Case No KKO 2005:14 – Helsinki Court of Appeal; Andersen M.B, '*Chapter 8: The Accused Arbitrator: New Roles and Dilemmas in the Era of Arbitration Litigation'* as cited in Schöldström P and Danielsson C (eds) (2023, Stockholm Arbitration Yearbook 2023, Stockholm Arbitration Yearbook Series, Volume 5, Kluwer Law International) pp. 115-130 at page 121.
[96] Möller G, *'The Finnish Supreme Court and the Liability of Arbitrators'* (2006, Kluwer Law International, Vol. 23, Issue 1) pp. 95-99 at page 95.
[97] Ibid at page 96.
[98] Ibid.
[99] Ibid.

to appeal to the Finnish Supreme Court was not requested within sixty days and thus the judgment of the Court of Appeal became final.[100]

Based on the annulment of the award, the claimant filed a civil claim for damages against the chairman to recover the loss caused by his misconduct as they has to re-arbitrate the case in order to obtain a decision in the matter.[101] The case went to the Finnish Supreme Court, which overturned the decisions of the two lower courts and held that the chairman responsible for the financial loss suffered by the claimant.[102] Contrary to the lower courts, the Supreme Court held that the relationship between the parties and the chairman was comparable to a contractual relationship and the standards of liability therefore should be decided according to the rules of contract law instead of tort.[103] The court also stated that in order to preserve the independence and integrity of arbitrators, they are only susceptible to liability in exceptional circumstances.[104]

Only in situations of clear procedural faults or negligence displayed by the arbitrator there will be a basis for liability.[105] As for the chairman's conduct, the court concluded that the chairman should have disclosed his consultancy role to the claimant (the Ruolas) during the arbitration.[106] When assessing whether this failure was negligent, the court attached considerable importance to four expert opinions provided to the respondent during the arbitration for which he has charged a fee. The Finnish Supreme Court found that the chairman should have foreseen how his consulting work for which he received remuneration for would appear in the eyes of the claimant and that he should have foreseen that his consultancy work was likely to give rise to justifiable doubts about his impartiality and independence.[107]

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[100] Ibid.
[101] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 261.
[102] Ibid.
[103] Ibid.
[104] *Ruolas v Professor J Tepora*, 31 January 2005, Case KKO 2005:14, Finnish Supreme Court, Centre for Judicial Cooperation, < https://cjc.eui.eu/data/data/data?idPermanent=120&triial=1> accessed on 8 May 2024.
[105] Waselius J and Meinander T, '*The Ruola Family v X, The Supreme Court of Finland*' (2005) 14, 31 January 2005 in A Contribution by the ITA Board of Reporters (Kluwers Law International) as cited in Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 261.
[106] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 262.
[107] Ibid.

This case highlights the standards of liability that Finland places on its arbitrators, in the absence of any provisions of arbitrator liability in their national law.[108] The Finnish Supreme Court focused on 'exceptional circumstances' as the relevant standard of liability, likely to set a high threshold amounting to acts of intentional misconduct and gross negligence. The case also applies 'Contractual Status Approach' when determining the standards of liability rather than the arbitrator's adjudicatory function. As the literature has suggested, this legal interpretation of the case is difficult to reconcile with the court's finding that clear procedural faults or negligence displayed by the arbitrator can provide a potential basis for liability.[109] The Supreme Court did not find the relationship between the parties and the arbitrators to be contractual. Rather, the relationship was comparable to a contractual relationship and ruled that the compensation payable should be decided pursuant to rules which apply to contractual liability and not to rules which apply to liability in tort.[110]

The Supreme Court held that the legal basis for the arbitrator's liability was his failure to disclose and not the fact that there was a ground for his challenge as an arbitrator (as originally argued by the Ruolas').[111] If the arbitrator has not failed to disclose the ground for challenge, he would not have been liable to compensate the damage caused to the Ruolas, even if the challenge had not been accepted by the arbitral tribunal and the award had then been set aside.[112] This judgment leaves open two main questions for further consideration. Firstly, whether an arbitrator cannot be liable for damages when an award has been set aside on the ground that he was disqualified, if he had disclosed the grounds for challenge but the arbitral tribunal had not sustained the challenge.[113] Secondly, whether

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[108] Onyema E, '*International Commercial Arbitration and the Arbitrator's Contract*', (2010, Routledge, Taylor and Francis Group) at page 170.
[109] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at 263; Möller G, *'The Finnish Supreme Court and the Liability of Arbitrators*' (2006, Kluwer Law International, Vol. 23, Issue 1) pages 95-99 at page 98.
[110] Möller G, *'The Finnish Supreme Court and the Liability of Arbitrators'* (2006, Kluwer Law International, Vol. 23, Issue 1) pages 95-99 at page 98.
[111] Onyema E, '*International Commercial Arbitration and the Arbitrator's Contract*', (2010, Routledge, Taylor and Francis Group) at page 170.
[112] Möller G, *'The Finnish Supreme Court and the Liability of Arbitrators'* (2006, Kluwer Law International, Vol. 23, Issue 1) pages 95-99 at page 98.
[113] Ibid at page 99.

an arbitrator can be liable for acts and omissions based on breaches of its adjudicatory duties under Finnish law, and if so, which liability/immunity standard should be applied.[114]

Netherlands: *Greenworld* and *Qnow*:

In the Netherlands, the Dutch Supreme Court ruled on the standard and scope for arbitrators' liability in the case of *Greenworld*.[115] This case set a high bar to establish arbitrators' liability.

In the *Greenworld* case, arbitrators faced a liability claim for wrongly accepting jurisdiction.[116] In the setting aside proceedings following the arbitration, Greenworld successfully argued that no valid arbitration agreement existed, and the award ought to be set aside.[117] The Dutch Supreme Court rejected this claim but provided guidance on the standards on the liability of arbitrators. Firstly, the court clarified that the fact that an arbitral award is set aside is insufficient for an arbitrator to be held liable.[118] Secondly, it stated that arbitrators can only be held personally liable if they acted intentionally or knowingly in a reckless manner or with evident gross neglect in the proper performance of their duty.[119] In applying the judgment, the court laid down a standard of 'gross negligence' leading to arbitrator liability only in exceptional circumstances.[120] In the Netherlands at least, this can arguably be extended to cases where the arbitrator violates fundamental principles of law, such as impartiality and the right to a fair hearing, making the award incapable of being enforced.[121]

The *Qnow* case[122] followed the *Greenworld* case which added additional layers to the Dutch law on arbitral liability. In the *Qnow* case, the chair of the arbitral tribunal was held liable because the two co-arbitrators failed to sign the arbitral award, as is required under Dutch

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[114] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 263.
[115] Dutch Supreme Court, 4 December 2009, ECLI:NL:HR 2009 BJ7834, NJ 2011/131.
[116] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 263.
[117] Angelier J and Verstappen M, *'The Liability of International Arbitrators: When and Where to Sue*?' (Houthoff Arbitration Blog)<https://www.houthoff.com/expertise/practice/arbitration/arbitration-blogs/the-liability-of-international-arbitrators-when-and-where-to-sue> accessed on 8 May 2024.
[118] Ibid.
[119] Dutch Supreme Court, 4 December 2009, ECLI:NL:HR 2009 BJ7834, NJ 2011/131 at paragraph 3.6.
[120] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 263.
[121] Meijer G and Paulsson M.M.P, '*National Report for the Netherlands'* (2018, International Handbook on Commercial Arbitration) at page 31.
[122] Dutch Supreme Court 30 September 2016, ECLI:NL:HR:2016:2215, NJ 2017/141.

law.[123] The chair should have supervised and ensured the signing of the award by the entire tribunal.[124] The Supreme Court further elaborated on the arbitrators' liability standard and considered gross dereliction of duty to entail a lighter standard of culpability then the 'intentional or deliberate recklessness' standard. Nevertheless, a 'gross dereliction of duty' requires that sufficient personal blame can be attributed to the arbitrator for their acts or omissions.[125] That culpability involves, however, an objective element to some extent. Whether blame can be attributed on this basis depends on the circumstances of the case, such as severeness of the error.[126] In this case, the failure to sign the award was a gross dereliction of duty and the chairman of the tribunal was found liable based on unlawful acts for the damages resulting from the annulment of the award.[127]

France: *Bompard* Case

The French courts have taken on a more restrictive approach to arbitrator liability.[128] In the *Bompard* case, the Paris Tribunal of First Instance held that civil liability can only be incurred where it is established that they have committed fraud misrepresentation or gross fault.[129] The literature shows that arbitrators in France benefit from a limited liability standard in relation to the performance of judicial acts, in principle not being liable for error of judgment, factual or legal errors or for infringement of res judicata.[130] However, liability will arise in case of particularly serious breaches such as breaches caused by wilful or gross misconduct, fraud or denial of justice.[131] French courts have in several cases acknowledged the contractual obligations of the arbitrator to the parties and held that the arbitrator is liable where there is a breach of contract.[132] A serious error of fact or law committed by arbitrators will not lead them to incur personal liability. Given that they act

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[123] Dutch Arbitration Act 2015 as contained in the Dutch Code of Civil Procedure (DCCP), article 1057, Section 2.
[124] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 264.
[125] Angelier J and Verstappen M, *'The Liability of International Arbitrators: When and Where to Sue?'* (Houthoff Arbitration Blog)<https://www.houthoff.com/expertise/practice/arbitration/arbitration-blogs/the-liability-of-international-arbitrators-when-and-where-to-sue> accessed on 8 May 2024.
[126] Dutch Supreme Court 30 September 2016, ECLI:NL:HR:2016:2215, NJ 2017/141 at 3.52.
[127] Ibid.
[128] Judgment of 15 January 2014, No. 11-17 196 (Azran), Bull. Civ. 2014 1, no 1 (Cour de Cessation, First Civil Chamber).
[129] Judgment of 13 June 1990, 1996, Rev Arb 475-476 (Tribunal de grande instance Paris) Judgement of 22 May (the *Bompard* case).
[130] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 263.
[131] Ibid.
[132] Ibid.

as a judge, the arbitrators should be protected by their immunity to ensure that they do not become the target of actions based on allegations of serious errors of judgment. This was the view taken in the *Bompard* case, mirroring the decision in England which strongly suggested this to be the proper approach on public policy grounds.[133]

SHOULD ARBITRATORS BE IMMUNE?

Based on the evolution of arbitral immunity in case law and legal instruments, the literature suggests a trend towards a qualified immunity / restricted liability standard on liability as appropriate in international arbitration.[134] Support for the Functional Status Approach in the UK has led to express statutory immunity for arbitrators, whereas in other civil jurisdictions, the adherence to the Contractual Status Approach has implied contractual liability.[135] Statutory provisions and case law in some civil jurisdictions show that national courts and lawmakers restrict the liability in order to protect arbitrators whereby an implied qualified immunity is achieved (in applying the Hybrid Status Approach).[136]

In determining the standard of liability of arbitrators, the common and civil law systems start from opposite directions: the common law stresses the fact that arbitrators should be cloaked with immunity because of their quasi-judicial nature while the civil law views arbitration as professional experts who should be liable for misconduct. Whether arbitrators should be clothed in judicial immunity remains a topical debate with proponents both for and against this idea with equally valid arguments. Akin to the fundamental principles of arbitration, a neutral or middle ground would be an ideal solution. Arbitrators should be clothed in immunity when errors are made so long as these errors do not represent a manifest disregard for the law, the applicable arbitration rules, intentional misconduct, or criminality.

In fulfilling their roles as arbitrators, they should feel protected against unmeritorious claims or claims arising out of sheer unhappiness with the outcome of the arbitral process. This model would combine a reasonable degree of legal responsibility with a reasonable degree of protection of the arbitrator's independence.[137] It would, on the one hand, ensure

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[133] *Sutcliffe v Thackrah* [1974] UKHL J0212-3, per Lord Reid, House of Lords (UK).
[134] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 264.
[135] Ibid.
[136] Ibid.
[137] Hausmaninger C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*', (1990, Kluwer Law International, Volume 7, Issue 4) at page 46.

quality in arbitration and on the other, not deter capable men and women from acting as arbitrators, since every liability action would be subject to a two filter process (vacation of the award and at least, grossly negligent behaviour of the arbitrator) effectively preventing harassment of the arbitrator.[138]

[138] Ibid.

CHAPTER 5: THE NEED FOR UNIFORMITY

As the research uncovered, the topic of arbitrator liability is somewhat ambiguous with different jurisdictions both having differing sources of their liability standards and how liability is applied to arbitrators. This raises the question of whether an international harmonisation or uniformity of this legal area is needed, or if it is even possible to do so.[139]

Bringing uniformity to the rules on arbitrators' liability is undoubtedly desirable as it would bring a higher level of certainty and transparency among the various stakeholders in the international arbitration community.[140] Research suggests that it would provide the parties to the arbitrators, the arbitrator, arbitral institutions, and national courts with an improved basis to assess the legal basis and scope of arbitral liability.[141] Arbitrators would have an increased transparent basis for accepting the arbitrator's task in respect of potential liability concerns and the parties would be given more insight into when to hold arbitrators responsible for a breach of their conduct.[142]

An impediment to the uniformity of arbitral liability in international commercial arbitration comes from the fundamental differences as to how the legal relationships between the parties and the arbitrator are perceived and these are deeply rooted in the distinct legal traditions of each jurisdiction.[143] As a result, there may always be a divergent approach on the basis and scope of arbitral liability and the consequences of such liability, be it either under tort or contract law.

On balance, the concept of qualified liability according to which an arbitrator is neither granted full immunity, nor exposed to full liability, seems to be the most appropriate concept as proposed by the research.[144] It secures, at least partly, interests on both sides

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[139] Domke M, '*The Law and Practice of Commercial Arbitration'*, (1984) (Rev. Ed. Wilner) as cited in Hausmaninger C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990, Kluwer Law International, Volume 7, Issue 4) at page 47.

[140] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 270; Domke M, '*The Law and Practice of Commercial Arbitration*', (1984) (Rev. Ed. Wilner) as cited in Hausmaninger C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990, Kluwer Law International, Volume 7, Issue 4) at page 47; Alessi D, '*Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability'* (2014) 31 J.Int'l Arb. 735 at page 782.

[141] Ibid.

[142] Ibid.

[143] Ibid.

[144] Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007) (Manz'sche Verlags- und Universitätsbuchhandlung) at 105-124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 124; Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds),

while at the same time ensuring that the current boom in arbitration is not affected or even hampered. This was the view suggested in 1999 by the UNCITRAL Secretariat that this legal area should be harmonised.[145] From the research available, uniformity of this areas seems to be the way forward. It remains to be seen how the international arbitration community will adopt uniformity, be it with the use of Guidelines (such as the IBA Guidelines or IBA Rules) or amendments to institutional rules or national law.

It is worth noting that in the introductory note to its 1987 Rules of Ethics for International Arbitrators, the International Bar Association formulated a proposal for a uniform standard of liability for international arbitrators which reads: *"international arbitrators should, in principle, be granted immunity from suit under national laws except in extreme cases of wilful or reckless disregard of their legal obligations."*[146] The literature suggests that this is certainly a step in the right direction, with some going further, proposing amendments to the wording of the IBA Rules, which read:

> *"International arbitrators should be granted immunity from civil liability suits under national laws, except in cases of intentional or grossly negligent violations of their contractual duties, if such violations have led to either the premature termination of the arbitral proceedings or the vacation of the final award. In no case shall the arbitrator be held liable for an error in the making of the award except if such error consists in a manifest disregard of the applicable law*".[147]

Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 264; Franck S, '*The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*' (2000, New York Law School Journal of International and Comparative Law, Volume 20, No. 1); Jimenez D, '*Proposal for a Uniform Rule on Arbitrator Immunity'*, (2017, 4 ICC Dispute Resolution Bulletin 8).

[145] UNCITRAL, Thirty-Second Session Report A/CN.9/460, 'Possible Future Work in the Area of International Commercial Arbitration' (1999) < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents.un.org/doc/undoc/gen/v99/827/50/pdf/v9982750.pdf?token=AaJjpYruNs0r6VIWCL&fe=true> last accessed on 12 April 2024.

[146] International Bar Association, Rules of Ethics for International Arbitrators (Ethics Rules) (1987) 26 I.L.M 583, 15 Int'l Bus L. 336-338 and 12 Y.B. Comm. Arb. 199-202.

[147] Hausmaninger C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990, Kluwer Law International, Volume 7, Issue 4) at page 48.

While major arbitration conventions,[148] rules of international arbitration institutions,[149] modern national legislations addressing aspect of international commercial arbitration,[150] or Rules of Ethics for International Arbitrators[151] have failed to establish an agreed standard of liability, it is promising that there are enough jurisdictions which have dealt with the issue of arbitrator liability to propose a suitable way forward in the way of harmonising the various liability approaches adopted by both common and civil law jurisdictions.

WIDER SOCIAL IMPACTS

In addressing the research question relating to arbitrator liability, much of the attention is given to understanding the various theories behind the standards and scope of arbitrator liability when civil suits are commenced against arbitrators. This makes sense as liability is often a discussion at the micro level, meaning a review of the individual actions of arbitrators to ascertain if it amounts to personal liability under the applicable rules or national law.

Unfortunately, because of perceived misconduct by arbitrators and the risk of party manipulation, the arbitration process has come under increasing attack through civil actions against arbitrators, thus making this research question relevant in the wider societal context.[152] As a result of these concerns, the issue of an arbitrator's immunity has received increased attention and the scope of this immunity or limits on liability remains a controversial issue, even in the public domain.

Casting back to the fundamental principles of international arbitration, much of its effectiveness depends upon its reliability, effectiveness, and reputation. It is a dispute resolution mechanism which must be chosen by the parties. Thus, it needs to promote reliability, continuously evolve with the needs of the wider community, and sufficiently address any concerns which could bring the entire practice into disrepute. A recent

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[148] European Convention on International Commercial Arbitration of 1961, 484 U.N.T.S. 364 (No 7041); the Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965).
[149] ICC Arbitration Rules on the Arbitration Rules of the United Nations Commission for International Trade Law, UN Res. 31/98 (1976).
[150] Dutch Statute on Arbitration (1987), 26 I.L.M 921 (1987); Chapter 12 of the Swiss Statute on Private International Law, 27 I.L.M, 37 (1988).
[151] The ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (1987); International Bar Association, 'Rules of Ethics for International Arbitrators', 26 I.L.M 5683 (1987), 15 Int'l Bus. L. 336-338 (1987) and 12 Y.B. Comm. Arb 199-202 (1987).
[152] Franck S, *'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*,' (2000, NYLS Journal of International and Comparative Law, Volume 20, No. 1, article 2) at page 2.

example of this is the evolving nature of arbitration in light of the COVID-19 pandemic. Insofar as the sector of dispute resolution is concerned, two significant developments in international commercial arbitration emerged out of the pandemic: virtual hearings and paperless arbitration proceedings.[153] This was a necessary step to ensure arbitration practice remains both a relevant and effective dispute resolution mechanism which adapts itself to the needs of the wider community.

On the issue of arbitrator liability, the same principle can be applied. The wider community entrusts arbitrators to preside over arbitral proceedings and issue a binding award. In doing so, it has also come to expect certain levels of consistency and transparency, especially over a legal area which is not uniformly regulated but can have drastic effects on the parties. The scope of arbitral liability largely depends on the law of the relevant jurisdiction and the applicable institutional rules (except for the United States which is the only country that has nearly absolute immunity from arbitral acts).[154] Knowing the scope of arbitrator liability before commencing arbitration proceedings would likely demystify this legal area for the parties, enabling them to confidently enter into the arbitral process knowing exactly what the limits on arbitral liability are (i.e. when can a party bring a civil action against an arbitrator directly). Consequently, it would also promote confidence within the arbitration community itself, with arbitrators taking up their quasi-judicial role knowing exactly the situations which could bring them under threat of civil liability. On a wider societal context, providing greater clarity or uniformity to this area would arguably promote transparency, adding to the effectiveness of arbitration as a dispute resolution mechanism.

Just as judicial immunity has been extended beyond the individual judge to other persons and institutions involved in judicial proceedings, the question also arises whether arbitral immunity should also extend beyond arbitrators themselves and not merely shield arbitrators from actions involving alleged torts.[155] If arbitrators ought to enjoy immunity from civil claims to protect their authority, should this be extended to organisations and associations sponsoring and/or administering arbitration proceedings? The Court in *Corey v New York Stock Exchange*[156] held that extension of arbitral immunity to encompass boards

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[153] Panjwani P, *'Chapter II: The Impact of the COVID-19 Pandemic on International Arbitration Practices'* in 'International and Comparative Business Law and Public Policy' (2023, Koninklijke Brill NV Leiden) at page 28.
[154] Franck S.D, *'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*,' (2000, NYLS Journal of International and Comparative Law, Volume 20, No. 1, article 2) at page 59.
[155] Hausmaninger C, '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform'*, (1990, Kluwer Law International, Volume 7, Issue 4) at page 40.
[156] 171 N.W.806, US District Court for the Western District of Michigan.

which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity: otherwise the immunity extended to arbitrators is illusionary. In this US case, the Supreme Court of New York found it appropriate to extend arbitral immunity to boards, associations, commissions, and other quasi-judicial bodies which sponsor arbitration and make arbitration facilities available.[157]

The decisions mentioned in case law which unanimously state that associations and organisations sponsoring or administering arbitration enjoy a certain degree of immunity, they often disagree as to the source and extent of this immunity.[158] These are discussions which the literature often does not address but they are, (in the views of the author), equally as paramount as they are to the topic of arbitrator liability.

Would arbitration be seen by the public as an effective and reliable dispute resolution mechanism if statistics show an increase in the number of arbitrators being sued for procedural errors, gross negligence, or misconduct? As this thesis has not observed the *public perception* of arbitrator liability and its impact on the perceived reliability of arbitration practices, it is a difficult question to answer at this stage, warranting further qualitative research.

The conclusion reached here is that the micro topic of arbitrator liability (especially when discussing whether a unform approach needs to be adopted) can be influenced by the expectations of the wider community. In turn, any changes made to this legal area will impact the wider community in turn through their perception of international commercial arbitration as an effective, reliable, transparent, and reputable dispute resolution mechanism.

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[157] Hausmaninger , '*Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*', (1990, Kluwer Law International, Volume 7, Issue 4) at page 41.
[158] Ibid.

CHAPTER 6: CONCLUSION

Arbitration has become a prevalent method of settling disputes. Arbitrators perform a particular service in this dispute resolution mechanism. On the one hand, their role and functions are very similar to those of judges; arbitrators adjudicate on a dispute and decide it in a binding manner. It is well settled in most jurisdictions that judges are liable – if at all – only for the gravest errors usually amounting to criminality.[159] On the other hand, certain considerations may lead to the conclusion that arbitrators are service providers, receiving their mandate not from the State, but from a contract and the parties to the dispute themselves. They receive remuneration by the parties for their service in conducting the arbitral proceedings and issuing the final award. There is a direct relationship between the arbitrators and the parties which is formed out of a contract. This, quasi-judicial role that arbitrators play in international commercial arbitration, has led to concerns around determining the scope of arbitrator liability.

As a result, this thesis sought to answer the question, should arbitrators be immune from liability under abuse of process claims? This question was chosen because the question of arbitrators' liability does not merely relate to the arbitrator's performance of duties but touches upon the very foundation and nature of arbitration.[160] The way the relationship between the parties and the arbitrator is perceived is determining for the legal basis for potential liability or immunity.[161]

This thesis has uncovered that the arbitrators' rights and obligations are not only derived from the contract and applicable arbitration rules, but also by analogy from principles applicable to state judges. Different jurisdictions both in civil and common law countries have attempted to strike a balance between the benefits of immunity and the equality between the arbitrator and the parties.[162] The research suggests that a qualified immunity or restricted liability approach is the appropriate way to proceed provided that immunity is not an absolute protection, but only a limitation of the liability that otherwise exists.[163]

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[159] Klausseger C, Klein P et al. (eds), *'Austrian Arbitration Yearbook 2007'*, (2007) (Manz'sche Verlags- und Universitätsbuchhandlung) at 105-124 as cited by Riegler S and Platte M, '*Chapter II: The Arbitrator – Arbitrators' Liability* (2007, Manz'sche Verlags- und Universitätsbuchhandlung) at page 123.

[160] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 264.

[161] Ibid.

[162] Ibid.

[163] Smahi N, *'The Arbitrator's Liability and Immunity under Swiss Law – Part I*,' (2016) 34(4) ASA Bull, pages 878-879, at page 876, as cited in Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in

In favour of the immunity argument, it is said that there may be a fear that the pool of arbitrators will diminish if arbitrators can be susceptible to civil claims. A review of the cases on this topic has found this not to be the case and that it is often assumed that arbitrators will accept appointments regardless of a potential liability, which can only be triggered by clearly unacceptable behaviour.[164] The risk of civil claims based on alleged failure in the conduct of the profession is arguably a calculated risk which the arbitrator to a certain extent can, and should, obtain insurance coverage for.[165]

The diversity of liability standards in the various legal systems both in civil and common law systems, makes it difficult to obtain uniformity in this area. To the extent the scope of arbitrator liability depends on national laws on tort, contract and damages, international harmonisation or uniformity is arguably not practical.[166] Despite this, the international arbitration community should urge national jurisdictions to provide clear statutory rules on arbitrators' liability (qualified immunity/restricted liability) which would add a higher level of transparency and certainty to an increasingly important area of international arbitration.[167]

Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 271.

[164] Calissendorff A and Schöldström P (eds), *'Stockholm, Arbitration Yearbook'* (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 235.

[165] Truli E, '*Liability v Quasi-Judicial Immunity of the Arbitrator: The Case against Absolute Arbitral Immunity'* (2006) 17 Am. Rev. Int'l Arb. 383 at page 395.

[166] Schaeffer S, '*Approaches to Arbitrators' Liability: Immunity or Liability*?,' as cited in Calissendorff A and Schöldström P (eds), Stockholm, Arbitration Yearbook (2020) (Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International) at page 272.

[167] Ibid.

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