

ASSESSMENT OF THE DOCTRINE OF IMMUNITY AND LIABILITY OF ARBITRATOR

Abstract

Alongside the normal judicial/Court mode of settling scores between/among parties, there exist arbitration as an alternative form of dispute settlement especially in respect of commercial disputes. Indisputable, the position of an arbitrator is not clear cut as that of a judge who is appointed with sufficient rules and regulations guiding its functions including the Constitution. An arbitrator may be an ordinary person persuaded by a friend to settle a dispute and may not really think or be aware of the implications of what he/she is doing until his conducts during the settlement process becomes a subject of litigation. Some jurisdictions have taken it upon themselves to enact laws that would regulate such litigation and often times accord immunity to the arbitrator (whether from civil or criminal responsibility). The essence of this paper is to analyse the various practice of countries on the practice of arbitrators immunity and liability, examine the theoretical bases of States option in the adoption of the doctrine of arbitrators immunity and liability and then to proffer justification for those jurisdictions that have accorded immunity to arbitrators and to find rules which may be adopted by other jurisdictions that don't have immunity laws so that when a court is faced with a matter in which "arbitrators immunity" is a subject of the litigation, the judge in the absence of a legal framework may adopt the common Law doctrine of Immunity (as in the Nigeria situation) or find recourse in practices in other jurisdiction or institutions.

Keyword: Immunity; Arbitrator; Negligence; Jurisdictions;

Introduction

Arbitration is one of the processes of Alternative Dispute Resolution that has been developing over the years as a result of the need to settle dispute out of the court system/litigation process, especially in commercial transactions. International arbitration has become the preferred way of resolving international commercial disputes. Although the parties have an opportunity to play a role in the selection of arbitrators, they may be concerned about the responsibility of the selected third party to them.¹

In the past when arbitration was not commonly used as a means of resolving dispute, the selection of a professional to act as an arbitrator by one's acquaintance was regarded to be an honour for that

¹ Susan Franck, 'The liability of International Arbitrators: A Comparative Analysis and proposal for qualified immunity' (2000) 20(1) New York Law School Journal of International and Comparative Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=821104> accessed 10 January 2023

person and indication of that person's reputation in society. The arbitrator may not be paid at all or not properly paid for the services rendered. As a result of this, they seldom see the rendering of the services as a means of livelihood. Therefore, the issue of an arbitrator's accountability for his conduct was hardly a matter for consideration. The existence of immunity was not an issue and the question of enforcing remedies against an unsatisfactory arbitrator would rarely arise.²

However, we now have cases whereby arbitrators are being dragged to court because the parties expect that the arbitrators owe them an ethical duty and expect them to act accordingly and that merely removing the arbitrator or setting aside the award does not compensate for the loss they might have suffered. The question which this paper seeks to answer is whether an arbitrator can be sued or held liable for a breach of any of his duties where a party suffers loss as a result? This paper will discuss the doctrine of immunity and liability as regards arbitrators and the justification for the doctrine and its exceptions.

Immunity of Arbitrators from Liability

Immunity has been defined as ‘a legal privilege attributed to certain persons (State officials) and recognized by national and international law which enables them to exercise their functions free from outside constraints or pressures, including legal ones.’³ According to Edward Kionki, an immunity is a defence to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortuous act. Historically, tort litigation against units of government, public officers, and charities, and between spouses, parents and children have been limited or prohibited on this basis.⁴

An Arbitrator, an arbitral or other institutions or a person authorised under the Arbitration Act to perform any function in connection with arbitral proceedings is not liable for anything done or omitted in good faith in the discharge or purported discharge of that function.⁵ This is due to the fact

² Anastasia Tsakatoura, ‘The Immunity of Arbitrators’ 2002 <<https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm>> accessed 10 January 2023

³ Medecins Sans Frontieres, ‘The Practical guide to Humanitarian Law. <<https://guide-humanitarian-law.org/content/article/3/immunity/#:~:text=Immunity%20is%20a%20legal%20privilege,or%20pressures%2C%20including%20legal%20ones.>> accessed 10 January 2023

⁴ Edward Kionka, ‘*Torts in a nutshell*’ (Thompson Publishing 1992)

⁵ Immunity of Arbitrators Doyin Rhodes Vivour & Co <<https://drvlawplace.com>> accessed 10 February 2023

that Arbitrators like Judges are in the same business, that is , the administration of Justice and both should be granted immunity as a guide of independence.⁶

An arbitrator enjoys immunity from liability for all acts or omissions performed in the exercise of his judicial decision-making unless he has acted intentionally, or arbitrarily, or has committed a fraudulent act.⁷ This Principle follows from the fact that arbitrators are private judges and enjoy the same liability privilege as state court judges.⁸ This liability is however limited in two ways. First, it covers only the decision-making of the arbitrator. If the arbitrator causes damages to one of the parties to the arbitration and the act which has caused the damage is outside his decision-making task, he has incurred liability *vis-a-vis* that party under the arbitrator's contract which is concluded between the arbitrator and the parties as soon as the arbitrator is appointed.⁹ Secondly, the liability does not apply where the arbitrator has acted intentionally or arbitrarily or has committed a fraudulent act. In these cases, he does not deserve protection from liability, even if he acted within the limits of his decision-making duty.¹⁰

There are also judicial precedents to buttress the point that liability privilege does not apply in all situations but are guided by certain rules and principles and that there is an extent to which arbitrators may be immune from any scrutiny of their actions in the course of their mandate.¹¹ The Affaki affair is one of the high profile instances where arbitrators have been held publicly accountable for their alleged behaviour in accepting and carrying out their mandate.¹² Similarly, in the late 2019, 14 arbitrators were imprisoned and later released in Peru while they were investigated

⁶ Krystal Lee, 'Arbitration Vaccine: Immunity of Arbitrators Practical Law Arbitration' <arbitrationblog.practicallaw.com> accessed 20 February 2023

⁷ Principle XIII.2.7 Immunity of Arbitrator <https://www.trans-lex.org/70032_immunity_of_arbitrator> Trans-Lex Principle> accessed 22 February 2023; Berger, Klaus Peter. International Economic Arbitration, Deventer, Boston 1993; Born Gary B., 'International Commercial Arbitration, Volume 1 (2009); Fouchard Gaillard Goldman, 'International Commercial Arbitration' Edited by Emmanuel Gaillard and John Savage (1st Edition, Kluwer Law International 1999); Frank Susan D., 'The Liability of International Arbitrators : A comparative Analysis and Proposal for qualified Immunity [2000] (20) (1) New York Law School Journal of International and Comparative Law, 17; Weston Maureen, 'Re-examining Arbitral Immunity in an Age of Mandatory and Professional Arbitration' [2004] (88) (3) Minnesota Law Review, 449.

⁸ Frank Susan D., 'The Liability of International Arbitrators: A comparative Analysis and Proposal for qualified Immunity'

⁹ Commentary to Trans-Lex Principle <<https://www.trans-lex.org/070032>> accessed 22 February 2023

¹⁰ DIS Arbitration Rules 1998, downloadable at <http://www.dis-arb.de/DIS_Arbitration_Rules_1998> accessed 20 February 2023

¹¹ Krystal Lee, 'Arbitration Vaccine: Immunity of Arbitrators Practical Law Arbitration'

¹² In September 2020, a Kenyan court ordered that ICC disclose documents in a fraud case against arbitrator George Affaki. Proceedings were commenced against Affaki in both Kenyan and French courts by Kenyan mobile phone repair company Techno service Ltd for breach of contract, fraud and breach of Trust. The fact that the Kenyan court compelled the handover of documents shows that the court is willing to entertain the possibility of arbitrator liability.

for alleged bribery in favour of Odebrecht.¹³ Also in October 2018, three arbitrators were sentenced in absentia to a three-year prison term in Qatar, after they rendered a 20 million pounds award against Qatari businessman Sheikh Al Misnad. In the same vein, in a case concerning civil liability the Spanish Supreme Court found against two arbitrators for negligence in February 2017. They were involved in arbitration between PUMA and ESTUDIO 2000.¹⁴

Usually parties to arbitration proceedings recognize that arbitrators have a limited role in their dispute, which ends with the pronouncement of the decisions and award. However, some parties have filed suits against arbitrators or attempted to compel arbitrators to provide evidence on post-decision action¹⁵ and courts in most jurisdictions have held that arbitrators are immune from civil liability regarding their actions while in the capacity of an arbitrator.¹⁶ Courts have also held that an arbitrator cannot be compelled to provide evidence related to an arbitration proceeding, after rendering an award either directly, through testimony or affidavit, or indirectly by a subpoena.¹⁷

Few states have enacted statutes¹⁸ specifically providing immunity and, in the absence of a statute to that effect, courts have found common law on immunity. Arbitral Immunity has its origins in Common Law judicial immunity as most jurisdictions track Common Law directly to the functional comparability of the role of Immunity of Arbitrators from Liability arbitrators and the judges.¹⁹

The UNCITRAL Model Law,²⁰ which is adopted by a limited number of states, in general, does not make provision in respect of arbitrators' immunity to be more appropriate. Therefore, the issue of arbitrators' liability is dependent on the different legal systems. While Common Law accords full immunity to arbitrators, some states have remedied the uncertainty of the Common Law position by providing qualification to the immunity accorded.

¹³ Odebrecht is the Brazilian Construction company at the centre of the operation Car Wash corruption affair. <<http://www.google.com/amp/s/www.bbc.com/news/business-39194395.amp>> accessed 22 February 2023

¹⁴ Krystal Lee, 'The Arbitrator vaccine: Immunity of arbitrators'

¹⁵ *Maine Central Railroad v Brotherhood of Maintenance of Way Employees* (1989) 873 F.2d 425 (U.S Court of Appeals, 1st Cir. April 26, 1989)

¹⁶ *Austern v. Chicago Bd. Options Exchange, Inc.* (1990) 898 F.2d 882 (U.S Court of Appeals, 2nd Cir. March 15 1990) (On immunity for arbitrator and sponsoring agency in contract arbitration proceedings)

¹⁷ Domke, 'The Arbitrator's Immunity from Liability: A comparative Survey' (1971) U. Tol. Law Rev. 99 <<https://naarb.org/reference-materials/>> accessed 28 February 2023

¹⁸ E. g. California Evidence Code, Section 703.3 (testimonial immunity)

¹⁹ *Butz V. Economou* 438 (1978) US.478.511-12

²⁰ UNCITRAL Model Law of international commercial arbitration 1985 (as amended in 2006)

Accordingly, S.29 (1) of the Arbitration Act²¹ provides that ‘an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his function as arbitrator unless the act or omission is shown to have been in bad faith.’

Criteria to be Accorded Arbitrator Immunity

An arbitrator who is seen to be exercising a public function has immunity in his favour, however, it is not every person who settles dispute and gives binding result that is entitled to arbitral immunity. Before a person can be said to enjoy such immunity, the person must have actually acted as an arbitrator. To be entitled to this immunity, the arbitrator must act judicially, that is

- a) He must have been jointly engaged by the parties as arbitrator;
- b) A dispute must be submitted to him:
- c) He must not be a mere investigator, but must receive evidence or submission put before him for examination and consideration; and
- d) He must give a decision which the parties must have agreed to accept.²²

Where all these are present, a person could be held to have acted in that capacity and thus enjoy immunity from civil suit in the absence of bad faith. Therefore, the decision of the nature of a so-called arbitrator's function must be dealt with at the outset in order to determine whether a party claiming it is entitled to it or not.

The criteria for arbitrators immunity was also given in *Sport Maska Inc V. Zittreer*²³, that for a third party to be classified as an arbitrator, it is essential for the agreement of the parties to contain the components of a submission, whether or not this submission is the result of an undertaking to arbitrate. A submission requires the existence of dispute and an undertaking by the parties to submit that dispute to a third party. If the parties simply intended to avoid a possible dispute, the situation is not one of submission.

However, they may have agreed to submit to the arbitration of a third party once a dispute has arisen, following an agreement to arbitrate, the prerequisite to a submission. The search for the components of a submission present no difficulty when the parties have clearly indicated their intent to have the dispute between them arbitrated upon and have clearly identified that dispute. But in the absence of a

²¹ Arbitration Act 1996

²² J.O. Orojo and M.A Ajomo, ‘Law and Practice of Arbitration and Conciliation in Nigeria’ (Mbeyi & Associates 1999) 164

²³ (1988) 1 S.C.R 564

clear intention, it is crucial to identify the precise function the parties intend to entrust to this third party under their agreement and in the circumstances of each case. The language used by the parties, the similarity between arbitration and judicial process, the role assigned to the third party, the third party's independence and the compliance by the parties with the mandatory provisions of the code of Civil Procedure are means of determining that function and the parties intention. However, these criteria are neither exhaustive nor mutually exclusive.²⁴

All these criteria are means of determining the true intention of the parties. Like the case cited above, the two questions formulated by the lower court were 'did the parties to an agreement for the sale of asset agree to submit a dispute to the arbitration by a third party? If so, did such arbitrators enjoy immunity from prosecution?' The lower court answered the first question in the negative, thus making it unnecessary to answer the second question simply because there was no arbitration submission clause. On appeal, the Quebec Court of Appeal reversed the decision and answered the questions in the affirmative that the paramount consideration is what the parties intended.

If a submission clause or arbitration agreement is a necessity for arbitrators' immunity, then customary arbitrators will not enjoy the immunity.

The Rational for Arbitrator's Immunity from Liability

In some jurisdiction, arbitrators' immunity is not in any doubt and is simply based on public policy.²⁵ Often times, the nature of the function of an arbitrator stands as the basis and jurisdiction for the immunity accorded. The juridical nature of arbitration, namely, the contractual, the jurisdictional, mixed or hyped and autonomous theory²⁶ have been used to support the basis for arbitrators' immunity.

The theories on the jurisdiction have been divided into two schools. On the one hand are those who see the arbitrator as a judge and on the other hand are those who see the arbitral award as an act of jurisdiction and also as performing a public function as a temporary judge. This theory has been used to support the immunity of arbitrator, like the Common Law jurisdictions that support the exclusion of liability for the arbitrator on the ground that the arbitrators should be treated like judges. This is well entrenched in England where arbitrators are granted immunity from suit in the absence of bad faith and full immunity in the United States of America.

²⁴ Ibid.

²⁵ J. O. Orojo & M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*. 162

²⁶ A Tsakatoura, 'The Immunity of Arbitrators' 2002

The question to be asked is how sufficient this presumed analogy is to justify the exclusion of arbitrators' liability; this presumption of similarity has also been applied to arbitration immunity on the ground of public policy. Russell²⁷ asserts that '... arbitrators were immune but only as a secondary role of public policy; the primary role was the duty of care to others.'²⁸ The second principle of public policy is that the arbitrators would be immune from suit, like judges, and they should not be discouraged from accepting appointments by the threat of personal liability.

Also, Lebel J. A²⁹ stated that arbitrator who is called upon to settle or prevent a dispute is given certain immunities. These are governed by the rule of public and not private law because of the similarity of arbitration to the judicial function, even when the conclusion of a submission to arbitration is contained in private contract, when the law does require recourse to this method of settling dispute. Proponents of the contractual school/theory would disagree with the above assertion, as it is ironic to see the argument made that liability or non-liability of arbitrators is determined by public law and not by private law. According to Alan Redfern,³⁰ the question of whether a breach of a duty by an arbitrator can be sanctioned depends on the nature of the relationship between the parties.

The contractual school sees the relationship between the arbitrator and the parties as being established by contract. It considers the arbitrator appointed by or on behalf of the parties to perform the service of resolving their dispute for them. This approach, which is found in most civil law jurisdictions, fixes arbitrators with liability for breach of contract, unlike the proponents of public policy that see an arbitrator as having the same status as that of a judge who performs judicial or quasi-judicial function.

Another argument in support of arbitrators' immunity is that an arbitrator should be able to perform his task without constantly looking over its shoulder in fear of being challenged through a legal process.³¹ An arbitrator who is expected to conduct the proceeding in a free and fair manner is also expected to enjoy certain immunity in order to be able to perform his duties fairly. This argument is more tenable, as the fear of being sued or held liable in respect of a particular arbitration may lead to the arbitrator making some errors in judgment or mistakes which could be avoided but for the fear of

²⁷ D. St John Sutton and J. Gill and M. Gearing, 'Russell on Arbitration' (24th Edn, Sweet & Maxwell Ltd 2015)

²⁸ Sutcliffe V Thackrah (1974) AC 727

²⁹ *Sport Maska Inc V. Zitrer* (1988) 1 SCR 564. 393

³⁰ A Redfern and M. Hunter, and N. Blackaby and C. Partasides' *Law and Practice of International Commercial Arbitration*. (4th edn. Sweet & Maxwell 2004) 15-16

³¹ A Tsakatoura, 'The Immunity of Arbitrators' 2002

being sued. Again this argument seems to bring out differences between an arbitrator and a judge. A judge is not personally accountable for the decision he reached in a particular case to the litigant because he is supposed to be accountable to only the State. However, his decisions are subject to appeal and, therefore, his duty to apply the law of the State should not be disrupted by fear of personal liability. It seems that every attempt to make an arbitrator and a judge similar in order to justify immunity brings forth the argument as to the differences between them. Just like Mustil and Boyd argument in their book,³² analogy, if pressed too far, can lead to false conclusion.

The different theories in relation to the concept of arbitral immunity throw some light on the rationale for the different approaches under the main theories, contractual theory, jurisdictional theory and often time hybrid theory I'e a combination of both contractual and jurisdictional theories. These theories attempt to shed light on the relationship between the arbitrator(s) and the parties and the basis for the liability of an arbitrator (if any). These jurisprudential theories have influenced how arbitral immunity is viewed in different jurisdictions.

The contractual theory evolved from Merlin's perception that the arbitration agreement has the character of a contract.³³ The proponents of contractual theory argue that the (international) arbitral process is rooted in the arbitration agreement between the disputing parties which is a contract and the arbitrator draws his power and authority from the same arbitral agreement and not from any public authority.³⁴ According to the theory, an arbitrator cannot be regarded as a judge since the function is not of a public character.³⁵

However a modern proponent of the contractual theory, Bernard argues that the arbitration agreement is a contract but which is determined by special rules. He conceded that an arbitrator is not considered to be an agent of the parties, since the duty that determines the mutual obligations of the parties cannot be fitted into that of an agent's duties. He defined the nature of this special contract as, 'a contract sui generis, governed by the rules appropriate to it and which must be dealt with by taking into account both the principles of the contract and the particular nature of the function exercised by

³² M.J Mustil & S. C Boyd, '*International Commercial Arbitration*' (LexisNexis UK 2022) 1989 226

³³ Ibid

³⁴ Mullerat R & Blanch J, "The liability of arbitrators: A survey of current practice" [2007] (1) (1) *Dispute Resolution International* ; 106

³⁵ J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion" [2009] *J. Disp. Resol.* 230 Available at: <<http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10>> accessed 01 March 2023

the arbitrator'.³⁶Countries that follow the contractual theory view arbitrators as professionals and therefore subject to civil liability like all other professionals.³⁷

Jurisdictional theory is based on the premise that the arbitrator performs judicial functions as an alternative (though private) judge as permitted under the national law (or international convention which the state has implemented) of the particular sovereign state. It postulates that both the arbitrator's powers, and the award rendered, are governed by the laws of the jurisdiction, placing all aspects of the arbitral process ultimately in the control of the State (*lex arbitri*). This theory is justified largely on the grounds that it encourages the use of arbitration as an alternative dispute resolution.

Hybrid theory attempts to reconcile the jurisdictional and contractual theories on the basis that arbitrators are creations of statutes but the ability of these arbitrators to perform their function is independent on the disputing parties' arbitral agreement and the parties appointing them.³⁸ Supporters of this theory believe that the reality lies somewhere in the middle of the contractual and jurisdictional theory therefore neither the arbitrator performs a legal function nor that the award is a contract.³⁹ The parties by their agreement created and fixed the limits of their private jurisdiction and that though the arbitrator's duty is to judge, the power to do so is conferred on him by the agreement of the parties.⁴⁰ The English Court of Appeal appear to favour the hybrid approach in *K/S Norjari v Hyundai Heavy Industries Co Ltd*, where Sir Nicholas Brow Wilkinson VC stated thus; 'for myself, I find it impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of these two elements. The arbitration agreement is a bilateral contract between the parties to the main contract. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status.'

United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and the Immunity of Arbitrators.

³⁶ Anastasia Tsakatoura, 'The Immunity of Arbitrators' 2002, E. Onyeama, 'International Commercial Arbitration and the Arbitrator's Contract' (Routledge 2010) 36

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

⁴⁰ J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, 2009. E. Onyeama, 'International Commercial Arbitration and the Arbitrator's Contract'

The UNCITRAL Model Law is silent on the question of immunity of an arbitrator and its workinggroup⁴¹ agreed that the question of the liability of an arbitrator could not appropriately be dealt with in a model law on international commercial arbitration nor was it desirable to attempt the preparation of a code of ethics for arbitrators. Likewise, the UNCITRAL Arbitration Rules of 1976 contains no provisions on the immunity of an arbitrator, however during the process of revising the 1976 Rules, it was generally agreed that any provision that might be introduced in the Rules to exonerate arbitrators from liability should be aimed at reinforcing the independence of arbitrators and their ability to concentrate with a free spirit on the merits and procedures of the case.⁴² It was recognized that arbitrators need to be protected from threats of potentially large claims from parties dissatisfied with the tribunal's decision. However, such protective provision should not result or appear to result in total impunity for the consequences of any personal wrongdoing on the part of arbitrators or otherwise interfere with public policy or the applicable law.⁴³

Thus the UNCITRAL Arbitration Rules 2010 provides that 'save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.'⁴⁴

Article 49 of the OHADA⁴⁵ Treaty

The above Article provides that 'the civil servants and employees of OHADA, the judges of the CCJA⁴⁶ and the arbitrators appointed or confirmed by said Court, shall all benefit from privileges and diplomatic immunities in the performance of their duties.' Initially, the diplomatic immunity and privileges of CCJA arbitrators was limited to those designated by the Court. By a subsequent revision of the Treaty, the privileges and immunity was extended to arbitrators appointed by the parties and confirmed by the Court. The International Bar Association (IBA) Rules of Ethics⁴⁷ provides that 'international arbitrators should in principle be granted immunity from suit under

⁴¹UNCITRAL Working Group

⁴²Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session A/CN.9/646(New York, 4-8 February 2008)

⁴³Ibid

⁴⁴Article 16, UNCITRAL Arbitration Rules 2010

⁴⁵OHADA is the French acronym for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", which translates into English as "Organisation for the Harmonization of Business Law in Africa". It was created on October 17, 1993 in Port Louis, Mauritius. 17 out of the 54 African Countries are members of OHADA including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo <<http://www.ohada.com/content/newsletters/1240/OHADA-International-Commercial-Arbitration.pdf>> accessed 02 March 2023

⁴⁶OHADA Common Court of Justice and Arbitration.

⁴⁷IBA Rules of Ethics for International Arbitrators 1987

national laws, except in extreme cases of willful or reckless disregard of their legal obligations.’The IBA appears to seek a balance between protecting arbitrators from unnecessary suits and holding them accountable for their obligations.

Arbitral Immunity Under Institutional Rules

Rules of arbitral institutions provide for the limitation of the liability of arbitrators, the arbitral institutions, their employees and other organs of the arbitral institutions. The International Criminal Court (ICC) Rules extends immunity to the ICC and its members, ICC national committees and groups and their employees and representatives. Some Rules including the Singapore International Arbitration Centre (SIAC) Rules 2016 and Kigali International Arbitration Centre (KIAC) Rules 2012 provide for absolute immunity for the arbitral tribunal and the institutions, thus arbitrators and the institution are not liable for any negligent acts or omissions. The London Court of International Arbitration (LCIA) grants a qualified immunity exempting intentional wrongdoing.⁴⁸ The Cairo Regional Centre for International Commercial Arbitration (CRCICA) follows suit.⁴⁹ The Stockholm Chamber of Commerce Rules⁵⁰ exempts willful misconduct or gross negligence and provides that the immunity/limitation of liability is dependent on the relevant applicable law.⁵¹

Arbitral Immunity in Common Law Jurisdiction

In common law jurisdiction an arbitrator is likened to a judge on the basis of public policy and is granted immunity from civil liability in the absence of bad faith. Common law countries favour the jurisdictional approach on arbitral immunity. The common law position evolved from England and the courts long recognized the concept of arbitral immunity in several cases.⁵² Notwithstanding, arbitrators are granted full immunity even in cases that bad faith can be found. This is because most American courts do not perceive arbitrators as professionals when exercising their skills.⁵³ The position of the English Arbitration Act has largely influenced the position of some common law countries. Countries such as Canada⁵⁴ and USA⁵⁵ do not have national laws with provisions on

⁴⁸ Article 16 UNCITRAL Arbitration Rules 2010, Article 31 LCIA Rules 2014, Article 79 WIPO Arbitration Rules and Article 16 Lagos Court of Arbitration Rules 2013.

⁴⁹ Article 16 CRCICA Arbitration Rules 2011

⁵⁰ Article 48, Stockholm Chamber of Commerce Rules

⁵¹ The UNCITRAL Arbitration Rules, ICC Rules, LCIA Rules, ICDR Rules, 33&34 Article 41 ICC Rules 2017; Rule SIAC Arbitration Rules 2016; Article 47 KIAC Arbitration Rules 2012; Article 38 ICDR Rules 2014

⁵² *Sutcliffe v Thackrah* [1974] A.C. 727

⁵³ A Tsakatoura, ‘*The Immunity of Arbitrators*’ 2002

⁵⁴ Susan Franck, ‘The liability of International Arbitrators: A Comparative Analysis and proposal for qualified immunity’

arbitral immunity though the common law position on arbitral immunity is applicable. In Ireland, an arbitrator is not liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions⁵⁶ even where such an arbitrator acts in bad faith unlike the English Arbitration Act which makes bad faith an exception to arbitral immunity.⁵⁷ The 2019 Indian Arbitration and Conciliation (Amendment) Act incorporates the principle of arbitral immunity.⁵⁸ They have strongly emphasized on the analogy of their functions with that of a judge. The Courts in USA indicated, in a line of cases, a growing interest in arbitration as a desirable method of dispute settlement and, therefore, by granting immunity, they wished to induce individuals to volunteer to arbitrate disputes without having to be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit.⁵⁹

As indicated earlier, the uncertainty of the Common Law position has now been remedied by Statutes in some Common Law jurisdictions (e.g. S.29(1) of the Arbitration Act 1996 of U.K as earlier cited). However, the meaning of bad faith is rather subjective. Other Common Law jurisdictions with no provision to that effect (like in Nigeria)⁶⁰ are bound or persuaded by the Common Law decisions of English courts that arbitrators are immune from suit in respect of acts done during arbitration. A resigning arbitrator is also liable for any liability incurred by reasoning of his resigning (if any). The Act in Section 74 extended arbitral immunity to arbitral institutions. An arbitral or other institution or persons by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator, or by his employees or agents, in the discharge or purported discharge of his functions as arbitrator.⁶¹

⁵⁵See *Malik v. Ruttenberg*, 942 A.2d 136 (N.J. Super. Ct. App. Div. 2008); *Johnson v. Thompson-Smith*, No. 16 C 1182 (N.D. Ill., Aug. 23, 2016). Various court decisions have also extended immunity to arbitral institutions. See *Owens v. American Arbitration Association*, No. Civ. 15-3320 (D. Minn. Dec. 15, 2015).

⁵⁶Section 22(1) Arbitration Act 2010. This immunity is extended to persons engaged by the arbitrators including an employee, agent, advisor or expert and arbitral institutions. See Section 22(2) –(5) Arbitration Act 2010

⁵⁷<<https://www.lawteacher.net/free-law-essays/commercial-law/the-principle-of-arbitrator-immunity-commercial-law-essay.php>> Accessed 5 Feb 2023, <<https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/ireland>> accessed 14 February 2023

⁵⁸See Section 42B; <<https://indiacorplaw.in/2020/04/combating-frivolous-claims-arbitral-immunity-in-india.html>> and <<http://www.inhouselawyer.co.uk/index.php/practice-areas/arbitration/germany->>> accessed 14 February 2023

⁵⁹Ibid.

⁶⁰There is no provision on arbitral immunity in the Arbitration and Conciliation Act 1988

⁶¹Lord Mackay of Clashen, *Halsbury's Laws of England* (4th Edn, Butterworth 2007) Reissue Vol 2(3) Arbitration. Para 36

Some commentators⁶² have argued that there seems to be no reason why arbitrators should be immune from liability in negligence whereas other professional are not. Also, since arbitrators have several obligations towards the parties to the arbitration, which include duty of care, acting impartially and proceeding diligently and that with immunity, those duties are unenforceable and consequently a suffering party might be left with no remedy.

Lord Morris⁶³ commented thus: ‘I think it must now be accepted that an action will not lie against an arbitrator for want of skill or negligence in making his award.’ In *Malik V. Ruttenberg*⁶⁴ where an attorney in arbitration assaulted one of the parties, the party had already asked the arbitrator to remove the attorney from the proceeding. This request was denied and the party was assaulted outside the arbitration room during a recess. The party brought an act against the American Arbitration Association and the arbitrator claiming that they know the attorney's dangerous tendencies but failed to exercise reasonable care to control these tendencies. The Association and the Arbitrator sought dismissal on the claim of immunity under NJSA 2A: 23B-14. The Court opined that the Common Law extended absolute judicial immunity to the work of quasi-judicial figures such as arbitrators. The acts of the arbitrator were found to be protected by judicial immunity as well as the arbitral organization in its job of administering arbitration. In finding that ‘immunity trumps liability’ the Appellate Court dismissed the complaint against the arbitration and the American Arbitration Association.

Also, in *Flock V. Beattie*,⁶⁵ an arbitrator was held to have breached article 9 of the arbitration agreement in a matrimonial dispute. The said article 9 states that the arbitrator shall communicate his award to the parties not later than sixty days after the close of hearings, subject to any reasonable delay due to unforeseen circumstances. The hearing of the arbitration was concluded on February 25, 2003 while written submissions were provided by September 3, 2003. The arbitrator's award was not issued until July 12, 2006. Upon an application filed by one of the parties, the award was set aside and a new hearing was directed. Dissatisfied, the other party sued the arbitrator for breach of contract, breach of duty of good faith, negligence and breach of fiduciary duty as a result of the delay, while the arbitrator claimed immunity. The Court held that, as a matter of Common Law, the

⁶² Michael Hwang and Katie Chung and Fong Lee Cheng, ‘Claims Against Arbitrators for Breach of Ethical Duties’ in Arthur W. Rovine (ed), ‘Contemporary Issues in International Arbitration and Mediation’ (Martinus Nijhoff Publishers, 2007)

⁶³ *Sutcliffe V. Thickrah* (1974) AC. 727

⁶⁴ (2008) Docket No. A-6615-06T3

⁶⁵ (2010) ABQB 193

arbitrator's unreasonable delay in delivering his arbitration decision did not take him out of his 'judicial-like role' and that he enjoyed arbitral immunity from suit in tort or contract absent of fraud or bad faith.⁶⁶

Finally, in the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability in both tort⁶⁷ and contract.⁶⁸

Arbitral Immunity in other Jurisdiction

Arbitration immunity in Civil Law countries is somewhat different from that of the Common Law adopted in the UK and the USA. Here, arbitrators are seen more as professionals, so there is no presumed analogy among them and judges. In France, the contractual theory is well embedded in the Nature of the arbitrators function. An arbitrator is clearly distinguished from judges, though there is no statutory provision in respect of arbitrator immunity from liability. He is fully liable for his act with the precondition that there should be no other remedy against the award. This liability is based on the contract between the parties and the arbitrators. So he can be liable for breach of contract⁶⁹ under Article 1382 of the Civil Law. Switzerland is similar to that of France in terms of the relationship being of a contractual nature. However, in practice, arbitrators are conferred a large degree of immunity.⁷⁰ In Austria, an injured party can claim damages for any loss caused by intent, negligence or gross-negligence, whereas, in Germany, arbitrators are accountable for willful conduct and negligence.⁷¹ Articles 12 and 13 of the International Commercial Arbitration⁷² of Greece provide that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubt as to his impartiality or independence, or if he does not possess qualifications agreed on by the parties to 367 the arbitration agreement.⁷³

Arbitral Immunity in Civil Law Jurisdiction in Africa

The civil law systems in Africa are inspired by the French, Portuguese, Spanish and the Italian legal systems. Let us take a look at at Arbitration immunity in some Civil law Jurisdiction in Africa.

⁶⁶ Felchtinger v. Conant, (1995) 893 P.2d 1266 Alaska

⁶⁷ Chambers v. Goldthorpe, [1901] 1 K.B. 624 (QB)

⁶⁸ Pappa v. Rose (1872) LR 7 C.P. 525 (Ex Ch.)

⁶⁹ A. Tsakatoura. 'The Immunity of Arbitrators' 2002

⁷⁰ Ibid

⁷¹ Ibid

⁷² The law is fashioned towards UNCITRAL Model Law

⁷³ A. Tsakatoura. 'The Immunity of Arbitrators' 2002

In Egypt, the Arbitration Act⁷⁴ is silent on the immunity of arbitrators. However arbitrators generally enjoy immunity from suit save in exceptional cases of fraud, corruption and/or gross negligence. Further, Article 217/2 of the Egyptian Civil Code precludes the exclusion of liability in case of fraud or gross negligence. The Angola Arbitration Act⁷⁵ provides for situations that may give rise to the liability of an arbitrator. Article 9(3) provides that having accepted the office, any arbitrator who withdraws without justification from the performance of his/her functions shall be civilly liable for the damages that he/she may cause. In addition, arbitrators who, with no justified grounds, prevent the arbitral award from being rendered within the time limit shall, under the law, be liable for any losses caused.⁷⁶ However arbitrators are generally immune, much as state judges.

Libya Article 748 Code of Civil and Commercial Procedure of 1953 merely provide that once an arbitrator accepts an arbitration appointment, the arbitrator may not withdraw without good reason otherwise the arbitrator might be liable in damages. Arbitrators might be held personally liable for their unjustified failure to render an award, as well as in the event of deliberate misconduct.⁷⁷ In Mozambique an arbitrator who having accepted the position and resigns without justification is liable for the damages caused.⁷⁸ The arbitrators or parties, who, without justification, impede the award being made within the deadline, are liable at law for the damages caused.⁷⁹ Where an arbitrator breaches any of its duties listed in Article 22(2), the parties may solicit the withdrawal from the office of an arbitrator.⁸⁰ The Law also provides that arbitrators are responsible for the dishonest or fraudulent exercise of their office, for the damages caused and for the violations of the law committed during the arbitration.⁸¹ In instances where an arbitrator refuses to sign the arbitral award

⁷⁴The Egyptian Arbitration Law (EAL), Law 27 of 1994 governs the proceedings of any arbitration that takes place in Egypt.

⁷⁵Law 16/2003 of 25 July 2003

⁷⁶ Article 25(3) Arbitration Act

⁷⁷Muller R. & Blanch J, "The liability of arbitrators: A survey of current practice" [2007]

⁷⁸ Article 21(5) Arbitration Law no 11/99 of 8 July.

<<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>> accessed 8 January 2023

⁷⁹Article 35(5) Arbitration Law n° 11/99 of 8 July

<<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>> accessed 8 January 2023

⁸⁰ Article 22(3) Arbitration Law n° 11/99 of 8

<<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>> accessed 2 February 2023

⁸¹ Article 22(4) Arbitration Law n° 11/99

<<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>> accessed 2 February 2023

or does not justify in writing the reasons for her dissent or particular vote, the arbitrator may be penalized with the loss of fees.⁸²

Arbitral Immunity in Mixed Legal System in Africa

Prior to the enactment of the International Arbitration Act of 2017, there was no law in South Africa expressly providing for arbitrator immunity. While notionally a claim may lie against an arbitrator for breach of mandate, there is no case law precedent whereby a party to an arbitration agreement has brought a claim against an arbitrator or former arbitrator in South Africa. There is also no restriction on the arbitrator's entitlement to require the parties to arbitration to contractually indemnify him or her on acceptance of the mandate.⁸³ The International Arbitration Act enacted in December 2017 provides for immunity of arbitrators as well as immunity of arbitral institutions.⁸⁴ Arbitral Immunity expressly provided under the Act is applicable to International Arbitration but examination of most domestic procedural rules do provide for some form of immunity.⁸⁵

While the Rwandan Arbitration Code⁸⁶ makes no provision for the immunity of an arbitrator, the Mauritian International Arbitration Act 2008 provides that the arbitrator enjoys immunity for anything done or omitted while acting as arbitrator unless the act or omission is shown to have been in bad faith.⁸⁷ The immunity is extended to the Permanent Court of Arbitration (PCA) in the discharge of its functions under the Act. This provision is titled 'Protection from Liability and Finality of Decisions.' It is based on Sections 29 and 74 of the English Arbitration Act 1996 and it has been recognised that English case law may be of assistance in future interpretations of this provision.⁸⁸

⁸² Article 22(5) Arbitration Law n° 11/99 of 8 July
<<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>>. Accessed 2 February 2023)

⁸³ The International Comparative Legal Guide to International Arbitration 2016, 13th Edition, Global Legal Group in association with CDR. <<https://www.mondaq.com/ireland/arbitration-dispute-resolution/518392/the-international-comparative-legal-guide-to-international-arbitration-2016>> accessed 02 March 2023

⁸⁴ See Section 9 of the International Arbitration Act. 2017

⁸⁵ See Article 41 of the International Court of Arbitration of the International Chamber of Commerce (ICC) Rules 2017 <<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>> (Accessed 10 January 2023); See also Article 31 of the London Court of International Arbitration (LCIA) Rules (effective 1 October 2020). <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> (Accessed 15 January 2023)

⁸⁶ Law No. 005/2008 of 14 February 2008

⁸⁷ Section 19 Mauritian International Arbitration Act 2008

⁸⁸ The Mauritian Arbitration Act 2008 <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Mauritian-International-Arbitration-Legislation-Handbook.pdf>> accessed 14 February 2023

OHADA STATES

Most of the OHADA countries practice civil law and have adopted the OHADA Uniform Act of Arbitration. The Uniform Arbitration Act contains no provision on the immunity of an arbitrator. However arbitrators designated or confirmed by the CCJA shall enjoy privileges and diplomatic immunities under Article 49 of the OHADA Treaty.

From the foregoing, one can decipher that Civil Law countries are more in favour of the contractual approach on arbitrator's immunity. Generally Civil Codes of countries such as Austria,⁸⁹ and Italy⁹⁰ expressly provide for the liability of arbitrators. Whereas in some countries like Germany,⁹¹ France,⁹² and Netherlands⁹³ there are no clearly stated provisions on the immunity of arbitrators, however arbitrators may be liable for contractual breaches. The Malaysian Arbitration Act provides that any acts or omissions by the arbitrator in the discharge of his functions will not attract liability except where the impugned act or omission was in bad faith.⁹⁴ That notwithstanding, the immunity of an arbitrator was not extended to the employee or agent of the arbitrator. Similarly, an entity that appoints, or fails or refuses to appoint a person as arbitrator is not liable in relation to the appointment, failure or refusal if it was done in good faith. Immunity of an arbitrator applies in domestic arbitration proceedings and the immunity also extends to the arbitrator acting as a 'mediator, conciliator or other non-arbitration intermediary'.⁹⁵

Conclusion

From our discussions so far, it will be tenable to conclude that arbitrators are accountable to certain extent because they are liable for their criminal activities and for their actions in bad faith.

⁸⁹See Section 594(4) of the Austrian Code of Civil Procedure. See also <http://globalarbitrationreview.com/jurisdiction/1003167/austria> accessed 02 March 2023

⁹⁰Article 813 of the Italian Civil Procedural Code

⁹¹ See sections 1036 and 1038 ZPO German Civil Code (Bürgerliches Gesetzbuch – BGB). See also <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/germany> accessed 02 March 2023

⁹² <https://www.globallegalinsights.com/practice-areas/international-arbitration-/global-legal-insights---international->Article 1142 of the French Code Civil. https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf & <http://www.inhouselawyer.co.uk/index.php/wgd_question/are-arbitrators-immune-from-liability/> accessed 10 January 2023

⁹³Article 6:162 of the Netherlands Civil Code. See also <<http://www.lexology.com/library/detail.aspx?g=d7fd72d8-8021-4b0a-836b-0515ab2c4fda>>

⁹⁴Section 47 Arbitration Act

⁹⁵See *Sinclair v Bayly* Unreported Supreme Court of Victoria, Justice Nathan, October 19, 1994

Sometimes, their award can be appealed or reviewed by the court. Therefore, an arbitrator cannot plead or claim immunity where his activity or act is criminal in nature.⁹⁶

Having discussed arbitrators' immunity both from the Common Law jurisdiction and Civil Law jurisdiction vis-à-vis the justification of the immunity, the problem of uncertainty of immunity, especially in the Common Law jurisdiction, needs to be resolved. In essence, what are the criteria for determining bad faith? It is even better in jurisdictions where they have statutory provisions in that respect, as there would be no uncertainties as to the arbitrators' immunity.

It is also suggested that a model should be put in place whereby arbitrators will be mandated to join an association in order for proper disciplinary measures to be taken against an arbitrator who has, in one way or the other, contravened any of the laid down ethical duties imposed on arbitrators. This will make the association to also be a subject of litigation when it fails to call its members to order.

Another proposal is that there should be an International Court of Arbitration that could challenge the liability of the foreign arbitrators among other matters relevant to arbitration at the International level. Although tilting towards the mixed/hybrid theory, a mid-way cause is also suggested whereby an arbitrator will be immune from unjustified claim (like judges) and will only be held liable in cases of fraud and gross negligence where it is obvious that the arbitrator is guilty of serious act of misconduct during the arbitration.

This paper further suggests the notion of the autonomous theory to the extent that since arbitration is seen as having autonomous character. Then, there should be laws, both international and domestic, specifically in respect of arbitrators' immunity in order to do away with all these doubts and uncertainties.

The problem of borrowing from the Common Law doctrine of immunity of arbitrator as applicable to the Nigerian situation would not have arisen if the Arbitration and Conciliation Act 1988 has specifically provided for immunity. It is therefore suggested that the Arbitration and Conciliation act be amended to provide for this lacuna in order to do away with the uncertainties involving the issue of arbitrators' immunity.

⁹⁶ Jonnette Watson Hamilton, 'Doubts about Arbitrator Immunity' (2010) Case Considered Flock v Beattie (2010 ABQB 193) <<https://www.google.com/amp/s/ablawg.ca/2010/04/28/doubts-about-arbitrator-immunity/>> accessed 02 March 2023