

THEME: THE SYNERGY AND DIVERGENCE BETWEEN CIVIL LAW AND COMMON LAW IN INTERNATIONAL ARBITRATION

**TOPIC: IMMUNITY OF ARBITRATORS
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Introduction

Arbitral immunity exempts arbitrators from certain acts or omissions arising out of or in relation to their functions.¹ The concept of arbitral immunity is essentially premised on policy considerations of according immunity to persons acting in judicial capacity. Judicial immunity, a common law doctrine entails that any person acting within a judicial capacity, if acting within his jurisdiction, shall enjoy immunity from any liability that may result from him discharging his duties.² The scope and application of arbitral immunity may differ between different jurisdictions depending upon the parties' agreement,³ the applicable institutional rules and the provisions of the applicable national law.

The purpose of this paper is to give an overview of the concept of arbitral immunity with references to the practice in countries and the application of the doctrine by arbitral institutions. The paper highlights the differences in the approach of civil and common law jurisdictions and seeks to identify the existence of any common grounds and/or divergences. Possible solutions to achieving harmonization or bridging the gap between common and civil law cultures in a bid to aid certainty in international arbitration are proffered.

Judicial/Arbitrator's Immunity

The concept of arbitral immunity derives justification from judicial immunity in common law jurisdictions.⁴ In *Bremer Schiffban v South Indian Shipping Corp Ltd*,⁵ Donaldson held that 'courts and arbitrators are in the same business, namely the administration of justice. Donaldson J however affirmed that 'the only difference is that the courts are in the public and arbitrators are

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¹ For the definition of immunity generally see Black's Law Dictionary 8th edn (United States: Thomson West, 2004) p 765. See also <https://definitions.uslegal.com/a/arbitral-immunity/> [accessed 29 June 2017]

² See J Randolph Block, "Stump v Sparkman and the History of Judicial Immunity," (1980) 5 *Duke LJ* 880. In the Irish case, *Patrick Redahan v Minister for Education and Science*, [2005] LEH C 271, Giligan J referred to the policy arguments cited by Lord Denning in *Sirros v Moore* [1975] 1 QB (CA) 118 (1974) 132 137 in relation to the immunity of judges from suits. He also referred to the Irish decision in *Manning v Shackleton* [1996] 3 IR 88 94 where the Irish Supreme Court reiterated policy arguments in support of arbitrators enjoying immunity from suits at common law on the basis of being in a quasi-judicial position and thus should enjoy immunity from negligence and mistakes in law, and fact in the absence of bad faith. See also Adedoyin Rhodes-Vivour, *Commercial Arbitration Law and Practice in Nigeria through the Cases*, South Africa, LexisNexis 2016 p216

³ To the extent that the Lex arbitri allows this.

⁴ Judicial immunity dates back at least to two early seventeenth century English cases, *Floyd v. Barker* 77 *Eng. Rep.* 1305 (1607) and *The Marshalsea*, 77 *Eng. Rep.* 1027 (1612) in which Lord Coke announced the rule of judicial immunity, stated its purposes, and specified its limitations.

⁵ 1981 AC 999-21

in the private sector of the industry.’ International instruments state the protection granted to judges through the doctrine of judicial immunity. The IBA Minimum Standards of Judicial Independence (Adopted 1982) provides that a judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.⁶

The UN Basic Principles on the Independence of the Judiciary 1985 though recognizing that judges may be subject to disciplinary procedure and their decisions subject to right of appeal, states that judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.⁷

However opponents of a broad conferment of immunity on arbitral tribunals argue that there are differences between an arbitrator and a judge in the carrying out of their functions. Firstly whilst a judge’s power is derived directly from a state, an arbitrator derives its power from the agreement of the parties and unlike a judge who is accountable to the state, the arbitrator is accountable to the parties and the arbitral institutions, where applicable. Furthermore in most jurisdictions an arbitrator’s decision is not subject to appeal or is subject to appeal on limited grounds whilst a judge’s decision can be revised or rectified on appeal. An arbitrator is also paid by the parties whilst a judge derives its remuneration from the state.⁸ Arguments are thus advanced that parties and arbitral institutions deserve a right of action against arbitrators who act carelessly, negligently or compromise in any form the high expectations of the parties.⁹ There are arguments in favour of the grant of arbitral immunity.¹⁰ Immunity helps to ensure the finality of an award. Fewer skilled persons would be willing to act if they were to run the risk of incurring substantial liability.¹¹ In addition, arbitrators have no interest in the outcome of the dispute and should not be compelled to become parties to it.¹² Finally, it ensures the protection of the public in those cases in which truly the judicial functions are exercised.¹³

The approach differs in various jurisdictions and in particular the civil and common law divide. It is possible to group the different approaches into countries which offer their arbitrators absolute immunity, others who offer them a limited or qualified immunity and others which offer

⁶ See G43 IBA Minimum Standards of Judicial Independence (Adopted 1982)

⁷ See UN Basic Principles on the Independence of the Judiciary 1985. For the rationale for the wide extent of judicial cover from suits see *McC v Mullan* [1984] 3 All ER 908(at page 916b) where Lord Bridge held as follows: ‘If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of the society to leave that party without a remedy than that 999 honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.’

⁸ For further reading see R. Mullerat, J. Blanch, “The liability of arbitrators: A survey of current practice”, *Dispute Resolution International* Vol. 1 No 1 June 2007 p 106

⁹A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (New York: Oxford University Press, 2015) pg 325

¹⁰ A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (New York: Oxford University Press, 2015) pg 324

¹¹A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (New York: Oxford University Press, 2015)

¹² A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (New York: Oxford University Press, 2015)

¹³A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (New York: Oxford University Press, 2015)

no immunity whatsoever (absolute liability).¹⁴ The different theories in relation to the concept of arbitral immunity throw some light on the rationale for the different approaches.

THEORIES ON ARBITRATORS' IMMUNITY

Arbitral immunity has been classified under three main theories, contractual theory, jurisdictional theory and hybrid theory. These theories attempt to understand 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.¹⁵

Contractual theory

The theory evolved from Merlin's perception that the arbitration agreement has the character of a contract.¹⁶ 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.¹⁷

According to the theory, an arbitrator cannot be regarded as a judge since the function is not of a public character.¹⁸ However a modern proponent of the contractual theory, Bernard argues that the arbitration agreement is a contract but which is determined by special rules.¹⁹ 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.²⁰ 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 the arbitrator.'²¹

¹⁴ R. Mullerat, J. Blanch, "The liability of arbitrators: A survey of current practice", *Dispute Resolution International* Vol. 1 No 1 June 2007 p106

¹⁵ J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The," 2009 *J. Disp. Resol.* (2009) page 230 Available at: <http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed 6 June 2017]

¹⁶ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators," LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 6 June 2017]

¹⁷ E. Onyeama, *International Commercial Arbitration and the Arbitrator's Contract* (New York, Routledge, 2010) p 36

¹⁸ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators", LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 6 June 2017]

¹⁹ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators", LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 6 June 2017]

²⁰ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators," LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 6 June 2017]

²¹ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators," LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 6 June 2017]

Countries that follow the contractual theory view arbitrators as professionals and therefore subject to civil liability like all other professionals.²²

Jurisdictional theory

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.²³ 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 forum.²⁴

Hybrid theory

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 dependent on the disputing parties' arbitral agreement and the parties appointing them.²⁵ Supporters of this theory "believe that the reality lies somewhere in the middle of the contractual and jurisdictional theory, namely, that neither the arbitrator performs a legal function nor that the award is a contract.²⁶ 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 to him by the agreement of the parties.²⁷

The English Court of Appeal appear to favour the hybrid approach in *K/S Norjari v Hyundai Heavy Industries Co Ltd*,²⁸ where Sir Nicholas Browne-Wilkinson VC noted that:

"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

²² J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The," 2009 *J. Disp. Resol.* (2009) p 229 Available at: <http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed 6 June 2017]

²³ E. Onyeama, *International Commercial Arbitration and the Arbitrator's Contract* (New York, Routledge , 2010) p 33

²⁴ J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The," 2009 *J. Disp. Resol.* (2009) p 230 Available at: <http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed 6 June 2017]

²⁵ E. Onyeama, *Onyeama, International Commercial Arbitration and the Arbitrator's Contract* (New York, Routledge , 2010) p 57

²⁶ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators," *LEX E-SCRIPTA ONLINE LEGAL J.* (June 20, 2002), available at <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 6 June 2017]

²⁷ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators," *LEX E-SCRIPTA ONLINE LEGAL J.* (June 20, 2002), available at <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 6 June 2017]

²⁸ [1992] QB 863, [1991] 3 WLR 1025, at [7]

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.”

INTERNATIONAL INSTRUMENTS

UNCITRAL Model Law on International Commercial Arbitration

The Model Law is silent on the question of immunity of an arbitrator. The UNCITRAL Working Group 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.²⁹

UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules 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. 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.³⁰

Thus the UNCITRAL Arbitration Rules 2010 provides:³¹

‘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.

OHADA³²

²⁹ Report of the Working Group on international contract practices on the work of its third session A/CN.9/216, (New York, 16-26 February 1982)

³⁰ Report 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)

³¹ Article 16 UNCITRAL Arbitration Rules 2010

³² OHADA is the acronym for the French "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", which translates into English as "Organisation for the Harmonization of Business Law in Africa". 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

Article 49 of the OHADA Treaty provides as follows:

“the civil servants and employees of OHADA, the judges of the [CCJA] 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.³³

IBA Rules of Ethics for International Arbitrators 1987

The IBA Rules of Ethics provides that;

‘International arbitrators should in principle be granted immunity from suit under 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.

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 ICC Rules extends immunity to the ICC Court and its members, ICC national Committees and Groups and their employees and representatives.³⁴ Some Rules including the SIAC Rules 2016³⁵ and KIAC Rules 2012³⁶ provide for absolute immunity for the arbitral tribunal and the institutions. Thus arbitrators and the institution are not liable for any negligence, acts or omissions. The LCIA grants a qualified immunity exempting intentional wrongdoing.³⁷ The Cairo Regional Centre follows suit.³⁸ The Stockholm Chamber of Commerce Rules exempts wilful misconduct or gross negligence.³⁹ The UNCITRAL Arbitration Rules, ICC Rules, LCIA Rules, ICDR Rules⁴⁰ provide that the immunity/limitation of liability is dependent on the relevant applicable law. The Vienna Rules provide that the liability of arbitrators is excluded ‘to the extent legally

³³ <http://www.ohada.com/content/newsletters/1240/OHADA-International-Commercial-Arbitration.pdf> [Accessed 14 July 2017]

³⁴ Article 41 ICC Rules 2017

³⁵ Rule 38 SIAC Arbitration Rules 2016

³⁶ Article 47 KIAC Arbitration Rules 2012

³⁷ Article 16 UNCITRAL Arbitration Rules 2010, Article 31 LCIA Rules 2014, Article 79 WIPO Arbitration Rules and Article 16 Lagos Court of Arbitration Arbitration Rules 2013.

³⁸ Article 16 CRCICA Arbitration Rules 2011

³⁹ Article 48, Stockholm Chamber of Commerce Rules

⁴⁰ Article 38 ICDR Rules 2014

permissible.⁴¹ The ICDR Rules further provide that the parties agree that arbitrators are not under any obligation to make any statement about the arbitration and parties shall not make them, a party or witness in any judicial or other proceedings relating to the arbitration.

IMMUNITY UNDER NATIONAL LAWS

ARBITRAL IMMUNITY IN AFRICA

Africa is made up of diverse legal systems including common law, customary law, civil law and religious law systems. The laws in a number of African countries are influenced by one or more of these legal systems. Therefore arbitral immunity will be discussed under common law jurisdictions,⁴² civil law jurisdictions⁴³ including the OHADA States⁴⁴ and mixed regime jurisdictions.⁴⁵

COMMON LAW JURISDICTIONS IN AFRICA

The principle of arbitral immunity in common law jurisdictions in Africa have been greatly influenced by the common law received from England. In jurisdictions where there are no express provisions on arbitral immunity, common law is deemed to be applicable. Equally the provisions of the English Arbitration Act 1996 on the immunity of an arbitrator were adopted with little or no modifications in Ghana,⁴⁶ Liberia⁴⁷ and Kenya.⁴⁸

Nigeria

The Arbitration and Conciliation Act⁴⁹ makes no provisions on the immunity of arbitrators. However common law is applicable in Nigeria and arbitral immunity from suit exists at common law. Thus courts in various common-law jurisdictions have consistently recognized that arbitrators perform duties of a judicial character and enjoy the same immunity as judges in view of the adjudicatory nature of their functions.⁵⁰ In *NNPC v Lutin Investment Ltd*,⁵¹ Hon. Justice Uche Omo was named as a party in a judicial proceeding for action he had taken as an arbitrator. The Court heard and determined the dispute involving the arbitrator however the claims were

⁴¹ Article 46 of the Rules of Arbitration of the Vienna International Arbitral Center (VIAC) 2013

⁴² These include Gambia, Sierra Leone, Ghana, Nigeria, Zambia, Malawi, Tanzania, Kenya, Uganda, South Sudan, Rwanda

⁴³ These include Algeria, Angola, Benin, Burkina Faso, Burundi, Chad, Congo, Democratic Republic of Congo, Cote D'Ivoire, Cape Verde, Central African Republic, Egypt, Equatorial Guinea, Ethiopia, Eritrea, Gabon, Guinea Bissau, Libya, Mauritius, Rwanda,

⁴⁴ These include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.

⁴⁵ These include South Africa, Somalia, Botswana, Cameroon, Lesotho, Mauritius, Namibia, Swaziland, Zimbabwe

⁴⁶ Section 23 (1) Alternative Dispute Resolution Act, 2010

⁴⁷ Section 7.21 Liberian Commercial Code of 2010

⁴⁸ Section 16B, Arbitration Act 1995 as amended in 2010

⁴⁹ Cap A18LFN 2004

⁵⁰ *Lendon v Keen* [1916] 1 KB 994; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 (HL).

⁵¹ [2006] 2 CLRN 1 16.

dismissed. The issue of immunity of the arbitral tribunal was not raised during the court proceedings.⁵²

The Lagos State Arbitration Law specifically provides for arbitral immunity adopting the provisions of the English Arbitration Act 1996.⁵³

Zambia

Section 28 of the Arbitration Act⁵⁴ provides that an arbitrator, an arbitral or other institution or a person authorized by or under the 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. The Act further provides that witnesses in arbitral proceedings enjoy protection from liability as witnesses appearing before a court of law.

Uganda

The Ugandan Arbitration and Conciliation Act 2000 is silent on immunity of an arbitrator.⁵⁵ However Section 19(4) provides that every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court. In *Attorney General v Dtt Services & 3 Ors*,⁵⁶ it was held that arbitrators are vested with judicial immunity which protects their person from claims by the parties regarding any judicial intervention professed by them. The court on this premise held that there can be no claim for general or special damages against an arbitrator under the Arbitration Act.⁵⁷ Thus the court confirmed that the common law position is applicable in Uganda.

Tanzania

The Tanzanian Arbitration Act 1931 made no provision for the immunity of an arbitrator. However Tanzania's legal system is based on the English Common Law thus the position of the common law on arbitral immunity was applicable. The 1931 Act has now been repealed by the Arbitration Act No. 2 of 2020 (“the Act”).⁵⁸ The Act provides for both the immunity of arbitrators as well as immunity of arbitral institutions.⁵⁹

⁵² Adedoyin Rhodes-Vivour, *Commercial Arbitration law and Practice Through the Cases* (South Africa, LexisNexis, 2016) p 216

⁵³Section 18(1)-(3) Lagos State Arbitration Law

⁵⁴ Arbitration Act No. 19 of 2000

⁵⁵ See the Report of the study undertaken by the Ugandan Law Reform Commission commissioned with the support of the Justice Law and Order section for the purposes of reviewing and informing the Arbitration and Conciliation Act 2000. The Report recognised that having a law which is supportive of arbitral immunity ensures the efficient and speedy administration of justice.

⁵⁶(CAD/AMA/01/2013) [2013] UGCADER 1 (10 April 2013); <https://www.ulii.org/ug/judgment/court-appeal/2013/1-0> [Accessed 23 June 2017]

⁵⁷ Sections 13-14 Arbitration and Conciliation Act 2000

⁵⁸ See Section 91 of the Arbitration Act, No 2 of 2020; <https://www.agctz.go.tz/uploads/publications/sw1582713039-THE%20ARBITRATION%20ACT,%202020%20Final%20chapa.pdf> [Accessed on 25 August 2020]

⁵⁹See Section 31 and 76 of the Arbitration Act, No 2 of 2020

CIVIL LAW JURISDICTIONS IN AFRICA

The civil law systems in Africa are inspired by the French, Portuguese, Spanish and the Italian legal systems.

Egypt

The Arbitration Act 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.

Angola

The Arbitration Act⁶⁰ 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.⁶¹ However arbitrators are generally immune, much as state judges.⁶²

Libya

There are no provisions in Libyan Law No.4 for 2010 on Arbitration and Conciliation. Article 748 Code of Civil and Commercial Procedure 1953 of 1953 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.⁶³

Mozambique

In Mozambique an arbitrator who having accepted the position and resigns without justification is liable for the damages caused.⁶⁴ The arbitrators or the parties who without justification impede

⁶⁰ Law 16/2003 of 25 July 2003

⁶¹ Article 25(3) Arbitration Act

⁶² <https://gettingthedealthrough.com/area/3/jurisdiction/151/arbitration-angola/> [Accessed 23 June 2017]

⁶³ <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/libya> [Accessed 23 June 2017]

⁶⁴ Article 21(5) Arbitration Law n° 11/99 of 8 July.

<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>. [Accessed 22 June 2017]

the award being made within the deadline, are liable at law for the damages caused.⁶⁵ 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.⁶⁶ 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.⁶⁷ In instances where an arbitrator refuses to sign the arbitral award or does not justify in writing the reasons for her dissent or particular vote, the arbitrator may be penalized with the loss of fees.⁶⁸

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.

ARBITRAL IMMUNITY IN MIXED LEGAL SYSTEMS IN AFRICA

SOUTH AFRICA

Prior to the enactment of the International Arbitration Act 15 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.⁶⁹ The International Arbitration Act enacted in December 2017 provides for both immunity of arbitrators as well as immunity of arbitral institutions.⁷⁰ Arbitral Immunity expressly provided under the Act is applicable to International Arbitration, the purview of the Act.⁷¹

⁶⁵ Article 35(5) Arbitration Law n° 11/99 of 8 July
<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>. [Accessed 22 June 2017]

⁶⁶ Article 22(3) Arbitration Law n° 11/99 of 8 July
<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>. [Accessed 22 June 2017]

⁶⁷ Article 22(4) Arbitration Law n° 11/99 of 8 July
<http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf>. [Accessed 22 June 2017]

⁶⁸ 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 22 June 2017]

⁶⁹ The International Comparative Legal Guide to International Arbitration 2016, 13th Edition, Global Legal Group in association with CDR

⁷⁰ See Section 9 of the International Arbitration Act. 2017

⁷¹ International Arbitration is defined in the Act in Article 1(3) of Schedule 1. An examination of most domestic procedural rules do provide for some form of immunity. 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 on 25 August 2020]; 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 25 August 2020]

Rwanda

The Rwandan Arbitration Code⁷² makes no provision for the immunity of an arbitrator.

Mauritius

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.⁷³ The immunity is extended to the Permanent Court of Arbitration (PCA) in discharge of its functions under the Act. This provision is headed as “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.⁷⁴

COUNTRIES OUTSIDE AFRICA

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.⁷⁵ The common law principles conferring immunity upon arbitrators have been codified by s. 29 of the Arbitration Act 1996.⁷⁶ Section 29 of the English Arbitration Act provides that an arbitrator and his employee or agent is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. A resigning arbitrator is also liable for any liability incurred by reasoning of his resigning (if any). The Act extended arbitral immunity to arbitral institutions.⁷⁷ An arbitral or other institution or person designated or requested by parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been made in bad faith.⁷⁸ 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.⁷⁹ Thus both arbitrators and arbitral institutions are not immune for acts or omissions done in bad faith.

⁷² Law No. 005/2008 of 14 February 2008

⁷³ Section 19 Mauritian International Arbitration Act 2008

⁷⁴ <https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Mauritian-International-Arbitration-Legislation-Handbook.pdf> [Accessed 14 July 2017]

⁷⁵ *Sutcliffe v Thackrah* [1974] A.C. 727

⁷⁶ R. Merkin *Arbitration Law* (London: Informa Professional, 2004) p387

⁷⁷ Section 74, Arbitration Act 1996

⁷⁸ Lord Mackay of Clashen, Halsbury's Laws of England Fourth Edition Reissue Vol 2(3) Arbitration. Para 36

⁷⁹ Lord Mackay of Clashen, Halsbury's Laws of England Fourth Edition Reissue Vol 2(3) Arbitration. Para 36

The position of the English Arbitration Act has largely influenced the position of some common law countries including Australia.⁸⁰ Such countries including Canada⁸¹ and USA⁸² do not have national laws with provisions on 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 functions⁸³ even where such an arbitrator acts in bad faith unlike the English Arbitration Act which makes bad faith an exception to arbitral immunity.⁸⁴ The 2019 Indian Arbitration and Conciliation (Amendment) Act incorporates the principle of arbitral immunity.⁸⁵

Civil law countries favour the contractual approach on arbitral immunity. Generally Civil Codes of countries including Austria,⁸⁶ Italy⁸⁷ expressly provide for the liability of arbitrators. In some countries like Germany,⁸⁸ France,⁸⁹ Netherlands⁹⁰ there are no explicit provisions on the immunity of arbitrators however arbitrators may be liable under provisions 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.⁹¹ The Spanish Arbitration Act provides that where Arbitrators and, as appropriate, the arbitral institution, fail to comply with their commission in good faith, they will

⁸⁰ See Section 28 of the International Arbitration Act 1974 (as amended in 2010). However, the immunity of an arbitrator was not extended to the employee or agent of the arbitrator. Equally, 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 arbitral proceedings and the immunity also extends to the arbitrator acting as a ‘mediator, conciliator or other non-arbitral intermediary.’ See *Sinclair v Bayly* Unreported Supreme Court of Victoria, Justice Nathan, Oct 19, 1994

⁸¹ http://www.fasken.com/files/Publication/0020d7a2-7c72-4320-8c00-42bfb8f24fe0/Presentation/PublicationAttachment/df3a5202-5aa9-4647-8368-4eb1192235df/IA10_Chapter-37_Canada.pdf [Accessed 13 June 2017]. See also *Sport Maska Inc. v. Zitrer* [1988] 1 S.C.R. 564

⁸² See *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).

⁸³ Section 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

⁸⁴ <https://www.lawteacher.net/free-law-essays/commercial-law/the-principle-of-arbitrator-immunity-commercial-law-essay.php> [Accessed 5 June 2017], <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/ireland> [Accessed 14 July 2017]

⁸⁵ See Section 42B; <https://indiacorplaw.in/2020/04/combating-frivolous-claims-arbitral-immunity-in-india.html> [Accessed 25 August 2020]

⁸⁶ See Section 594(4) of the Austrian Code of Civil Procedure. See also <http://globalarbitrationreview.com/jurisdiction/1003167/austria> .

⁸⁷ Article 813 bis of the Italian Civil Procedural Code

⁸⁸ 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>
<https://www.globallegalinsights.com/practice-areas/international-arbitration-/global-legal-insights---international-arbitration-3rd-ed./germany>, <http://www.inhouselawyer.co.uk/index.php/practice-areas/arbitration/germany-arbitration/>

⁸⁹ 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 21/6/2017

⁹⁰ Article 6:162 of the Netherlands Civil Code. See also <http://www.lexology.com/library/detail.aspx?g=d7fd72d8-8021-4b0a-836b-0515ab2c4fda>

⁹¹ Section 47 AA

be liable for any damages resulting from bad faith, recklessness or mens rea.⁹² It further provides that arbitrators or arbitral institutions on their behalf will be bound to take liability insurance or equivalent security for the amount established in the rules.⁹³ The Singapore International Arbitration Act provides that an arbitrator will not be liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator and any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.⁹⁴ The Act further adopts the provisions of the English Arbitration Act 1996 on the immunity of appointing authorities and arbitral institutions.⁹⁵ The New Zealand Arbitration Act provides that arbitrators are not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator.⁹⁶

SYNERGIES

Most jurisdictions acknowledge a form of immunity either absolute or qualified for arbitrators and/or including their agents for either judicial acts only and/or procedural errors.

An analysis of both common law and civil law jurisdictions reveal that most jurisdictions apply limited/qualified immunity. Most jurisdictions acknowledge liability on limited grounds e.g. failure to discharge duties, delay in the delivery of the award, misconduct, fraud, bad faith and corruption.

The immunity of arbitrators 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 jurisdiction.

DIVERGENCE

Arbitral immunity in common law countries is premised on the origin and character of the appointment and not on the methods of performing the duties.⁹⁷ In these jurisdictions, judges and arbitrators are perceived as playing similar roles in the administration of justice and arguments are made for immunity on public policy grounds.⁹⁸ Civil law countries premise liability of an arbitrator on the terms of appointment rather than the functions an arbitrator performs. Thus the liability of the arbitrator is based on the contractual relationship between the arbitrator and the parties. In mostly civil law jurisdictions, an arbitrator may also be liable in torts for failure to act with diligence or due care as a professional. Interestingly in some civil law jurisdictions, in spite

⁹² Article 21 Spanish Arbitration Act.

⁹³ Article 21 Spanish Arbitration Act.

⁹⁴ Section 25, International Arbitration Act Chapter 143A

⁹⁵ Section 25A International Arbitration Act Chapter 143A . Compare with Section 74 English Arbitration Act 1996

⁹⁶ Section 13 New Zealand Arbitration Act.

⁹⁷ Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration (The Hague, Kluwer Law International, 2003) p 289

⁹⁸ A. Redfern and M. Hunter, Redfern and Hunter on International Arbitration 6th edn (New York: Oxford University Press, 2015) p 324

of the contractual basis, the courts recognize that arbitrators perform similar functions with judges and should be accorded some form of immunity from suits.⁹⁹

There are divergences in the scope, nature and extent of arbitral immunity in civil and common law jurisdictions. The scope of the liability of an arbitrator in civil law jurisdictions appears wider than that applicable in common law countries. In common law countries the major exception to immunity will be bad faith¹⁰⁰ or lack of good faith and for losses occasioned by the resignation of an arbitrator.¹⁰¹ Arbitrators in civil law countries may be liable under the general principles of tort and contract law on several grounds including delay in rendering a timely award, erroneous application of the law, gross negligence, willful misconduct, denial of justice and misrepresentation.

Most common law jurisdictions provide for the immunity of an arbitrator while civil law jurisdictions expressly provide and/or make reference to the liability of an arbitrator.

Common law jurisdictions practice absolute immunity or limited immunity with very few grounds for liability. Civil law jurisdictions provide for absolute liability or wider grounds for the liability of an arbitrator.

In some common law jurisdictions, immunity is extended to persons engaged by the arbitrator including employees, agents advisor or expert. In Australia, immunity is further extended to an arbitrator acting as a ‘mediator, conciliator or other non-arbitral intermediary. Arbitral immunity has also been extended to appointing authorities including arbitral institutions and their employees or agents in respect of the appointment of arbitrators and other functions. Some jurisdictions like Zambia and Uganda provide that immunity extends to witnesses in arbitral proceedings. However a number of civil law jurisdictions recognize the immunity of arbitrators and/or arbitral institutions while it is silent on the liability of persons employed by arbitrators or appointing authorities.

Arbitrators in civil law jurisdictions are usually liable in damages for civil claims. In some civil jurisdictions, the arbitrators have been found liable to pay all or part of the costs of a failed arbitration.¹⁰² The arbitrators may also forfeit all or part of their fees in instances where liability is established by the court.

⁹⁹ *Bompard v. Consorts C. et al.* (Court of Appeal of Paris, 22 May 1991), <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/france> [Accessed 14 July 2017], <https://www.hoganlovells.com/blogs/international-arbitration-news/arbitrators-in-france-a-quasiimmunity-from-liability> [11 July 2017]

¹⁰⁰ In England, bad faith has been said to mean malice in the sense of personal spite or desire to injure for improper reasons or knowledge of absence of power to make the decision in question. See Sutton David St John, Gill Judith & Gearing Matthew *Russell on Arbitration* 23rd edn (London: Sweet & Maxwell, 2007) p 175

¹⁰¹ Sutton David St John, Gill Judith & Gearing Matthew *Russell on Arbitration* 23rd edn (London: Sweet & Maxwell, 2007) p 175

¹⁰² *Du Toit v Vale* [1993] WAR 138.

There are little or no cases in common law jurisdictions where arbitrators were held liable for civil claims arising out of the arbitration.¹⁰³ Many common law jurisdictions have adopted the UNCITRAL Model Law which provides remedies for the acts or omissions of the arbitrator. Commonly the recourse against the acts or omissions of the arbitrator is against the award not the arbitrator personally subject to the exceptions to the immunity rule.¹⁰⁴ In instances of misconduct, the arbitrator may be removed upon application to the Court.

Conclusion

Arbitrators should be able to perform their functions without threats, harassment or intimidation from a losing party. However arbitrators are professionals who are being remunerated for the tasks they perform. All jurisdictions civil law and common law recognise that arbitrators owe duties to the parties irrespective of whether they follow the contractual or jurisdictional approach.

The CIARB London Centenary Principles 2015 recognizes arbitral immunity as an important principle for an efficient and effective seat of arbitration. It provides for a clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

The issue is the extent to which arbitrators should be conferred with immunity. It appears there is no common worldwide approach. The standards for liability and/or the exceptions currently provided for in most national laws and rules e.g. 'bad faith', 'good faith' and 'conscious and deliberate wrongdoing' is not easily ascertainable.

Uniform principles and standards of immunity across the civil/common law divide should be adopted with a view to establishing uniform application of immunity and the exceptions to the protection. Making arbitrators liable for wrongful acts or omission preserves the integrity of the office and the continuing legitimacy of the arbitration process. Adopting a uniform approach beyond the divide engenders well for the development and growth of international commercial arbitration and will be in line with the spirit and intent of the harmonization of arbitration law and practice. UNCITRAL and Arbitral institutions should promote the case for harmonization in this area.

¹⁰³ See <http://www.nadr.co.uk/articles/published/construction/Immunity%20Spurin%202006.pdf> [accessed 12 July 2017]

¹⁰⁴ However see the case of *Wicketts v Brine Builders & Siederer*[2001] App.L.R. 06/08 where the English Court removed the arbitrator for serious procedural irregularity and he was ordered to pay the costs of a party to the arbitration.