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Proposal for a Uniform Rule on Arbitrator Immunity

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This article navigates through institutional rules and national case law to demonstrate that a uniform rule governing arbitrator immunity is both welcome and timely. The author identifies which elements matter when defining arbitrator liability and suggests a wording to be included in the texts that regulate arbitration.

Introduction

International arbitration is a self-regulated system of cross-border dispute resolution services, composed of arbitral institutions, governmental and non-governmental organizations, lawmakers, academia, and practitioners, including arbitrators and counsel, as well as other players such as experts, funders and specialized media. Because it is self-regulated, its effectiveness relies almost entirely on trust. The Secretary General of the Stockholm Chamber of Commerce described this impeccably in 2016:

> Public and private parties refer to arbitration because they trust the system. They trust that international arbitration will offer a neutral and impartial resolution of their disputes, and a level playing field. They trust a procedure governed by the rule of law; at national level through legal frameworks, which thanks to the UNCITRAL Model Law on International Commercial Arbitration, but also other instruments, demonstrates an impressive consistency throughout the world, and at international level with the help of instruments such as the New York Conventions on the Enforcement and Recognition of Foreign Arbitral Awards and the Washington Convention on the Settlement of Investment Disputes. And they know that in the end, their rights, as defined in an arbitral award – should they be successful – must be respected and upheld by national courts in more than 150 jurisdictions as a matter of international law.[1]

As the market grows, arbitration becomes more complex and sophisticated, including users and practitioners from different backgrounds and often involving numerous jurisdictions in a single case. As the system becomes more complex, different demands arise to ensure that the playing field remains leveled and arbitration continues to deliver the desired result: reliable awards.

In this regard, in the last decade the system saw increasing demands for transparency and efficiency. In relation to the former, institutions reduced moral hazard resulting from the asymmetry of information between users and players by taking different measures, such as publicizing information on the identity of arbitrators and requiring arbitrators to reveal information regarding their relations with other actors in the specific cases. The International Bar Association (IBA) developed 'Guidelines on Conflicts of Interest in International Arbitration' in 2004 and revised them ten years later, seeking to harmonize criteria across the globe. In addition, efforts such as the Global Arbitration Review's Arbitrator Research Tool 'ART' and the ongoing efforts to finish a complete non-profit tool, Arbitrator Intelligence 'AI', provide detailed material on arbitrators' skills, experience and other data. As to efficiency, institutions now offer an array of tools that improve timeliness, such as expedited procedures and stricter time limits within which to render arbitral awards (often hinging arbitrators' fees on the compliance with such time frames, e.g. the ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration)[2]. The increase in emergency arbitration services is also a manifestation of the push to make the system more efficient.

In this context of widespread use and complexity, news of cases where arbitrators have been sued has called the author's attention. While it is not a trend, it is not unlikely that dissatisfied parties will seek this recourse increasingly, with or without merit. The absence of specific legal norms and standards governing arbitrator immunity in a uniform manner results in uncertainty,

1 Annette Magnusson, keynote address 'Why Arbitration Matters', GAR Live 8 April 2016, available at http://sccinstitute.se/media/93591/annette-magnusson-gar-live-keynote-speech-8-april-2016_.pdf

2 Available at https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/

which – coupled with the arbitrator-turned-defendant having to invest resources and time as well as dealing with anxiety – is undesirable for the system.

The immunity of judges was conceived to prevent them from being sued for alleged infringements in the performance of their duties. This protection was first introduced in the judicial system and was later transferred to arbitrators. It fulfills several purposes, among which doctrine and jurisprudence have highlighted the following:

- safeguard freedom of judgment and independence of criteria that must be applied by arbitrators when exercising the jurisdictional function,[3]
- protect the integrity of the process,
- avoid a 'chilling effect' causing arbitrator unavailability, and
- guarantee that annulment be the only recourse against awards.

While there is no denying that immunity of arbitrators contributes to the effectiveness of arbitration, immunity should not be absolute, as it would destabilize the fundamental principle of equality before the law and disregard the contractual nature of arbitration. Indeed, although immunity originally arose as a protection from tortious claims, arbitrators also acquire contractual obligations and should not be able to shirk them. This is likely the reason why this topic is not treated in a uniform manner in arbitration rules or in statutes, as will be described below. Given that the 1985 UNCITRAL Model Law did not include a provision on arbitrator liability – despite the UNCITRAL Secretariat's suggestion to further consider this issue in 1999 –[4], some discussions arose on this topic and on the need for standardization,[5] but did not appear to go far. The following decade saw international efforts to increase transparency and efficiency in arbitration, but these efforts did not address arbitrator immunity. However, in 2015, the Chartered Institute of Arbitration (CIArb) established the London Centenary Principles (the 'Principles')[6], where it identified 10 qualities that a jurisdiction should have in order to be considered a 'safe, effective and efficient' arbitration *locus*. The Principles include arbitral immunity as one of those qualities:

> A clear right to arbitral immunity from civil liability for anything done or omitted by the arbitrator in good faith in his or her capacity as an arbitrator.

More recently, in June 2017 an ad hoc committee of the French legal think thank *Le Club des juristes* issued a Report called 'The Arbitrator's Liability'.[7] The purpose of the report was to present proposals under French law covering civil liability, criminal liability and disciplinary liability. While the present paper does not address criminal and disciplinary matters, the report's comparative law analysis is obviously quite useful for the study of the subject matter.

The following sections will describe the status of arbitrator liability in certain institutional rules and jurisdictions (I), and outline the elements that should be taken into account for developing a uniform rule and propose language for such a provision (II).[8]

I. State of affairs

Generally, institutions and arbitration centers include provisions acknowledging arbitrator immunity in their arbitration rules as will be shown in the first part of this section. The provisions invariably establish that exceptions to such immunity under applicable law will apply. Therefore, in cases where arbitrators are sued, institutional provisions will not suffice, as the relevant applicable law is essential. Indeed, institutional rules that provide full protection to arbitrators will be of limited effect if the applicable law foresees circumstances where liability is in order. In that regard, there are few jurisdictions with specific legal provisions for arbitrator liability or arbitrator immunity. The second part of this section includes brief notes regarding some of those jurisdictions, as well as others where there are court decisions that have relied on civil or contractual law to determine the issue.

A. Institutional rules

Protection under institutional rules can be divided into three groups: 1) full immunity, to the extent that applicable law allows it, 2) qualified immunity, to the extent applicable law allows it, and 3) qualified

3 See Indiana Court of Appeals, **Ron Droscha v. Scott Shepherd and Fort Wayne Area Association of Realtors**, No. 52A02-1001-PL-26, quoting Mendenhall v. City of Indpls., 717 N.E.2d 1218, 1226 (Ind. Ct. App. 1999): 'The underlying purpose of the immunity is to preserve judicial independence in the decision-making process'.

4 UNCITRAL 32nd session A/CN.9/460, available at **https://documents-dds-ny.un.org/doc/UNDOC/GEN/V99/827/50/IMG/V9982750.pdf?OpenElement**

5 See, Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 NY Sch J Int'l & Comp L. footnote 1, pp. 2 and 3.

6 Principles available at **http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4**

7 Report on The Arbitrator's Liability, available at **http://www.leclubdesjuristes.com/rapport-responsabilite-de-larbitre-disponible-anglais/**.

8 This article is restricted to the limitation of liability of the arbitrator and will not address the limitation of liability of arbitral institutions. Also, the scope of the article is limited to civil liability, excluding criminal and disciplinary actions.

immunity without reference to applicable law. The first two ultimately leave qualification to the competent courts, while the latter establishes the threshold directly, by way of contract.

In the first group, we find Article 41 of the ICC Rules of Arbitration that gives arbitrators ample immunity. Such protection will not be available, however, if it is 'prohibited by applicable law'.

The PCA Arbitration Rules are almost identical. Article 16 reads as follows:

> The parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

In contrast, the UNCITRAL Arbitration Rules provide for qualified immunity. For a liability claim to succeed, the arbitrator's act or omission in question must be 'intentional' and 'in connection with the arbitration' under Article 16 of the UNCITRAL Arbitration Rules:

> 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.[9]

Similarly, Article 31 of the LCIA Rules excludes liability for any act or omission by the arbitrator in connection with the arbitration, except:

> (i) [W]here the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the [arbitrator]; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law.

In rules of the second group, applicable law must allow waiver of immunity for 'negligent' acts or omissions as well; the contractual regime may be limited further by applicable law. This means that both groups of provisions effectively leave the matter to be decided in accordance with 'applicable law'.[10] These provisions are useful, of course, if the applicable law is silent altogether and/or if competent judges deem that any existing judicial immunity is not applicable to arbitrators.

Finally, the Stockholm Chamber of Commerce makes no reference to the applicable law in its Arbitration Rules:

> **Article 48 Exclusion of liability**
>
> Neither the SCC nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes wilful misconduct or gross negligence.

A similar provision is found in the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Association:

> **Article 45 Exclusion of Liability**
>
> Neither the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, the individual Chambers or their staff, the arbitrators, the tribunal-appointed experts, nor the secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, except if the act or omission is shown to constitute intentional wrongdoing or gross negligence.

It is noteworthy that the qualified immunity in rules of the third group is less ample than in the second group, as it includes gross negligence in the exception. In any case, the question that arises is whether, when confronted with a case governed by such institutional rules, a competent court will apply this provision only or will also consider the applicable statutory regime, the more likely scenario.

B. Jurisdictions

Turning to statutory and judicial regulation of arbitrator immunity, there are different approaches depending on each jurisdiction. Some jurisdictions have specific statutory provisions for arbitrator liability, while others apply general rules of civil liability. The question that different regimes seem to answer is whether to protect the 'quasi-judicial decision-making function' or extend the scope to the contractual relationship between the

9 In terms of local institutions, the Centre of Conciliation and Arbitration of the Chamber of Commerce of Costa Rica has the same provision in Article 13 of its Arbitration Rules, while the Caracas arbitration center of the Chamber of Industry includes full immunity in Article 10 of its Arbitration Rules.

10 For an explanation regarding the interplay between institutional rules and statutory provisions in Dubai, see http://arbitrationblog.kluwerarbitration.com/2016/03/28/the-liability-of-arbitrators-in-the-uae-quod-novi-sub-sole/. The cases will be discussed below.

arbitrator and the parties. In that sense, the result will be to hold arbitrators liable for damages caused solely by fraud or willful intent (similar to judicial immunity), or to include also liability for reckless or negligent behavior (similar to contractual liability).

Below is a sample of the different ways in which certain jurisdictions across the globe deal with the matter, in alphabetical order.[11]

Argentina

Argentina's Congress passed an international arbitration law in September 2017 modifying its Civil and Commercial Code in order to include parts of the UNCITRAL Model Law on International Commercial Arbitration. Although there is no provision on arbitrator liability/immunity in this law, the Civil and Commercial Procedural Code (which governs procedural matters) contains a section devoted to arbitration (Book VI, 'Arbitral Proceedings'). In that section, the following provisions govern the matter:

> **Arbitrator Performance**
>
> Art. 745. – Arbitrator acceptance will entitle the parties to compel them to fulfill their assignment, with liability for damages.
>
> **Extinction of the arbitration agreement**
>
> Art. 748. - The agreement shall cease:
>
> (...)
>
> 2) With the expiration of the time limit established in the agreement, absent which, with the expiration of the legal time limit, without prejudice of the liability of arbitrators for damages and interests, if by their negligence time elapsed unnecessarily...
>
> **Arbitrator Liability**
>
> Art. 756. - Arbitrators who, without justifiable cause, do not issue the award within the established time limit, shall not be entitled to fees. They shall also be held liable for damages.[12]

It seems that, in Argentina, arbitrator liability is something stemming from the contractual nature of the arbitrator's mission rather than from the judicial function of deciding disputes; therefore, the test includes negligence or recklessness. It also looks like Article 745 is a catch-all provision, for all contractual breaches other than the rendering of the arbitral award outside the time limit. The question that remains is whether these provisions apply to international arbitration cases.

Canada

In Canada's *Flock v. Beattie*,[13] the arbitrator took nearly three years in rendering an award while the agreement established that the award would be rendered within 60 days after the end of the hearings. The Alberta Court of Queen's Bench dismissed the claim for damages recognizing that:

> '[A]rbitral immunity' may be properly expressed as: 'in absence of fraud or bad faith, an arbitrator enjoys civil liability immunity'.[14]

The court established that liability is a matter of public and not private law due to the functions that arbitrators perform. Thus, save for an act or omission that is fraudulent or made in bad faith, arbitrators will not be liable in tort or in contract.

The court took into account the circumstances of the case, namely that the claimant had not complained of the delay during the years it took the arbitrator to render the award, thereby waiving any right to object. Also, it seems that it was only after the award was set aside that claimant complained of such a delay.

Dubai

In Dubai, lawsuits have been brought against arbitrators acting under the Rules of the Dubai International Arbitration Center. Such Rules establish that:

> [No arbitrator] shall be held liable for any unintentional error in their work related to the settlement of disputes by the Centre.

As an example, in case 2012/2014, *Meydan Group LLC vs. Alexis Mourre*, on 8 October 2015, Dubai's Court of Cassation dismissed the claim as follows:

> [T]he arbitrator is not responsible for any unintentional error ... based on the authority provided under prevailing laws, according to which the power to judge is left to the arbitrator's discretion. *This means that the arbitrator enjoys the protection of the law in the exercise of his duties unless the arbitrator makes a fundamental mistake*. A fundamental mistake is defined as a failure to comply with

11 For a more detailed comparative analysis, see Susan D Franck, Id. note 5. See also Ramón Mullerat, 'Liability of Arbitrators: A Survey of Current Practice', September 2001, available at http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/arbitrators__impartiality_and_independence/mullerat_ilability_arbs.pdf .

12 Free translation.

13 *Flock v. Beattie*, 2010 ABQB 193.

14 Ibid. para. 17.

> unambiguous legal principles or ignore clear-cut facts while the judgment is left to the arbitrator's own consideration.[15]

The subsequent case of the Court of Cassation, *Meydan Group LLC v. Doug Jones*, also dismissed the claim because claimant was not able to prove its case. The court provided that:

> [L]iability in tort requires proof of three elements, namely error, damage and a causal relationship between the two; failure to prove any one of these will mean that no liability has been established.[16]

It seems that arbitrator immunity in Dubai is meant to protect not only the quasi-judicial function of the arbitrator, but also the contractual obligations, as gross negligence ('fundamental mistake', 'error') is part of the test used by the court.

England and Wales

English law has a tradition of judicial immunity, which transited to arbitration and is consonant with the idea of full protection of the judicial function. This strong protection is reflected in the UK Arbitration Act 1996, under Section 29 'Immunity of arbitrator':

> (1) An arbitrator 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.

English law does not define 'bad faith' and reported cases do not allow us to identify this concept.[17] It seems reasonable to equate it with the concept of willful misconduct in civil law. In any case, it is clear that the rule offers extensive protection to arbitrators.

France

In France, the approach is balanced, as judges recognize that arbitrators perform functions that are both judicial and contractual in nature. As described in the introduction of the Report 'The Arbitrator's Liability' issued in June 2017 by *Le Club des juristes*:

> Aware of the necessity to adopt a liability regime that integrates the duality of arbitrators' missions, French case law tries to take into account the judicial specificity of their mission of contractual origin.[18]

Indeed, the Code of Civil Procedure sets out the arbitrators' (and parties') contractual obligations to act in good faith and with celerity in Article 1464 paragraph 3. The obligation to act in good faith, or with loyalty, includes the obligation to treat the parties equally, and to be and remain independent/ impartial. Any breach of these obligations will be determined under common civil liability rules, in terms of defining whether the breach in question is a breach of a duty of 'results' or a duty of 'means'.

The second aspect of the arbitrator's liability, with regards to the protection of the judicial function has been developed by case law and, the test applied is whether the arbitrator's acts are equivalent to a serious misconduct or constitute fraud, gross negligence or denial of justice.[19]

Peru

Like other civil law jurisdictions, the General Arbitration Law of Peru provides for a qualified immunity that derives not only from the quasi-judicial function of the arbitrator but also from the contractual nature of his/ her mission. According to Article 18 (General provision) arbitrators are liable for damages caused by the extemporaneous rendering of the award and also for other 'corresponding obligations':

> Acceptance of the position by the arbitrators and by the arbitration institution gives the parties the right to compel them to fulfill their assignment within the agreed time limit; otherwise they shall be liable for damages arising from their delay or *for breaching their corresponding obligations.*[20]

15 Emphasis added. From Gordon Blanke, 'The liability of arbitrators in the UAE: Quod novi sub sole?' available at http://kluwerarbitrationblog.com/2016/03/28/the-liability-of-arbitrators-in-the-uae-quod-novi-sub-sole/.

16 *Meydan Group LLC v Doug Jones.* Case No. 284/2015, as translated in Gordon Blanke, *supra* note 15.

17 Hazem Hebaishi, 'Should Arbitrator Immunity Be Preserved under English Law?', *North East Law Review* (2014), Volume 2, Issue 2, pp. 45-73. See also 'Report on the Arbitrator's Liability', *supra* note 7, p. 111.

18 'Report on the Arbitrator's Liability', *supra* note 7 at p. 20.

19 See the 'Azran case', Cass.1re civ., January 15, 2014, no 11-17.196, *Bull. civ. 2014, I, no 1*:'Considérant que, comme l'a rappelé le Tribunal de grande instance de Paris, l'arbitre est investi d'une mission à la fois contractuelle et juridictionnelle qu'il doit remplir en toute conscience, indépendance et impartialité ; qu'il bénéficie, en tant que juge, d'une immunité juridictionnelle de sorte qu'il n'est responsable que de sa faute personnelle qui, pour engager sa responsabilité, *doit être équipollente au dol, constitutive d'une fraude, d'une faute lourde ou d'un déni de justice*', emphasis added.

20 Emphasis added, free translation from original text: 'La aceptación del cargo por los árbitros, o por la institución arbitral, otorga derechos a las partes para compelerles a que cumplan el encargo dentro del plazo establecido, bajo pena de responder por los daños y perjuicios que ocasionen por su demora o por incumplir las obligaciones respectivas.'

Spain

The Spanish law follows the same rationale as the Peruvian law, although the drafting is much clearer. According to the first paragraph of Article 21 of the Spanish Arbitration Law:

> Acceptance compels arbitrators and, as the case may be, the arbitral institution, to faithfully fulfill their assignment, otherwise incurring in liability for damages arising from actions committed in bad faith, recklessness or willful intent.[21]

It is worth noting that 'recklessness' is equal to gross negligence; therefore, liability is broader than in Canada and England and Wales, where, as we have explained above, only acts bad faith or fraud are excluded from immunity.

According to the same provision, arbitrators or arbitral institutions are required to take civil liability insurance or equivalent guarantee on their-own behalf. Public entities, integrated arbitration systems, or those depending on public administrations, are exempt from such requirement.

Furthermore, beyond bad faith, recklessness or willful intent, Article 37(2) of the same law foresees arbitrator liability in cases where the award is rendered after the time limit has expired:

> Unless otherwise agreed by the parties, the arbitrators shall decide the dispute within the six-months following the date of submission of the reply to the claim referred to in Article 29, or that from expiration of the term for submission. Unless otherwise agreed by the parties, the arbitrators may extend this period for a period that may not exceed two months, by means of a reasoned decision. Except as otherwise agreed by the parties, the expiration of the period without a final award shall not affect the effectiveness of the arbitration agreement or the validity of the award rendered, *without prejudice to the liability in which the arbitrators may have incurred.*[22]

It is not clear against which standards that liability will be measured, and it seems that there are enough safeguards within the provision to avoid pitfalls. The only reported case regarding timeliness was in Andalucía, where the award was set aside for extemporaneity, despite the fact that the Spanish law does not include this ground in the grounds for setting aside.[23] However, there is no report of the affected party having sued the arbitrators.

More recently, in February 2017, the Supreme Court of Spain upheld the Spanish courts' conviction against two arbitrators for deliberately excluding the third arbitrator from the final deliberation, drafting and notification of the award[24]. On 10 June 2011, the Provincial Court of Madrid had set aside the award for 'infringing the principle of arbitral collegiality', after which the affected party, *Puma SE*, sought civil liability from the arbitrators under Article 21 of the Arbitration Act. The two arbitrators were ordered to compensate *Puma SE* an amount of € 750,000 each, equaling to the fees they had been paid, for damages caused. On appeal, the Supreme Court established that:

> [R]ecklessness is like gross negligence, with a grave and manifest error, with no justification, that does not disappear with the setting aside of the award, but rather is equivalent to a risky act on the part of persons who know their profession and should have applied such knowledge in the interest of those who hired them for that end. A conduct of

21 Free translation from original text: 'La aceptación obliga a los árbitros y, en su caso, a la institución arbitral, a cumplir fielmente el encargo, incurriendo, si no lo hicieren, en responsabilidad por los daños y perjuicios que causaren por mala fe, temeridad o dolo.'

22 Emphasis added, free translation from original text: 'Salvo acuerdo en contrario de las partes, los árbitros deberán decidir la controversia dentro de los seis meses siguientes a la fecha de prsentación de la contestación a que se refiere el artículo 29 o de expiración del plazo parar presentarla. Salvo acuerdo en contrario de las partes, este plazo podrá ser prorrogado por los árbitros por un plazo no superior a dos meses, mediante decision motivada. Salvo acuerdo en contrario de las partes, la expiración asin que se haya dictado laudo definitive no afectará a la eficacia del convenio arbitraje ni a la validez del laudo dictado, sin perjuicio de la responsabilidad en que hayan podido incurrir los árbitros'.

23 Decision T.S.J. Andalucía 1/2012 of January 18.

24 Decision Nº102 del 2017 (February 15) of the Supreme Court of Spain, Civil Chamber, available at **http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Tribunal-Supremo-condena-a-indemnizar-a-Puma-a-los-dos-miembros-del-tribunal-de-arbitraje-que-dictaron-un-laudo-luego-anulado**. Free translation: 'The arbitrators that were sued met on June 2, 2010 and excluded the third arbitrator, fully aware that he was travelling. Therefore, they neither invited nor allowed him to participate in the preparation of the award; he was the arbitrator designated by PUMA and he was not in agreement with the position of the other two that excluded him. In addition, there was enough time to dictate the award, since it expired on July 4, and there was no formal constraint of the parties or necessity of having to anticipate the decision'.

> who ignores –within a minimum standard of reasonableness –the rights of those who entrusted them with the arbitration and the qualities inherent to arbitrators that effectively distorted the course of the arbitration, and failed to produce a correct award, with the accompanying prejudice. In short, an unbelievable and unusual conduct, strange to anybody's good judgment. [25]

United States

The year 1872 saw the first case, *Bradley v. Fischer*, in which the Supreme Court of Justice recognized the doctrine of judicial immunity. Broadly speaking, the court made a distinction between the jurisdictional function of judges and their administrative function, and it was decided that only the former should be protected, provided that the judge had acted within its jurisdiction.

In arbitration, in line with other common law jurisdictions, protection is broad regarding the arbitrator's judicial (or 'quasi-judicial') functions. However, in contrast, such protection will not apply if there is an infringement of contractual obligations. In a 1983 case, *Baar v. Tigerman*, the California Court of Appeals determined that the arbitrator was accountable for having rendered the award beyond the time limit set in the applicable arbitration rules.[26]

The question regarding the arbitrators' obligation to disclose potential conflicts of interest was addressed on 7 January 2014, when the United States Court of Appeals for the Second Circuit upheld the lower court's refusal to vacate two ICC awards in *Adriano Gianetti Ometto and Adriano Ometto Agricola Ltda. vs. ASA Bioenergy Holding AG*.[27] This summary order does not create precedent but it is nonetheless relevant for purposes of analyzing the test being applied at least in part of the US jurisdictions. In this case, Claimant sought to set aside the awards on the basis of evident partiality of the chair of the arbitral tribunal for not having effectuated a proper conflicts check within his law firm. In refusing to vacate the award, the court deemed that:

> To the extent that the lead arbitrator was careless, that carelessness does not rise to the level of willful blindness.[28]

The court considered that i) since the chair of the arbitral tribunal did not have a reason to believe that there could have been a non-trivial conflict might exist, there was no further duty to investigate, and ii) he was not aware of any conflict during the drafting of the award. Although this case relates to the setting aside procedure, this (stringent) test for establishing 'evident partiality' is generally consistent within US case law.[29]

II. Towards a uniform rule

The brief exercise of comparative law provided in the first part of this paper evidences some differences in the definition and coverage of arbitral immunity among institutional rules and jurisdictions. In Argentina, grounds for liability appear to be quite broad, while in France, Peru and Spain, immunity will protect the arbitrator except in cases of gross negligence and willful intent. These three jurisdictions seem to strike a balance between the protection of the judiciary function and the need for accountability within the contractual aspect of the arbitrators' mission. In the United Kingdom and Canada arbitrators enjoy a broad protection, while in the United States there seems to be a mix of approaches, depending on the state jurisdiction.

In this context, a uniform rule would endeavor to eliminate disparity and the uncertainty that comes along with it. Indeed, normally arbitrators will be sued in the competent courts of their place of residence, and this is the most convenient solution for the arbitrator, who is able to hire counsel amongst his or her colleagues and work within a familiar environment. Since it is common in international arbitrations for the members of arbitral tribunals to reside in different

25 Free translation from original text: 'La temeridad se identifica con una negligencia inexcusable, con un error manifiesto y grave, carente de justificación, que no se anuda a la anulación del laudo, sino a una acción arriesgada por parte de quienes conocen su oficio y debieron aplicarlo en interés de quienes les encomendaron llevar a buen fin el arbitraje. A una conducta de quien ignora con arreglo a una mínima pauta de razonabilidad los derechos de quienes encargaron el arbitraje y las atribuciones propias de los árbitros, desnaturalizando en suma el curso arbitral sin posibilidad de que pudiera salir adelante el laudo correctamente emitido, como así fue, con el consiguiente daño. A una conducta, en definitiva, insólita o insospechada que está al margen del buen juicio de cualquiera'.

26 *Baar v. Tigerman,* 140 Cal. App. 3d 979, 984 (Cal Ct. App. 1983).

27 *Ometto v. Asa Bioenergy Holding A.G.*, 2014 WL 43702 (2d Cir. 2014).

28 Decision available at https://www.casemine.com/judgement/us/5914e5b8add7b049349083d1

29 The Brazilian high court denied recognition of the awards subsequently, on the basis of the lack of disclosure of a conflict of interest. The Superior Tribunal de Justiça (STJ) applied an objective test to determine that the debtor, Abengoa, had been a client (albeit indirectly) of the chair's law firm and that fact was enough to cast doubts on his independence. There were other operations by the Abengoa group where the arbitrator's law firm was involved during the arbitration proceeding that were not disclosed by the arbitrator, which according to the STJ was also relevant in determining that the awards could not be recognized. The amount of damages was also taken into account by the STJ in the decision. Sentença Estrangeira Contestada Nº 9.412 - EX (2013/0278872-5).

jurisdictions, if all of the members of the panel are sued, there is a risk of conflicting decisions. This constitutes another reason why having a uniform rule is desirable. In terms of applicable law, the ideal solution would be to apply the law of the seat of the arbitration,[30] but the fact is that sometimes competent courts are not located in the seat of the arbitration.

Before submitting a draft proposal, let us first identify the elements that should be considered in elaborating a uniform rule.

- Any liability should have to deal with both, the arbitrator's function as an adjudicator and the contractual relationship between the arbitrator and the parties. As mentioned, this paper only addresses civil liability and does not discuss the disciplinary and criminal spheres.
- One element in defining the scope of arbitrator immunity is *temporality of liability*. An arbitrator should not be liable for actions carried out before formally being appointed, save for breaches of the duty to disclose potential conflicts of interest. These breaches will only be relevant, of course, if the arbitrator is eventually appointed as arbitrator, and not if she was merely a candidate. Can an arbitrator be liable for actions carried out after having ceased his or her mission? For instance, within the implied duty of confidentiality or 'secret du délibéré'. If such a breach causes damage to a party and is made recklessly or intentionally, that arbitrator should be held accountable in the appropriate degree. For that reason, any liability should include actions or omissions 'in connection with the arbitration', as proposed by some institutional rules shown in section I.A above.
- Another element is the *degree of care* of the arbitrator in the relevant conduct. While protection from second-guessing the decision should be total, fundamental duties of disclosure, independence, impartiality, and propriety – inherent to the function of a decision-maker – should be demanded. The contractual aspect of the role of the arbitrator should also be included in the scope of liability, and it is mainly related to matters of efficiency, such as rendering the award within the applicable time limit or requesting extensions in a timely fashion. In this vein, arbitrators should not be immune from grievances caused by behavior that is reckless, in bad faith, or fraudulent.
- Lastly, in all cases, the claiming party must have suffered a grievance, and *a link should be established* between that grievance and the conduct of the arbitrator. Frivolous claims should not be allowed, as well as claims where the grievance has been cured, for example, with the dismissal of the arbitrator, except for extraordinary circumstances. Also, the amount of damages must be gauged with care, taking into account also the conduct of the grieved party and all circumstances surrounding the conduct of the arbitrator.
- One solution to guarantee uniformity would be to amend the UNCITRAL Model Law on International Commercial Arbitration[31], in response to the Secretariat's suggestion in 1999. This could be done by adding a paragraph 6 to Article 11 or adding a new article, which could be Article 15 bis to be included in Chapter III 'Composition of the Arbitral Tribunal'. Any such provision should be copied into the UNCITRAL Arbitration Rules by way of modification of its Article 16.
- Another solution could be to have leading international organizations such as ICC, the IBA, ICCA, and CIArb run task forces to come up with a text and propose that it be included in the different institutional arbitration rules.

In any case, the present article makes an attempt to propose such a text de lege ferenda. The following text, which would take into account all elements listed above, is inspired by both Article 21 of the Spanish Arbitration Law[32] and the CIArb London Centenary Principles of 2015:

> The acceptance of the assignment exempts arbitrators from liability arising from actions or omissions in connection with the arbitration, except when such actions or omissions are reckless, made with willful intent or are fraudulent.
>
> In determining liability, judges shall take into account all circumstances surrounding the claim, including the existence of a grievance,

30 See Nadia Smahi, 'The Arbitrator's Liability and Immunity under Swiss Law - Part I', *ASA Bulletin*, 4/2016: 'Most commentators indeed consider that the substantive law of the seat of arbitration is the one applicable to the arbitrator's contract'.

31 For a proposal to modify the UNCITRAL Model Law, see Dyalá Jiménez, 'Are We Beyond the Model Law – or is it Time for a New One?', ICC Institute of World Business Law Newsletter, November 2016 available at **www.djarbitraje.com**

32 See *supra* note 21

> the connection of such grievance to the alleged conduct, and the conduct of the party bringing the claim.[33]

Conclusion

These proposals aim at contributing to the debate regarding this important issue, considering that liability claims against arbitrators should not be encouraged, due to the harmful consequences that this may have on arbitration. In addition, it is not meant to be the only solution, as arbitrators are responsible for contracting insurance policies and taking other measures imposed by applicable laws or by their own policies, the least of which is careful and proper conduct of the proceedings.

33 See *supra* note 6.