ARBITRATAL IMMUNITY

AT COMMON LAW

By

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I. Introduction

Most reinsurance arbitrators will not accept an appointment without a contractual hold harmless from any action against them in their role as arbitrators as well as an agreement by the parties to pay any costs of the arbitrators in defending themselves from suit. The purpose of this article is to examine the immunity already provided to arbitrators at common law.

II. Case Law Supporting Arbitral Immunity

There is a great deal of case law supporting arbitral immunity. The theory behind it is explained in Austern v.Chicago Board of Options Exchange, 898 F.2d 882 (2nd Cir.1990) at 885-6:

> Absolute immunity, "justified and defined by the functions it protects and serves, not by the person to whom it attaches," has long shielded judges from damages liability for actions taken in the exercise of their judicial functions. This comparatively sweeping form of immunity has also been extended to executive branch officials who perform

> either quasi-judicial functions, or prosecutorial functions "intimately associated with the judicial phase of the criminal process". As with judicial immunity, which "protect[s] the finality of judgments [by] discouraging inappropriate collateral attacks . . . [and] also protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants," the scope of quasi-judicial immunity is defined not by the identity of the actor but by the nature of the function performed, namely freeing the adjudicative process and those involved therein from harassment or intimidation.
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> . . . We are persuaded by these policy concerns and agree that the nature of the function performed by arbitrators necessitates protection analogous to that traditionally accorded to judges. Furthermore, we note that "individuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between litigants and saddled with the burdens of defending a lawsuit." Accordingly, we hold that arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process (citations omitted).

Similar expressions of a broad arbitrator immunity can be found in many cases *see e.g.* Olsen v. National Association of Securities Dealers, 85 F.3d 381, 382 (8th Cir.1996); International Medical Group v. American Arbitration Assoc., 312 F.3d 833, 843 (7th Cir.2002); Cort v. American Arbitration Association, 795 F.Supp. 970, 972-3 (N.D.Cal.1992); Hill v. Aro Corporation, 263 F.Supp. 324, 326 (N.D.Ohio1967); Airco v. Rapistan Corp., 446 N.W.2d 372, 376-7 (Minn.1989); Stasz v. Charles R. Schwab, 121 Cal.App.4th 420, 430-1 (2004).

This immunity has been extended to organizations which sponsor arbitrations as well. *See e.g.* Cory v. New York Stock Exchange, 691 F.2d 1205, 1211 (6th Cir.1982); Austern, *supra* at 886.

To the argument that broad arbitral immunity encourages misbehavior or failure to reveal relationships indicative of bias, courts commonly respond that the remedy is to seek vacatur of the panel's ruling pursuant to the Federal Arbitration Act. *See e.g.* Olson, *supra* at 383; Corey, supra at 1210-12; Feichtinger v. Eaton Conant, 893 P.2d 1266, 1268 (Alas.1995); Airco, *supra* at 378; Stasz *supra* at 438-9; Pullara v. American Arbitration Association, 2006 Tex.App.Lexis 4081 *6 (2006).

III. Limits on Arbitral Immunity

Notwithstanding broad language used in the case law cited above, courts have commented on the limits of arbitral immunity. For instance, non-feasance (as distinct from mis-feasance), was the issue in Ernst, Inc. v. Manhattan Construction Company of Texas, 551 F.2d 1026 (5th Cir.1977). An architect, McCauley, was placed in the role of arbitrator of disputes between the owner of the building and the contractor constructing it. McCauley failed to make timely decisions over matters in dispute or any decisions at all. The court found the architect liable for damages stating:

> [T]he question is not the insulation of McCauley from suit because of a decision it made but, more accurately phrased, its immunity from suit for failing, or delaying, in making decisions.
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> . . . In his role as interpreter of the contract and as private decisionmaker, the arbitrator has a duty, expressed or implied, to make reasonably expeditious decisions. Where his action or inaction, can fairly be characterized as delay or failure to decide rather than timely decisionmaking (good or bad), he loses his claim to immunity because he loses his resemblance to a judge. He simply defaulted on a contractual duty to both parties.[1]

See also Morgan Phillips, Inc. v. Jams/Endispute.LLC, 140 Cal. App.4th 795 (2006).

Similarly, the court speculated that an arbitration sponsoring organization might be liable to return sponsoring fees if it failed to organize and administer an arbitration. International Medical Group, Inc. v. American Arbitration Association, 312 F.2d 883, 843-4 (7th Cir.2002).

Several courts have observed that clear lack of jurisdiction might be a basis for lack of arbitral immunity. Larry v. Penn Truck Aids, Inc., 94 F.R.D. 708, 724 (E.D.Pa.1982); Stasz, *supra* at 432-4. A case in point is New England Cleaning Services, Inc. v. American Arbitration Association, 199 F.3d 542 (1st Cir.1999). In that case, grievances were subject to arbitration through the American Arbitration Association under a collective bargaining agreement. The union filed for an arbitration and the AAA proceeded despite the employer's claim that the collective bargaining agreement had been terminate prior to the filing of the arbitration. The employer obtained a court ruling that supported its position on the termination of the collective bargaining agreement and the employer sought damages from the AAA. The court ruled in favor of the AAA stating:

[1] 551 F.2d at 1033.

> [The employer] points out that the district court determined that the AAA lacked jurisdiction or authority to adjudicate the dispute and contends that therefore the AAA was not protected by arbitral immunity. Judicial immunity applies, however, unless there is a "clear absence of jurisdiction. We see no reason not to adopt the same parameter for arbitral immunity.
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> . . . Adopting [the employer's] position would require arbitral organizations, not courts or arbitrators, to themselves resolve what might well turn out to be significant threshold legal issues long before the hearing. In this case, the AAA would have had to decide not merely whether there was a facially valid demand, but the legal effect of the demand and whether an arbitrator in fact had jurisdiction to determine whether [the employer's] termination of the Agreement was effective. . . . We think it abundantly clear that resolution of the arbitrability issue was not facially obvious. Forcing the AAA itself to preliminarily address potentially complex legal issues would not only impose an unwelcome burden but would interfere with the organization's neutrality and likely add further cost and delay to the arbitral process (citations omitted).[2]

The matter was put more succinctly by the court in International Medical Group, *supra* at 842: "But it is not the responsibility of the AAA or even the arbitrator to determine whether a particular agreement creates a duty for the parties to arbitrate a particular grievance. Unless the parties clearly and unmistakably provide otherwise, the question of arbitrability is to be decided by a court, not by an arbitrator (citation omitted)."

IV. What Benefits Are Not Provided by Common Law Immunity?

The contractual hold harmless generally required by reinsurance arbitrators goes beyond common law immunity in several ways. Theoretically, it could cover non-feasance or lack of jurisdiction. More practically, a contractual hold harmless generally includes the cost of asserting a defense and, in some cases, the value of the time the arbitrator spends in defending himself or herself. In addition, a contractual hold harmless at the outset of the organizational meeting provides an on the record buy-in by the parties which is hard to deny when the arbitration develops in unexpected and unfavorable ways.

[2] 199 F.2d at 545-6.

As a result, contractual hold harmless agreements serve a useful purpose from the arbitrator's standpoint.

V. Conclusion

Arbitrators, and organizations that sponsor arbitrations, enjoy immunity from suits in much the same manner as judges. While this immunity may not apply to very unusual allegations (*e.g.* non-feasance and facial lack of jurisdiction), the contractual hold harmlesses in common use by reinsurance arbitrators may cover such gaps. In addition, these hold harmlesses have the benefit of covering the costs of defending suits against arbitrators.