

Critical assessment of arbitrators immunity law contract essay

Law



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INTRODUCTION

In this era, globalization makes the world borderless. This drives a remarkable development of international commercial activities. As a result, international commercial dispute is an inexorable matter in this arena which usually arises from the failure of a party to perform an obligation under the contract with or without his fault. Due to its simplicity, flexibility and the world-wide recognition of the award, International Commercial Arbitration has been widely recognized by the international business community as an

alternative to litigation to settle various disputes arising from the international commercial contracts and activities.[1]It is undoubtedly, arbitrator plays major role in arbitration. As a professional decision maker, he is attached with certain duties. It includes the duties to act fairly and impartially, to conduct arbitration diligently, to disclose any conflict of interest, to preserve the integrity of arbitration, to act with skill and care, as well as the duty to respect the procedural rules imposed by both arbitration contract and the law of the seat[2]. A question arises; can the arbitrator be sued if there is a breach while performing his responsibility in the course and scope as arbitrator? For this issue, it is important to note that the answer varies from one legal system to the other. In some jurisdictions like the United States, absolute immunity is granted, and therefore the arbitrator is fully protected from any civil liability attack by the parties. However, in most civil law countries such as Spain[3], there is no immunity granted, hence arbitrator can be sued and consequently be held liable for any breach of the arbitral duties. The UNCITRAL Model Law was established in 1985 with the aim to harmonize the law on international commercial arbitration. However, the Working Group entrusted with preparing a draft text has expressly provided that this issue should not be covered in the Model Law " in view of the fact that the liability problem is not widely regulated and remains highly controversial"[4]. In light of the above, this research paper attempts to critically analyse the immunity of arbitrator and propose for a qualified immunity as a standardised applicable law for arbitrator's liability in international commercial arbitration. The discussion will be divided into 4 parts. In Part 1, the nature of the relationship between the parties and the

arbitrators shall be examined. It is a core analysis that needs to be dealt first as the nature of the relationship influences the attitude of the different jurisdictions in granting immunity to the arbitrator. In Part 2, the basis of immunity will be comprehensively analysed and subsequently in Part 3 the basis of the immunity will be critically evaluated in determining the relevancy of arbitrator's immunity in the contemporary international commercial law arena. It is suggested that immunity is preferred to preserve the independence and impartiality of the arbitrator by way of protecting arbitrator from frivolous attack by parties which can affect both arbitrator from giving a principled decision as well as the whole arbitration process. However, this immunity shall be qualified in order to circumvent carelessness and to maintain the professionalism of the arbitrator so as to uphold the international commercial arbitration as a highly reputable forum to settle dispute. The hypothesis in Part 3 will be substantiated in Part 4 by making a comparative analysis of the possible outcome in the case of *Feichtinger v Eaton Conant* in different jurisdictions.

PART 1- NATURE OF RELATIONSHIP BETWEEN THE ARBITRATOR AND THE PARTIES

It is essential to comprehend the nature of the relationship between the arbitrator and the parties because it has much influence on the attitude of different jurisdictions towards immunity or liability of an arbitrator. There are two main schools of thought in this matter namely; the " Contractual" School of Thought and the " Status" School of Thought.

a) The " Contractual" School of Thought

The " Contractual" School of Thought views that arbitrator is appointed to perform a service to adjudicate and determine issues or disputes for a fee by virtue of a contract.[5]It was first argued by Merlin that arbitrator was in fact, agents of the parties on the basis that arbitrators performs a private function in which their powers are determined from the agreement of the parties.

[6]This view was supported by Foelix who added that the court has no room to intervene as the relationship between the parties and arbitrator because it is private in nature and the arbitration agreement is the sole basis of arbitrator's power[7]. Nonetheless, other scholars from this school disagreed with the notion that arbitrator is an agent of the parties. Scholars like Bernard argued that albeit arbitrator is empowered by virtue of the parties' agreement, that does not infer that the arbitrator is an agent of the parties. He was of the view that it is a contract of sui generis (a special contract). It differs from any other ordinary contract because the contract must not only in parallel with appropriate rules and principles governing contracts in general, but it also confers the adjudicatory functions that will be exercised by the arbitrator[8]. Likewise, Laine correspondingly argued that the arbitrator is not an agent because it is a well-established principle under the law of agency that an agent is bound to act in the best interest of his principal. However in contrast, an arbitrator must decide the issues or disputes submitted by the parties independently and impartially based on the facts and law; not to serve in the best interest of the principal who appointed him[9]. This " Contractual" School of Thought theory is mostly adopted in Civil Law jurisdictions. They adopt the pro - liability approach

despite the fact it is unsettled the exact kind of contract between the arbitrator and the parties. This is because arbitrators are considered as experts whose liability should be based upon the terms of their appointment contract as negotiated by the parties[10].

b) The " Status" School of Thought

In contrast, under the ' Status' School of Thought, the arbitrator holds a delegated authority granted by the state where the seat of arbitration is held[11]. Accordingly, the arbitrator is theoretically held to be in a similar position of the judge of the national courts. This is because their authorities also originate from the state. Even so, the nomination is different; the earlier nominated by the parties while the later nominated by the state[12]. This approach is mainly followed by the Common law jurisdictions[13]. In Common Law system, judges are granted with immunity to enable them to discharge their duties fearlessly and impartially. Since this school of thought sustains the view that an arbitrator resembles the judge, the immunity is well extended to the arbitrator[14]. Further discussion on the basis of immunity will be dealt accordingly in the next part.

PART 2- BASIS OF ARBITRAL IMMUNITY

Before critically examining the basis of arbitral immunity, it is worth to highlight that the arbitrator can be held liable in contract or tort[15]. As previously discussed, the Civil Law jurisdictions favour the Contractual School of Thought; hence the issue of arbitrator's duties and immunity are negotiated between the parties and fall under the contract terms in Civil Law jurisdictions.[16]Although the parties in dispute are free to negotiate the

arbitrator's duties and liabilities, it is important to note that the extent of the liability must within the limit and general principles of contractual liability imposed by the Civil Code of the seat. Another basis for the arbitrator's liability is governed under the law of tort. This is a well-established principle that a professional has the duty under the law to act with due care and diligence; thus it is applied to arbitrators as they are professionals. Arbitral immunity springs from the doctrine of judicial immunity. Judicial immunity is a long well established English principle. This was highlighted by Lord Denning in the case of *Sirros v Moore and others*[17]:" Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action."[18]Meanwhile, in the United States, the reception of the English doctrine of judicial immunity was established in the case of *Bradley v Fisher*, where the court held that:"...the defendant [the judge] cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff."[19]As previously stated, Common Law jurisdictions adopt the view of the " Status" School of Thought which takes a functional analysis of the role of an arbitrator[20]. The arbitrator is empowered to determine questions of law and fact, to

adjudicate all issues presented by the parties before them, as well as to determine the rights of the parties[21]. Therefore, an arbitrator is said to perform quasi-judicial functions[22] and that he has the inherent powers as a judicial officer.[23] For these reasons, the arbitrator is recognized to have the position as "judges chosen by the parties to decide the matters submitted to them"[24]. Further, in the case of *Hill v Aro Corp*[25], it was held that arbitrators are in a certain sense, a court and for this basis, arbitrators are granted with immunity. One of the earliest cases which confirmed the judicial immunity is extended arbitration was the 1884 case in the United States, *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*[26]. In this case, the arbitrator had been alleged to have committed fraud and conspiracy. The court dismissed the plaintiff's claim and held: "... An arbitrator is a quasi-judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him." [27] On the other hand, in England, the House of Lords confirmed the judicial immunity is extended to arbitrator in the case of *Sutcliffe v. Thackrah*, where the court held that: "... Since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognised that public policy requires that they too shall be accorded the immunity to which I have referred. ... Judges and arbitrators have disputes submitted to them for decision. The evidence and the contentions of the parties are put before them for their examination and consideration. They then give their

decision"[28]It is clear from the above authorities that the main basis of immunity is that the arbitrators has the same functional compatibility with the judges and thus deserves the same protection against civil liability. Secondly, being a person who is serving as neutral between disputing parties in both public and private spheres, it is essential to ensure that he is free from fear of liability so as to enable him to exercise his responsibilities as arbitrator with a complete impartiality.[29]In the case of Pratt v. Gardner, it was held that it is an established jurisprudence that a judge " should act upon his own free, unbiased convictions, uninfluenced by any apprehension of consequences" in deciding the controversy between the parties.[30]It is a natural result that impartiality would tarnish if a decision maker had to fear of being sued.[31]Hence, immunity is essential to maintain the independence and the impartiality of an arbitrator. Protection from harassment by the dissatisfied party is also closely linked with the aim to preserve the integrity and independence of the arbitration process.[32]In the case of Lee S. Fong v. American Airline Inc, the court highlighted:" the integrity of the arbitral process is best preserved by recognizing the arbitrators as independent decision-makers who have no obligation to defend themselves in a reviewing court"[33]Meanwhile, in the case of Corbin v Washington Fire and Marine Insurance Co, the court asserts that the denial of arbitrator immunity would cause difficulties to arbitrators in conducting the arbitration with fairness and hence immunity is indispensable:" Freedom to develop a relevant record and to present pertinent arguments, without fear of reprisal by way of threatened libel or slander actions, is a necessary prerequisite to the fair resolution of any controversy through

arbitration."^[34]Also in the case of *Corey v New York Stock Exchange*^[35]the court reiterated that the immunity plays an important role in protecting and insuring the arbitrator's impartiality, independence, and freedom from undue influences^[36]:" The Supreme Court has long recognized that there are certain persons whose special functions require a full exemption from liability for acts committed within the scope of their duties. The rationale behind the Supreme Court decisions is that the independence necessary for principled and fearless decision-making can best be preserved by protecting these persons from bias or intimidation caused by the fear of a lawsuit arising out of the exercise of official functions within their jurisdiction" The third basis of immunity is the public policy. Arbitration, as an alternative method of dispute resolution, is a relief to the overburdened legal system^[37]. Arbitration is a popular alternative because of its expeditious and cost effective scheme as compared to litigation. It is argued that this policy is best implemented if the arbitrator is given the immunity. This is because arbitrators may choose not to take the position as an arbitrator if they are fearful of being personally liable^[38]. This matter was raised in the case of *Abdallah W. Tamari et al v. William P. Conrad, Jr., et al and Bache Halsey Stuart, Inc. (Intervenor)*^[39]where the court held:" But individuals such as defendants [arbitrators] cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit. Defendants have no interest in the outcome of the dispute between Tamari and Bache, and they should not be compelled to become parties to that dispute" Thus, it can be said that arbitrators would hardly be inclined to accept their appointment if

they were aware of the risk of being liable.[40]When the shield given, the potential arbitrator would not have to fear of the consequence and he can discharge his duty confidently and diligently. The fourth basis is that immunity is to maintain the finality of the award. There is a possibility that a party who have lost their case may seek reprisals and subsequently hassle the arbitrator with litigation[41]. This will directly affect the finality of the award. In *Arenson v Casson Beckman Rutley & Co.*,[42]Lord Salmon held that immunity is essential for the efficient and speedy administration of justice. In addition, this issue was also addressed by the Departmental Advisory Committee drafting of the 1996 English Arbitration Act which highlighted that the finality of the arbitral process could well be undermined unless a degree of immunity is afforded[43].

The Limitation of Immunity

It is essential to highlight that not all acts of the arbitrator are protected by the immunity. Immunity only applies to the arbitrator's quasi-judicial act[44]. This means that if an arbitrator being negligent or performing misconduct outside his quasi-judicial act, after rendering the final award for instance, no immunity granted and an action can be brought against him.[45]Therefore, the arbitrator can be sued in a situation where he refuses or unwilling to proceed with the arbitration[46]. Secondly, immunity is not applicable if the arbitrator has no jurisdiction to try the matter in controversy. This means that there must be a valid arbitration agreement in conferring a valid jurisdiction for the arbitrator[47]or otherwise, no immunity is granted. This is parallel with the scope of judicial immunity as decided in the case of *Stump v Sparkman* that a judge is not immune if he has acted in " clear absence of all

jurisdiction".[48]Thirdly, immunity does not extend to criminal act of the arbitrator. The penal law of the seat applies should the arbitrator involve in criminal acts such as bribery, corruption and embezzlement of funds[49]. The arbitrator is not only punishable under criminal law but also liable to the injured party under the Civil Law which is usually the pecuniary damages[50]

PART 3- THE EVALUATION ON THE BASIS OF IMMUNITY

The basis of immunity, which has been previously dealt with, shall now be critically evaluated in this part with the aim to determine the relevancy of immunity in international commercial arbitration. At the end of the assessment; it will be decided whether absolute immunity is desirable? It is suggested that there is a need to strike a balance in preserving the independence of arbitration by granting immunity and the need to combat willful misconduct of the arbitrator by imposing liability at some degree. This means that it is suggested that qualified immunity is the best approach in balancing both needs.

Are arbitrators comparable with judges?

As previously discussed, arbitrator immunity was extended from the doctrine of judicial immunity on the ground that the arbitrator's function is comparable to judges. Nevertheless, this notion is contested. Some commentators argued that arbitrators are not similar to judges. They argued that " the analogy is applied too rashly and superficially without any consideration or analysis of deeper more fundamental differences between judges and arbitrators."[51]For further analysis, we shall examine the

decision by Lord Kilbradon in the case of *Arenson v Casson Beckman Rutley*
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& Co.[52]. He distinguished the position of the arbitrator and the judge[53] in terms of appointment and remuneration. Judges are appointed and receive remuneration from the state and for this reason, the judge does not owe any duty of care to the parties but rather it is a moral duty for him to act fairly. Thus, in any unfortunate event where a judge breaches his duty, he is protected by immunity given by the state. On the other hand, the arbitrators are appointed and receive remuneration from the parties. There is a bargain between the parties and the arbitrator. Accordingly, it can be implicitly understood from the judgement that arbitrators are in the position where they owe the duty of skill and care towards parties since the arbitrator is appointed and paid by the parties. On this basis, the arbitrator is not similar to a judge and thus the immunity shall not be extended. The arbitrator must be accountable for his breach to the parties. Furthermore, Lord Kilbradon emphasized the fact that immunity is an exclusive right of a judge because of his special position and character in the system and not because of his duty:" You do not test a claim to immunity by asking whether the claimant is bound to act judicially; such a question, as Lord Reid pointed out in *Sutcliffe v. Thackrah* [1974] A. C. 727 , 737, leads to arguing in a circle. Immunity is judged by the origin and character of the appointment, not by the duties which the appointee has to perform, or his methods of performing them"[54]. Besides that, in the case of *Baar v Tigerman*[55]the court made a further distinction between the arbitrator and the judge. It was highlighted that the judges have a direct link in the democratic system in sustaining social, economic and governmental order. Accordingly, independence of the judiciary is one of the fundamental elements in maintaining democracy. How

to make the judiciary independent? It is by allowing judges to act without fear of being attacked or reprisal from dissatisfied parties or from persons who have lost their case or from those who have been convicted. Therefore, immunity is indeed important, and without it, judges can be easily harassed with lawsuits against them. As a result, this will tremendously affect the independence of judges as they cannot discharge their duty judiciously and fearlessly due to the fear of being attacked and reprisal.[56] On the other hand, democracy does not link with the arbitrator. This is because, the arbitrator acts in a private forum of settlement. From the above authorities, it is true that there is a distinction between judges and arbitrators in terms of remuneration, mode of appointment and the role in preserving democracy. However, it is submitted that there is a significant link which can place the arbitrators in the similar position of the judges. It is submitted that, notwithstanding there are differences in the matter pertaining to remuneration and appointment, the significant similarity is their duty. Both judges and arbitrators are entrusted to hear and decide the controversy in accordance to the law and facts. Albeit they are acting in different spheres; judge in the public sphere while arbitrator is in the private sphere, the nature of the duty itself demands a 'protection' in order to be independent and impartial. Should the immunity be judged by the origin and character of the appointment and not by their duty? As a response to this question, it is submitted that it has been an established jurisprudence that judicial immunity does not exist for those individuals who hold judicial office per se, but it exists for a broader purpose[57]. It is for the benefit of several sorts of personnel who carry the task of adjudicating disputes and determining

rights or interest or carrying quasi-judicial function in both public and private spheres. It is essential to enable that personnel to exercise his duty effectively with complete impartiality and independence by being free from the fear of being attacked or reprisal. This can be supported with the decision in the case of *Butz v. Economou*[58]. In this case, even the executive official who performs adjudicatory acts or quasi-judicial act was held to be entitled to immunity to ensure that his decision is not prejudiced by harassment or intimidation. Furthermore, the court observed that immunity is granted because of their nature of responsibility and not because of their position within the Government[59]. This is further strengthened by the decision of Lord Buckley LJ in *Arenson v Arenson and Others*[60]:" In my judgment, these authorities establish in a manner binding upon us in this court that, where a third party undertakes the role of deciding as between two other parties a question, the determination of which requires the third party to hold the scales fairly between the opposing interests of the two parties, the third party is immune from an action for negligence in respect of anything done in that role [emphasis added]... This immunity is based, in my judgment, on public policy, for without it the third party might be inhibited from performing his arbitral function in the *371 free exercise of his judgment uninfluenced by the fear of a subsequent action by one or other of the opposing parties"[61]. At this point, it is argued that the extension of judicial immunity to the arbitrator is relevant and justified. This is because both judge and arbitrator have a significant similarity: they are performing the same responsibility i. e. deciding controversies of the parties

and their decision is binding. Hence, it is crucial for them to be protected to preserve their independence, impartiality and integrity[62].

Does immunity ensure finality of the award?

Apart from the above, immunity plays an important role in ensuring the finality of the award[63]. It is widely known that arbitration is popular as an alternative forum to settle disputes because of its advantage of time effectiveness; and that the finality of the award is the key component to attain that advantage. Hence, when the arbitrators are immune, parties have no room to litigate after the award has been pronounced with the allegation that the arbitrator has breached his duty. Thus, the finality of the award is well-preserved. Undoubtedly, immunity ensures finality of the award.

Nevertheless, it is suggested that immunity needs to be qualified on the basis of the inadequacy of remedy in the event arbitrator breach his duty. In litigation, although judges are immune from civil liability, if the judge has breached any duty in rendering a decision, the parties have the remedy to appeal the case. In the United States, the losing party in a decision by a trial court in the federal system normally is entitled to appeal the decision to a federal court of appeals[64]. Similarly in the United Kingdom, if parties are unhappy about the decision made by the judge in the case, they may be able to appeal against the decision to a judge in a higher court[65]. However, in arbitration, the common and most sought after remedy for arbitral breach of duty is setting aside the arbitral award.[66]The main concern is that all losses including time, attorneys' fees, payments for logistics, and other incidental and consequential damages cannot be adequately compensated.

[67]Consequently, the parties will end up bearing the costs and the delay of

a failed arbitration procedure. All the advantages of the arbitration proceedings are denied and parties are getting less for what they have bargained for in relation both to their agreement to arbitrate and their contract with the arbitrator[68]. This has certainly defeated the main aim of going of arbitration i. e. to have a speedy, cost effective and flexible forum of settling disputes. At this point, it seems that it is not desirable to grant an absolute protection to the arbitrator. Should the immunity then be lifted? Should the arbitrator be held liable for his breach of arbitral duties and consequently be responsible for the losses sustained by the injured parties? This will be answered in the following sub-issue.

It is justified to protect arbitrator when he has acted extra-judiciously?

As previously highlighted, it is necessary for the arbitrator to be held liable at some degree in order to ensure that he observed his duty and not to undermine the reputation of arbitration; at the same time, their independence and impartiality in the arbitration process needs to be protected as well via immunity. Hence, to balance both necessities, it is suggested that the immunity needs to be qualified. It is suggested that the arbitrator should not be protected when he commits gross negligence. Often, the experts within the industry of the dispute are appointed as arbitrator and they possess relevant professional certifications, qualifications and experiences. It has been established principle that " every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill"[69]and could be held liable for failing to exercise a level of skill and care which is normally applied by persons of that

profession or a skilled trade[70]. Hence, as a professional, committing gross negligence is intolerable as they possess relevant professional certifications, qualifications and experiences. It is further strengthened by the fact that the parties have put their trust and confidence in the arbitrator to adjudicate the controversy due to their qualifications and experience. Gross negligence can be regarded as a betrayal of that trust and it ought not to be tolerated. The same reasoning applies to willful misconduct. As a professional, he is bound to a particular standard of ethics and conducts which must not be breached deliberately. Committing willful misconduct does not only give negative impacts on the trust and confidence given by the parties but also undermines the reputation of the arbitration tribunal as a whole. Furthermore, granting absolute immunity may encourage carelessness[71]and therefore it is highly suggested that immunity must not cover situations where the arbitrator has committed gross negligence and willful misconduct. In addition, as a decision maker, an arbitrator is expected not to act in bad faith. The concept of bad faith was emphasised in the case of *Re Alcan Wire*[72]:" The absence of a rational basis for the decision implies that factors other than those relevant were considered. In that sense, a decision in bad faith is also arbitrary. These comments are not intended to put to rest the debate over the definition of bad faith. Rather, it is to point out that bad faith, which has its core in malice and ill will, at least touches, if not wholly embraces, the related concepts of unreasonableness, discrimination and arbitrariness" Therefore, it is submitted that an arbitrator must also not to be immune when he has acted in bad faith as parties will be denied a fair trial which is the fundamental right of natural justice. Hence, it

is firmly suggested that immunity shall be qualified and must not be extended when the arbitrator has committed gross negligence, willful misconduct or has acted in bad faith.

Will imposing liability discourage the potential arbitrator to take the task?

Another issue arises, if the arbitrator can be sued in the event where he committed willful misconduct, gross negligence or acted in bad faith, would it affect the readiness of potential arbitrators to take the task? As deliberated previously, one of the basis of arbitral immunity is that arbitrators may choose not to take the position as an arbitrator because of the fear of being personally liable. It is submitted that this argument has long been proven groundless[73]. The members of other professionals such as architects, doctors, lawyers are growing rapidly despite they are professionally accountable for any negligent or misconduct[74]. Hence it is submitted that imposing liability for willful misconduct, gross negligence and any act of bad faith will encourage the arbitrator to be more careful and diligent as well as it can be a scheme for deterrence[75]. To support this, we may make an analogy of the principle of sentencing in criminal law. As decided in the case of *R. v James Henry Sargeant*[76], it is a well-established principle that one of the aims of sentencing is to deter the society from committing such crime as well as the offender so as not to repeat the offence. It is submitted that the same aim is applied: deterring the arbitrator from being careless or committing willful misconduct or acting in bad faith by imposing liability.

PART 4 : CASE STUDY- FEICHTINGER v EATON CONANT[77]

In this part we shall apply the hypothesis concluded above by reviewing the classic case of Feichtinger v Eaton Conant which involves the allegation of an arbitrator who has deprived the claimant's right for due process during the proceeding. Unsurprisingly, as the United States grants absolute immunity to arbitrators, the Supreme Court of Alaska has rejected the claimant's claim. However, the outcome may have different under different jurisdictions for example, in England where there is qualified immunity by virtue of section 23 of the Arbitration Act 1996 or in Spain, where there is no immunity granted. We shall later make a comparative analysis of the outcome of the case, should the case be heard in England and Spain. The rational is to establish which approach to immunity is the most desirable.

Facts of the case

The Anchorage Police Department has dismissed Frank Feichtinger who was then filed an administrative grievance, contending that he was terminated without just cause. The case must be heard by an arbitrator pursuant to the contract between the Municipality of Anchorage and the Police Officers' Union. The arbitrator, Eaton Conant, decided against Feichtinger. Feichtinger sued Conant in superior court, alleging he has been deprived of due process rights during the arbitration proceeding in violation of the underlying labor contract. He claimed that he has been denied the right of fair hearing as he was refused for a grant for continuance, has been excluded from participating in the hearing, his evidence was not heard and the arbitrator has conspired with the Municipality to deny the claimant's fair hearing. The

Superior court granted the defendant summary judgment on the ground of arbitral immunity. An appeal was made to the Supreme Court but it was held that the Appellant's claims are barred by arbitral immunity. It is interesting to point out the arguments forwarded by the Appellant. It was argued that the arbitrator is not immune when he has acted in bad faith[78]. The court held that if the court were to agree with the proposed limits on arbitral immunity, it would undermine the policies served by arbitral immunity.[79]

Absolute immunity: United States.

From the case, it is submitted that the outcome of the case was not a surprise. It is well known that the United States grants absolute immunity to arbitrators on the ground that federal policy encourages arbitration and "arbitrators are indispensable actors in furtherance of that policy." [80] The Immunity is also extended to arbitral tribunals as decided in *Corey v New York Stock Exchange* where the court held that: [81] "Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusory. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association" The shield is so expansive and it covers situations where the arbitrator fails to meet minimal standards of competence; or in situations where the arbitrator renders erroneous due to clear mistake of fact or law. Furthermore, the arbitrator is also protected even if he has acted in bad faith, malice or other deliberate intention; or when he fails to disclose conflict of interest.[82]. It is submitted that this case is a good case to illustrate that

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it is not desirable for an arbitrator to be immune when he has acted in bad faith. Indeed, should this case involve international commercial dispute, the award can be challenged under Article 34(2)(a) (ii) of the Model Law which provides: "(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: ... (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case" However, as previously argued, all losses including time, attorneys' fees, payments for logistics, and other incidental and consequential damages cannot be adequately compensated. The arbitrator must be held liable and be sued for damages. In addition, the arbitrator is a person who has been entrusted by parties to act with fairness. Denying a party for a fair trial is considered as a gross misconduct and indeed, it is a breach of natural justice. Unfortunately, even though the act was intolerable, he can easily escape the liability by raising the blanket of immunity. Another important fact to be highlighted is that there was an allegation of conspiracy between the arbitrator and the other party which leads to the denial of the Appellant's right to be heard of his evidence. However this was not taken into consideration nor tried by the court because of the pro-absolute immunity approach in the United States. It is submitted, should this fact is indeed established, it ought not to be tolerated and the arbitrator must not be protected by the immunity. This is because it is a clear breach of natural justice - the right of Appellant to be heard and the right to a fair trial. Besides, such act would tarnish the credibility and reputation of the arbitration as a whole. In the international commercial

area, there is a risk of parties manipulation[83]. There can be instances of conspiracy and fraud between the arbitrator and the irresponsible party. Hence in this situation, the arbitrator ought not be protected and the innocent party shall be entitled to damages in such occurrences.

Nonetheless, although the arbitrator cannot be subjected to a civil action, in the case of *Beaver v. Brown*[84], it was held that the arbitrator can be prevented from receiving their remuneration out of the contract due to acts of bad faith such as fraud and conspiracy. Unfortunately, this was not pleaded by the claimant. There is a possibility of success if the claimant pleaded as it can be understood implicitly from the judgement that the court acknowledges the misconduct of the arbitrator nevertheless due to pro-absolute immunity approach taken by the United States, the arbitrator cannot be held liable.

Qualified Immunity: England.

We shall now examine the possible outcome should the case occurred and tried in England. As previously discussed in Part 2, arbitral immunity was first announced in England in the case of *Sutcliffe v. Thackrah*[85]. However, by virtue of s. 29(1) of the Arbitration Act 1996, it is clear that immunity is not absolute. It is provided under the statute that "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." Therefore, should the *Feichtinger's* case is heard in England, it is submitted the claimant may invoke s. 29 of the Act to make the arbitrator liable. As for now, there is no case to suggest what amounts to "bad faith" of the arbitrator in discharging his functions. With the authority from the rule

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established in the case of *Pepper v Hart*[86], as a guide to the meaning of "bad faith", we may refer to the Parliamentary proceedings report in order to determine the scope of "bad faith" intended by the Parliament while enacting the provision. It was provided that "bad faith" is :-Malice in the sense of personal spite or desire to injure for improper reasons, or knowledge of the absence of power to make the decision in question Failure to act fairly and impartially and failure to avoid unnecessary delay and expense. Refused or failed to conduct the proceedings properly or with reasonable speed and a party has suffered substantial injustice as a result[87]Based on the above authorities, it is argued that the arbitrator in the case of *Feichtinger* has acted in bad faith since he has conducted the hearing so unfairly and that *Feichtinger* was deprived of his fundamental rights of due process. In addition, there was an allegation of conspiracy between the arbitrator and the other party. Should this fact established, the appellant may argue that it is a malice or desire to injure for improper reasons within the ambit of "bad faith". Therefore, the appellant may argue for the immunity to be lifted since the arbitrator has acted in bad faith and that he can be held liable under section 29 of the Act in the courts of England.

Absolute Liability: Spain.

Under Spanish Law, arbitrators are not afforded with immunity. It is provided expressly in s. 21. 1 of Spanish Arbitration Act 2003 that once an arbitrator accepted his duty as arbitrator, the arbitrator has the duty to comply their responsibilities faithfully, failing which they are liable for the damage and losses he caused by reason of bad faith, recklessness or fraud[88]. It is

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important to note that under the Spanish Law, the intention of the arbitrator to cause damage is a decisive factor in determining the liability of the arbitrator. Hence, applying the authorities, it is argued that should the Feichtinger case occurred in Spain, the arbitrator may be held liable. This is because, the provision imposed liability not only on the basis of bad faith, but recklessness as well. It is humbly submitted that the element of "recklessness" is easier to prove compared to "bad faith" because "recklessness" under the law implies an especially irresponsible course of action that lacks even the most basic diligence[89]. The fact that they refused to grant a continuance and excluded the claimant from participating in the hearing can be firmly argued that the arbitrator has been reckless. By virtue of section 21. 1 of the Spanish Arbitration Act 2003, it is argued that Feichtinger's case has a good chance of winning against the arbitrator. However, it is as previously argued, imposing absolute liability to the arbitrator is not desirable because the need to maintain independence of the tribunal as well as to ensure the finality of the arbitration award.

CONCLUSION

The basis of arbitrator immunity has been critically assessed and it is firmly submitted that immunity is relevant to maintain the independence and impartiality of the arbitration process. However, the immunity must be qualified. The blanket of immunity ought to be lifted when the arbitrator has committed gross negligence, willful misconduct or when he has acted in bad faith. Arbitrators are usually professionals; their certifications, qualifications and experiences are the main consideration that have driven the parties to put their trust and confidence in them to adjudicate their dispute.

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Committing those acts is certainly intolerable and it is a betrayal of trust and confidence of the parties. This is further strengthened with the fact that when the arbitrator commits gross negligence, willful misconduct, or acts in bad faith, it renders the failure of the whole arbitration process. All losses such as time, attorneys' fees, payments for logistics, and other incidental and consequential damages cannot be adequately compensated by setting aside the award per se. Hence, the arbitrator must be liable and be sued for damages. In addition, imposing liability would act as a deterrent, and this definitely will boost the quality of services offered by arbitrators. The hypothesis has been reflected with the comparative analysis of the United States case of *Feichtinger* of the possible outcome should the case be heard in England and Spain where it is clear that qualified immunity is the most desirable approach. It is highly recommended that this qualified immunity should be the standard applicable law for arbitrator's liability in international commercial arbitration and it is humbly submitted that it should be incorporated in the Model Law- the arbitrators are immune unless if he has committed gross negligence, willful misconduct or acted in bad faith. At the time being, there is no uniformity in this particular matter. It depends on the law of the seat. Undeniably, the attitude of the jurisdiction of the seat towards immunity of the arbitrator is one of the important determining factors in choosing the place of arbitration however it is usually overlooked by the parties. Hence, by standardising the liability of arbitrators, this will improve the efficiency of the tribunal process and will uphold the integrity of international commercial arbitration as a highly reputable forum to settle dispute.