

Immunity of Arbitrators

حصانة المحكمين

by

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Abstract

The losing party in any arbitration case is likely to attempt to settle its account with the arbitrator who issued a ruling against him by resorting to the courts and filing cases that make the arbitrator vulnerable to arbitrary prosecutions, the matter that will lead to the reluctance of many individuals with integrity and knowledge to be reluctant to enter into the arbitration club. In addition, arbitration, which is considered to be one of the most successful alternative mechanism to resolve disputes is likely to become weak in terms of solving global trade problems.

The purpose of this research is to study the extent to which the arbitrator is entitled to protection from prosecution and what is the optimal immunity that he should enjoy.

According to the results of the research, the researcher concluded the need to provide protection for the arbitrators so that they can carry out their duties and obligations towards the parties to the conflict without any fear of prosecution by the parties who are not satisfied with the judgments issued against them, but at the same time, this immunity should not be a gateway used by the arbitrator in his favor by committing gross errors, willful negligence, or taking bribes to rule in favor of one party against another.

The researcher also provides recommendations that the issue of arbitrator's immunity should be clarified further in the arbitral laws of countries and relevant institutions.

Abstract in Arabic

من المرجح أن يحاول الطرف الخاسر في أي قضية تحكيمية تسوية حسابه مع المحكم الذي أصدر حكمًا ضده من خلال اللجوء إلى المحاكم ورفع الدعاوي التي تجعل المحكم عرضة للملاحقات القضائية التعسفية، الأمر الذي سيؤدي إلى إحجام كثير من الأفراد الذين يتمتعون بالنزاهة والمعرفة من الإحجام في الدخول إلى نادي التحكيم. إضافة إلى ذلك، من المحتمل أن يصبح التحكيم والذي يعتبر من أنجح الوسائل البديلة لفض المنازعات ضعيفا من حيث حل مشاكل التجارة العالمية.

الغرض من هذا البحث هو دراسة مدى استحقاق المحكم للحماية من الملاحقة القضائية وما هي الحصانة المثلى التي يجب أن يتمتع بها.

وفقا لنتائج البحث، توصل الباحث إلى ضرورة توفير حماية للمحكمين بحيث يتمكنون من القيام بواجباتهم والتزاماتهم تجاه أطراف النزاع دون أي خوف من المقاضاة من قبل الأطراف الغير راضية بالأحكام الصادرة ضدهم، ولكن و في نفس الوقت يجب أن لا تكون هذه الحصانة بوابة يستخدمها المحكم في صالحه من خلال ارتكاب الأخطاء الجسيمة أو الإهمال المتعمد أو تلقي رشاوي للحكم لصالح طرف ضد طرف آخر.

كما قدم الباحث توصيات بضرورة توضيح مسألة حصانة المحكم بشكل أكبر في القوانين التحكيمية للدول والمؤسسات ذات الصلة.

DEDICATION

I dedicate this dissertation to my Late Father, my Great Mother, my wife, my children, my brothers and sisters for their continuous encouragement and support during my journey to finish this work, and without their encouragement nothing would have been achieved.

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I thank my Might God (Allah) who helped and give me the power to complete my dissertation.

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1.0 Introduction:

The arbitrator derives his actual authority to decide on the disputes entrusted to him from the judiciary and from the agreement of the parties to the dispute with him. Therefore, his function is similar to the function of the judge in his judicial mission, which is to settle the disputes of the parties against each other. Accordingly, and since his mission is like that, some arbitrators may fall into unintentional errors when concluding the awards such as error in the application of the law or incorrect calculations, and therefore some could wonder about the necessary protection to be provided to the arbitrator so that he is not subjected to legal prosecution by the losing parties, On the other hand, the arbitrator may commit intentional mistakes such as inequality between the parties to the dispute, bias towards one of them, taking a bribe, falsifying some documents, or failing to disclose his relationship with one of the parties to the dispute. which may lead to reluctance of the disputant parties to resort to arbitration.

Therefore, this research will address the immunity of arbitrators whether they deserve to be immune or not and if yes, what could be the optimal type of immunity that the may be granted. The research is divided into eight chapters, the first chapter will look over the introduction and background of the research topic, then the second chapter will address the legal nature of the arbitration and the role of the arbitrator, through the third chapter, the research will shed the light on the doctrine of origin of arbitral immunity, while the fourth chapter will examine the types of arbitral immunity, further, chapters five and six will respectively address the position of immunity of arbitrators in civil and common law jurisdictions, and at the end of the research, and specifically in chapters seven and eight, the researcher will highlight the findings and provide some recommendations.

Background:

The issue of the immunity of arbitrators has attracted the attention of many scholars, because of its great importance in order to preserve the outcomes of the entire arbitral process. Therefore, it was necessary to study and know this issue and its dimensions on the parties to the arbitral process, especially the arbitrator, who plays a major role in it. The scholars concluded that the arbitrator should enjoy the protection that qualifies him to carry out his mission, but they differed in the scope of this protection. as Abrams and Nolan (1989) concluded that arbitral immunity serves the disputed parties interest, by sustaining the arbitrator's neutrality, and finality of the awards, and they recommend that the courts to continue conferring the arbitrator a broad immunity.

Weston (2004) stated that arbitral immunity should be restricted and limited only to the protection of the arbitral decision making process, further, he stated that arbitral immunity should not extend to the provider institution, as they only perform administrative functions, which per se doesn't align with the aims of the doctrine of arbitral immunity.

None can justify the broad extension of absolute immunity to arbitrators and that absolute immunity failed to adequately protect the individual's right as stated by Brown (2009), the researches asserted that, more balanced and appropriate standards of qualified immunity should be implemented.

Veeder (2018) saw that immunities that the immunity granted to arbitrators in England and France is not effective, therefore, arbitrators and arbitral institutions should obtain insurance that cover and protect them against any anticipated liability.

1.1 Importance of the research:

The research will be based on the previous researches, and we will proceed from it to examine the extent to which the arbitrator is entitled to arbitral immunity and what immunity he should enjoy with.

This research will contribute to enriching the scientific content regarding the issue of arbitrators' immunity through:

- Study the difference between the different types of arbitral immunity, and determine the suitable type that should be granted to the arbitrators.

- Shedding light on some international and territorial arbitration laws, and calling on the legislators, to organize and add clear rules related to arbitrator's immunity.
- Due to the restricted scope of this research, the legal relationship between the arbitrators and the disputed parties will not be scrutinized in details, neither shall we analyze the liabilities of the Arbitrator towards the disputed parties in details. Also, there will be some references to the theories related to the nature of the arbitration, and the same shall not be concentrated on the evaluation of these theories in depth, but only to cite and mention them as a background of the attitudes towards the legal nature of the arbitration and the immunity of the arbitrators.

1.2 Research Questions:

- Should the Arbitrator enjoy immunity? And Why?
- What is the optimum type of arbitral immunity that arbitrators should enjoy with?
- What is the Arbitral Immunity?
- What are the types of Arbitral Immunity?
- Is it desirable to sustain the principle of Arbitral Immunity?

1.3 Research Objectives:

- Determining whether the Arbitrator shall enjoy Arbitral Immunity or not.
- Determining the appropriate Arbitral Immunity type that the Arbitrator should be granted.
- Introduce the concept of the Arbitral Immunity.
- Addressing the types of the Arbitral Immunity.
- Determining whether to sustain and keep the principle of Arbitral Immunity.

1.4 Scope of the research:

The scope of this research will include the definition of arbitral immunity and its types represented by absolute, relative and contractual immunities, and determine the justifications and scope of each of them. In addition to that, the position of arbitrator's immunity in some civil and common law jurisdictions will be highlighted.

1.5 Research Methodology.

In this research, two different approaches, namely the descriptive approach and the comparative analytical approach will be used, in order to reach the objectives and the desired results of this research, furthermore, to be able to present recommendations and proposals that benefit legislators in taking steps towards enacting clear legislations regarding immunity of arbitrators.

1.6 Research structure.

The research is divided into eight chapters, the first chapter will look over the introduction and background of the research topic, then the second chapter will address the legal nature of the arbitration and the role of the arbitrator, through the third chapter, the research will shed the light on the doctrine of origin of arbitral immunity, while the fourth chapter will examine the types of arbitral immunity, chapters five and six will respectively address the immunity of arbitrators in civil and common law jurisdictions, and at the end of the research, and specifically in chapters seven and eight six, the researcher will highlight the findings and provide some recommendations.

2.0 The Legal Nature of the Arbitration and the role of the Arbitrator.

There is no doubt that the arbitrator is an important and essential element in the arbitration system, so, the starting point will be to get acquainted with this system and its legal nature, in addition to identifying the nature of the arbitrator's mission, to arrive at an accurate and correct description of the civil liability of the arbitrator arising from the exercise of his function, and whether he shall enjoy immunity and the necessary guarantees that provide him with the necessary protection when he performs his task from any civil liability that may fall upon him. Therefore, the researcher in this chapter will discuss the nature of the arbitration system and the nature of the arbitrator's work in the first section by dividing it into two sub sections, then the nature of the arbitrator's legal work relationship arising from his work with the parties to the dispute in section two.

2.1 The nature of Arbitration and the role of the Arbitrator.

This section is divided into two sub sections, sub section one will look into the nature of the Arbitration, and sub section two will look into the role of the arbitrator, while section two will discuss about the legal relationship between the arbitrator and the disputed parties.

2.1.1 The nature of the Arbitration

The rapid development in the fields of international trade, the requirements of speed, and the innovations of the times, undoubtedly affected the legal field like all other fields. Among those major influences on the world is what we see now of the escalation of the wave of arbitration, as an alternative means of the judiciary in settling disputes and resolving disputes, due to the many advantages in arbitration that are not available in the ordinary judiciary.

Arbitration is one of the alternative mechanism of dispute resolution, which has been widely used in the past years. It has been used vastly to replace resorting to Litigation as it has simple, swift and flexible procedural processes that encourage parties to the dispute to resort to it to resolve their disputes. It is based mainly on the disputing parties agreeing to present their disputes to an independent and impartial third party "Arbitrator", which in turn and after listening to the disputants and considering the facts and the arguments, arrives at a final and

binding decision on the parties.¹ The legal nature of the arbitration system reflects the nature of the arbitrator's work, which in turn constitutes an essential element in this system, as the task he performs is similar to that of the judge, which is to settle the dispute between the parties. There are various literatures in scrutinizing and analyzing the legal nature of the arbitration. However, as we have already mentioned that, it is not possible to get into a deep detailed analysis of this matter in this research, but we found that, it is crucial to briefly address the legal nature of arbitration by presenting the opinions of jurists as a general concept, as this determination is useful in knowing legal nature of the Arbitrator and the legal relationship between the arbitrator and the parties to the disputes, which in turn will help in knowing the liabilities of the arbitrator towards the disputants, and thus, through the foregoing, we will figure out whether the arbitrator shall enjoy immunity or not.

The legal scholars differed in determining the nature of the arbitration system and its legal adaptation, where four different trends and views of jurisprudence² were mentioned, as follows:

a- The Jurisdictional Theory

Jurisdictional theory is based on the hypothesis that an arbitrator performs judicial functions similar to that of a judge (albeit private) as permitted by national law or the international convention and treaties that are implemented by particular sovereign state.³ It assumes that the powers of the arbitrator are subjected to the laws of the jurisdiction, in addition to the fact that the award issued by arbitrator is subject also to judicial oversight by ordering its implementation and ultimately puts all aspects of the arbitration process under the control of the state.⁴ "This theory is largely justified on the grounds that it encourages the use of arbitration as an alternative dispute resolution forum".⁵ Adherents of this view also believe that

¹A. Redfern and M. Hunter, Redfern and Hunter on International Arbitration, 6th edn (New York: Oxford University Press, 2015), p.2.

²Tsakatoura.A, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at: https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn10 [Accessed on 21/10/2021]

³E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.33.

⁴Tsakatoura.A, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at: https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn10 [Accessed on 21/10/2021]

⁵Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution, Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10>

the arbitral award possesses the authority of the matter decided, and is enforced forcible implementation, and they see that the judicial authority is an independent authority regardless of who is in charge of it, and in this sense it has the power to grant this authority to persons whom it deems appropriate to exercise it in the ways specified by law.

b- The Contractual Theory

The theory developed from Merlin's perception that an arbitration agreement has its own character derived from the contract.⁶ The Proponents of this theory argue that the international arbitration process is rooted in the arbitration agreement between the parties to the dispute, and that the arbitrator derives his authority from the same arbitration agreement rather than from any public authority.⁷ According to this theory, as the Arbitrator's function is not of a public character, thus he cannot be regarded as a judge.⁸ The litigants and their desire for the arbitration system are what drives the legal system of arbitration, clarify its features and define its steps, since it is on the basis of which the arbitration agreement is concluded, the composition of the arbitral tribunal, arbitral hearings and arbitral procedure are all made according to the arbitration agreement between the disputing parties.⁹

Upon accepting the appointment, the arbitrator shall become an agent of the disputing parties; despite some scholars says otherwise, but we are not going to go into this controversy and liberate the subject of this matter. The disputing parties, as principals, authorize the arbitrator to issue an award in settlement of their dispute, on their behalf. Therefore, the award becomes a contract that is enforceable in the courts.¹⁰

[Accessed on 22/10/2021]

⁶Tsakatoura.A, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at: https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn10 [Accessed on 21/10/2021]

⁷E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.36.

⁸Tsakatoura.A, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), available at: https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn10 [Accessed on 21/10/2021]

⁹E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.36.

¹⁰E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.36.

c- The Hybrid Theory

According to this theory, the arbitration is neither considered as a pure jurisdictional nor as a pure contractual, it attempts to reconcile between both theories of jurisdictional and contractual on the basis that, arbitrators are created by statutes, but the ability to perform their duties depends on the parties to the dispute.¹¹ The disputant parties by their agreement, they create and fix the limits of their private jurisdiction, though the arbitrator's duty is to judge, and the agreement of the parties confers him the power to do so.¹² So, arbitration in this case is of both a contractual and judicial nature, as arbitration is seen as a contract subject to the will of the parties during the stage of the arbitration agreement, and then this agreement is characterized by judicial action when ruling on the dispute presented to the arbitral tribunal.

d- The Autonomous Theory

This theory is developed by Professor Rubellin-Devinchi in 1965¹³, where its main principle is that arbitration should be detached from all the previous mentioned theories and acquire an independent character¹⁴, she stated "in order to allow arbitration to enjoy the expansion it deserves, while all along keeping it within its appropriate limits, one must accept that its nature is neither contractual, nor jurisdictional, nor hybrid but autonomous"¹⁵. Thus, Arbitration has a special nature, and aims to establish a legal relationship in principle between two parties, whether financial or personal, and to establish an organic entity to which the claims of the parties will be raised to take over the settlement of it independently of them.

In light of these divergent trends, the researcher is leaning towards the direction that considers arbitration as an independent system, with its own characteristics that distinguish it from others

¹¹E. Onyeama, *International Commercial Arbitration and the Arbitrator's Contract* (New York: Routledge, 2010), p.38-39.

¹²Tsakatoura.A, "Arbitration: The Immunity of Arbitrators" *LEX E-SCRIPTA ONLINE LEGAL J.* (June 20, 2002), available at: https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn10 [Accessed on 21/10/2021]

¹³E. Onyeama, *International Commercial Arbitration and the Arbitrator's Contract* (New York: Routledge, 2010), p.40.

¹⁴Tsakatoura.A, "Arbitration: The Immunity of Arbitrators" *LEX E-SCRIPTA ONLINE LEGAL J.* (June 20, 2002), available at: https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn10 [Accessed on 21/10/2021]

¹⁵Tsakatoura.A, "Arbitration: The Immunity of Arbitrators" *LEX E-SCRIPTA ONLINE LEGAL J.* (June 20, 2002), available at: https://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn10 [Accessed on 21/10/2021]

of legal systems because, arbitration enjoys privacy in that it does not take place through public formal procedures before traditional courts, which anyone can see their proceedings. Rather, it is an exclusive procedure between the two parties to the dispute and its course or any details of it should not be announced. Arbitration provides the possibility of controlling the dates of the arbitration sessions to suit the needs of the concerned parties and their free times, thus giving them more space and freedom to start the arbitration procedures whenever they want, because the whole process is a flexible process, and the concerned parties have the right to agree among themselves on all major procedural issues such as the arbitration procedure through written documents or through oral hearings. That is, the parties to the arbitration can, by agreement among themselves and in coordination with the arbitral tribunal, determine the dates of the arbitration procedures and sessions and the various financial expenses and costs, leaving them to determine them and not impose upon them.

2.1.2 The role of the Arbitrator

The arbitrator is considered the most important element in the arbitration system. The success of arbitration depends on the arbitrator's competence, experience and knowledge of the task entrusted to him. His qualifications and expertise are dependent on his person by following the correct procedures, which lead to a correct result. The arbitration parties choose the arbitrator to resolve their dispute as a result of their conviction of the arbitrator himself and his experience, conditions and personal qualifications.

Thus, when the arbitrator whether it is an institution and/or a sole arbitrator, accepts to consider, and decide on an arbitration case, its obligation towards the parties will be "to perform a service consisting in resolving a dispute between the parties for a fee"¹⁶, this means that, the arbitrator entered into a binding contract with the parties to the dispute, which consequently will result into creation of obligations and rights between parties into the contract.

¹⁶M.Ramon, The liability of Arbitrators: a survey of current practice International (International Bar Association, 2006) P.2 available at: https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/arbitrators impartiality and independence/mullerat_ilability_arbs.pdf [Accessed on 22/09/2021]

2.2 The legal relationship between the Arbitrator and the Disputed Parties.

The Legal relationship between the disputant parties per se is contractual based on the arbitration agreement as an independent contract.¹⁷ There are three different theories with regards to the legal relationship between the arbitrator and the disputed parties,¹⁸ and they are divided as follows :

- 1- Status theory: where the proponent of this theory says that, the arbitrator's function is akin to judge, and his duty to act fairly is not considered contractual obligation, but rather, it is considered a proof of the interest of sovereign country in arbitration, further, they claim that, this theory elaborates on the power of the arbitrator in making decisions which is legally binding on the parties to the dispute and the enforcement of his decision with the support of the state confers the statute character to his function.¹⁹
- 2- Contractual theory: the supporters of this theory state that, the relation between the arbitrator and the disputants is based on the contract, and that the arbitrator's contract essentially stems out form the arbitration agreement.²⁰
- 3- Hybrid theory: the argument of the proponents of this theory is that, arbitrators are the creatures of the statutes and the ability to perform their duties depends on the parties appointing them and/ or the disputed parties, thus, it has both contractual and status characters.²¹

From the point view of the researcher, the relationship between the arbitrator and parties to the disputes is contractual, as the arbitrator, when he accepts to look after the disputes, that means acceptance to enter into a contract, which consequently will result into creation of obligations and rights between parties into the contract.

The arbitrator has obligations and duties that he must abide by, as his breach of any of these

¹⁷E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.33.

¹⁸E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.44.

¹⁹E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.45-46.

²⁰E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.49.

²¹E. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York: Routledge, 2010), p.57.

obligations imposed on him, may result in a case of civil liability against him. This obligation could be divided into two types, Legal and Contractual Obligations, as will be elaborated below

Legal Obligations:

These obligations are considered obligations with legal nature, and they are including but not limited to:

- 1- Equality: pursuant to article 18 of the UNICITRAL Model Law on International Commercial Arbitration “the Model Law”, the parties to arbitration shall be treated on an equal manner, and each of them shall be provided with an equal and complete opportunity to present his claims and defenses.
- 2- The arbitrator shall make the arbitral award in written as stated in article 7 (2) of the Model Law.
- 3- Justification of the arbitral award: according to article 31 (2) of the Model Law, the arbitrator should justify the given arbitral award, unless agreed otherwise by the parties, or it is not required by the applicable law, that the grounds of the awards to be stated.
- 4- The subject matter of the dispute is one of the matters that cannot be arbitrated, and the arbitral award not to be in violence with the public order as stated in article 35 (2-b/ii) of the Model Law.

Contractual Obligation:

These obligations are considered obligations with contractual nature, and they are including but not limited to:

- 1- The obligation to disclose the circumstances that may raise doubts about the arbitrator's impartiality and independency: according to article 11 (2) of the International Chamber of Commerce “the ICC”, the Arbitrator whoever is notified of his candidacy to assume the task of arbitration, must declare in writing anything that may raise doubts about his impartiality or independence, and since his appointment and during the arbitration procedures, he shall notify without any delay the parties and other arbitrators in the event any circumstance that may constitute doubts about its impartiality or independency, and that is unless it has previously informed them of that circumstance.

- 2- Decision making regarding arbitration procedures.²²
- 3- Whether it has been requested by a party, or the joining party, the arbitrator may give authorization to a third party to join or intervene into the arbitration dispute, provided that he is a party in the arbitration agreement²³, furthermore, the arbitrator may determine the applicable proceedings²⁴.
- 4- The arbitration panel shall apply to the subject-matter of the dispute, the rules agreed upon by the parties.²⁵
- 5- The arbitrator shall issue his award within a period agreed on amongst the disputed parties.²⁶

Now, that we addressed the legal nature and theories that dealt with arbitration, the arbitrator and the relationship between arbitrator and the parties to the dispute, further to, highlighting the most important legal and contractual obligations of the arbitrator towards the parties to the conflict, it remains for us to answer the important question which is, whether the arbitrator should enjoy immunity or not?

The answer is, yes, the arbitrator, regardless of the various different of the legal nature that links him with the parties to the disputes, he should enjoy with an immunity that protects him to reach a final award without fearing from being sued by one of the disputed parties.

But, what type of immunity shall he enjoy with? Prior to answer this question, it is important to know, what does immunity mean and the origin of Doctrine of Arbitral Immunity and its relation with Judicial Immunity, further, to know what are the various types of immunity, and this subjects are what we are going to address in the next couple of chapters, in order to come up with optimal immunity that the arbitrator could be granted.

²²Article 12 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

²³Article 22 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

²⁴Article 23 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

²⁵Article 28 (1) of the Model Law

²⁶Article 37 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

3.0 Doctrine of Origin of Arbitral Immunity.

Arbitral Immunity originally emanates from the Judicial Immunity, which itself goes back to the seventeenth century English cases, *Floyd v. Barker* and *The Marshal sea*²⁷. In order to find out the reasons for the emergence of arbitral immunity, it is necessary to first know what immunity is, what is the origin of the principle of judicial immunity, and what is the relationship between judicial immunity and arbitral immunity.

In this chapter, the researcher will define the term immunity, and go through judicial immunity and how arbitral immunity stemmed out from judicial immunity and then, discuss about the relation between judicial immunity and arbitral immunity.

3.1 Definition of Immunity.

If we want to define the term immunity as its legal purpose, it is “The state of being protected from something”²⁸ or “A situation in which you are protected from legal action”²⁹ or it is an exemption from a legal duty, prosecution, or penalty imposed by a governmental authority or specific law. The term “immunity” is essentially a common-law concept and in the context of international arbitration, the term is “used primarily by the courts and authors in common law countries to refer to the principle that arbitrators cannot be held liable for the manner in which they perform their judicial functions”.³⁰

Therefore, we can say that, Immunity is when an individual or organization obtains an exemption from a legal obligation or penalty imposed by a governmental authority or specific law.

²⁷Abrams and Nolan, *Arbitral Immunity*, *Industrial Relation Law Journal*, Volume II, No.2, 1989, P.229, available at: <https://repository.library.northeastern.edu/files/neu:333082/fulltext.pdf> [Accessed on 2/02/2021]

²⁸Oxford Dictionary

²⁹Cambridge Dictionary

³⁰E. Gaillard and J. Savage, *Goldman on International Commercial Arbitration*, New York: Kluwer Law International, 1999, p.588.

3.2 Judicial Immunity

The Judicial Immunity can be traced back to the former 2 English cases as mentioned earlier, and its main role is that to keep judges away from being sued, and not to be liable for their damages to the parties. “It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility”.³¹

The Judicial Immunity only applies to the judicial act that are performed by the judges under where they have jurisdictions³², adversely, the judge will be held liable for his act or omission if he acted beyond his jurisdiction i.e. the judge will not be immune from the results of his personal administrative acts³³, criminal prosecution³⁴ and acting in clear absence of his all jurisdiction³⁵.

The aim of Judicial Immunity is to sustain judicial independence, preserve certainty, confidence in the judicial system, and ascertain the finality of the judicial decisions, thus, the courts extended the Judicial Immunity even to the quasi-judicial acts of persons who are acting and serving as neutrals in resolving disputes between parties e.g. Jurors, referees, hearing examiners, administrative law judges and masters perform judicial tasks, and the reason behind extending the judicial immunity to those is that, they are performing functions similar to the judge functions, despite that they are not true judges.³⁶

One of the crucial quasi-judicial act which has similar function of Judicial system is arbitration, therefore; the Judicial Immunity has been extended to arbitrators and organizations that

³¹Bradley v. Fisher, 80 U.S. 335, 347 (1872)

³²Bradley v. Fisher, 80 U.S. 336 (1872)

³³Forrester v. White, 108 S.Ct. 538, 544 (1988)

³⁴O’Shea v. Littleton, 414 U.S. 488, 503 (1974)

³⁵Stump v. Sparkman, 435 U.S. 349 (1978); Bradley v. Fisher, 80 U.S. 351 (1871)

³⁶Abrams and Nolan, Arbitral Immunity, Industrial Relations Law Journal, Volume II, No.2, 1989, P.232, available at: <https://repository.library.northeastern.edu/files/neu:333082/fulltext.pdf> [Accessed on 2/02/2021]

sponsor arbitration as well³⁷ because of the presumed analogy between the judge and arbitrators, and in the next section, the researcher will go through the Arbitral Immunity and its importance to the arbitrators.

3.3 Arbitral Immunity

The losing party in any arbitration case tries to reverse the arbitrator's decision by any means, and accordingly, he perhaps raise a case against the arbitrator and demands compensation for the wrong decision issued by the arbitrator in losing party's point of view, and here, everyone who performs the function of an arbitrator feels that he is liable to legal accountability, accordingly, this leads to the arbitrators' reluctance to perform this function.

Therefore; not only of this reason, but also, as the arbitrator is performing a role similar to the role of the Judge, as he is acting as a third party who will judge in a case or conflict between two parties, the idea of arbitral immunity emerged, which emanates originally from the judicial immunity, which provides the arbitrator and gives him the necessary security to practice his profession without fearing from being subjected to legal prosecution as a result of any mistake made by him, except for the fatal mistakes that will be discussed later in this research.

The first Arbitration cases where arbitral immunity has applied were *Shiver v. Ross*, where the arbitral immunity was applied without using the term of arbitral immunity, and *Jones v. Brown*, where the court concluded that judicial officer, i.e. an arbitrator is exempted from his civil liabilities for his judicial acts.³⁸

3.4 Relation between Judicial Immunity and Arbitral Immunity

There is a great similarity between judicial immunity and arbitral immunity, and in order to study the relationship between them, it is necessary to first study the similarities between the judiciary and arbitration.

Both the judiciary and arbitration, settle disputes with the aim of achieving justice, and

³⁷Austern v. Chicago Board Options Exchange, Inc., 898 F.2d 882 (CA, 2nd Cir.)

³⁸Abrams and Nolan, Arbitral Immunity, Industrial Relations Law Journal, Volume II, No.2, 1989, P.235, available at: <https://repository.library.northeastern.edu/files/neu:333082/fulltext.pdf> [Accessed on 2/02/2021]

therefore immunity is inevitably necessary for both the judge and the arbitrator, for the purpose of reaching judgments without any fear from being prosecuted, also, judiciary and arbitration are similar in terms of the effects of the judicial ruling and the arbitration ruling in terms of the authority of the *res judicata* and the execution power of these rulings. Whereas the purpose of granting immunity is to protect litigants and the judicial process from while ensuring the integrity and independence of judges, and not for the purpose of protecting the person who occupies the judicial position, that is, granting immunity is a mean to achieve an end and not an end in itself, so achieving this purpose requires granting immunity to everyone who performs a judicial function, even if he is not actually a judge. The principle underlying the doctrine of arbitral immunity is the same as that giving rise to the doctrine of judicial immunity which is the protection of the finality and the integrity of the decision-making process from requital by dissatisfied litigants.³⁹

Originally, judicial immunity extended only to judges to assure their freedom to execute their duties with independence and without fear of consequences.⁴⁰ The court also notes that the functions of third parties such as arbitrators, evaluators, and mediators involve neutrality and impartiality, very similar to that of a judge, and therefore, third parties should be entitled to the same immunity given to the others who function as neutrals in an attempt to resolve disputes.⁴¹ The most important common factor between the function of the judge and the function of the arbitrator is the decision-making process and the impartiality and independence of the arbitrator required to carry out this work.⁴²

³⁹Weston, Maureen A., Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, *Minnesota Law Review*, vol88:449, 2004., P484, Available at: <https://scholarship.law.umn.edu/mlr/713> [Accessed on 15/03/2021]

⁴⁰Robert M. Carroll, Quasi-Judicial Immunity: The Arbitrator's Shield or Sword, 1991 *J. Disp. Resol.* (1991) Available at: <https://scholarship.law.missouri.edu/jdr/vol1991/iss1/10> [Accessed on 15/03/2021]

⁴¹Robert M. Carroll, Quasi-Judicial Immunity: The Arbitrator's Shield or Sword, 1991 *J. Disp. Resol.* (1991) Available at: <https://scholarship.law.missouri.edu/jdr/vol1991/iss1/10> [Accessed on 15/03/2021]

⁴²Mathew Bricker, The Arbitral Judgment Rule: using the Business Judgment Rule to Redefine Arbitral immunity, *Texas law review*, vol92:197, 2013., P201, available at: <http://texaslawreview.org/wp-content/uploads/2015/08/Bricker.pdf> [Accessed on 20/02/2021]

4.0 Types of Arbitral Immunity.

An Arbitrator who issues an award in an arbitration case where the case is not under his jurisdiction, probably may not be liable if a party sued him, as it can be considered that according to his understanding to the circumstances of the case, he concluded that it is within his competence and therefore, decided on it. In this case, it is very difficult to hold the arbitrator liable for any damages to one of the parties as a result of the arbitrator's judgement. On the other hand, let us compare between the previous case and a case where an arbitrator, after he has been assigned to an arbitration case, did not disclose to all parties and other arbitrators if any, his relationship with one of the disputed parties, who later on, because of this relationship, judged in favor to him.

Therefore, what type of immunity shall both arbitrators enjoy with?

Arbitral immunity is divided into three main types, which are absolute immunity, relative immunity and contractual immunity. Through the next three sections, we will address the definition of the three types of the immunities, and the justifications necessary to obtain each one of them, and their scope of application.

4.1 Absolute Immunity.

This section is divided into three subsections, subsection one is going to define the absolute immunity, and sub section two will address the justifications for absolute immunity, whereas subsection three will highlight the scope of the absolute immunity.

4.1.1 Definition of Absolute Immunity.

Absolute Immunity is an “immunity from suit”⁴³, it is a form of statutory immunity, which is distinguished by the fact that, its beneficiaries are not being prosecuted for any harmful acts they commit, during the performance of their judicial or arbitral works⁴⁴, even if these acts are

⁴³Chemerinsky.E, Absolute Immunity: General Principles and Recent Developments, (Touro Law Review: Vol. 24: No. 3, Article 1 (2014) P476. Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol24/iss3/1> [Accessed on 10/01/2021]

⁴⁴Rasmussen.M, Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France, (Fordham International Law Journal.Vol. 26, issue.6,Article 9 (2002)) P.1840 available at: <https://core.ac.uk/download/pdf/144225774.pdf> [Accessed on 10/01/2021]

alleged to be erroneous, malicious and/or irregular⁴⁵. The United States of America “the U.S” is considered the only country who grants the arbitrator an absolute immunity except for certain cases which will be discussed later in the research.

4.1.2 Justifications for Absolute Immunity.

The jurisprudence and legal systems that are supporting Absolute Immunity of the arbitrator, are based on several justifications, the most important of which are:

- 1- Since the function of the arbitrator is considered quasi-judicial⁴⁶, and there is a functional similarity between arbitrators and judges⁴⁷, and since if immunity is necessary to protect judges decisions and free them from the fear of assuming responsibility for their decisions⁴⁸, the same logic should apply to arbitrators decisions that they should be granted Absolute Immunity as judges⁴⁹.
- 2- The absence of judicial precedents requiring the arbitrator to be held accountable for the errors he issued, as the court decision in *Jones v. Brown*⁵⁰, where the court refused to hold the arbitrator liable for his fraudulent actions because of absence of judicial precedents.
- 3- The field of arbitration is one of the areas that anyone with the required qualifications in a particular specialty can practice, so, the arbitrators who perform arbitration work, are considered professionals in their field, and without immunity granted to them⁵¹, it is very

⁴⁵Johnson v. Thompson–Smith, 203 F.Supp.3d 895, 902 (N.D. Ill. 2016)

⁴⁶Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution,Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 2/02/2021]

⁴⁷Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution,Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 2/02/2021]

⁴⁸Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution,Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 2/02/2021]

⁴⁹Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution,Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 2/02/2021]

⁵⁰Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution,Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 2/02/2021]

⁵¹Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution,Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 2/02/2021]

hard to assume that, there will be an encouraging factor for the arbitrators to serve anymore⁵².

- 4- Countering the steps that can be taken by litigants who are not satisfied with the arbitration process or the award, and this is considered a protection to the decision-making⁵³ process taken by the arbitrators.
- 5- The risks arising from holding judges accountable in extreme circumstances will not deter applicants to act as judges, unlike in arbitration, because the arbitrator usually serves without pay or little remuneration, some work temporarily, and few of them obtain job insurance or social status from his job as an arbitrator, in contrast, judges usually have security, primacy, steady and regular salary⁵⁴, and this is what was expressed by one of the Federal Courts of Appeal, saying: “individuals ... cannot be expected to volunteer to arbitrate disputes if they can caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit”⁵⁵

4.1.3 Scope of Absolute Arbitral Immunity.

Arbitrators enjoy absolute immunity in the United States⁵⁶, where they are protected from being prosecuted for all actions undertaken within their duties⁵⁷, for instance, this means that, they are free from civil liability in the case of failure to disclose – in *Olson v. National Ass'n of Sec. Dealers*⁵⁸, where the court of appeal affirms the district court's decision by dismissing Olson's complaint and holding that National Ass'n of Sec. Dealers is immune from improperly managing arbitral proceedings. Another example of the court judging in favor of the arbitrator

⁵²Tamara v. Conrad, 552 F.2d 778,781 (7th Cir. 1977)

⁵³ Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution, Volume(2009), issue1, Article 10, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 2/02/2021]

⁵⁴Abrams and Nolan, Arbitral Immunity, Industrial Relation Law Journal, Volume II, No.2, 1989, P.235, available at: <https://repository.library.northeastern.edu/files/neu:333082/fulltext.pdf> [Accessed on 2/02/2021]

⁵⁵Tamara v. Conrad, 552 F.2d 778,781 (7th Cir. 1977)

⁵⁶Bricker.M, The Arbitral Judgment Rule: Using the Business Judgment Rule to Redefine Arbitral Immunity, Texas Law Review, Volume(92), issue1, 2013, P.197 Available at: <http://texaslawreview.org/wp-content/uploads/2015/08/Bricker.pdf> [Accessed on 16/02/2021]

⁵⁷Mullerat.R, The Liability of Arbitrators: a survey of current practice, International Bar Association, commission on Arbitration, 2006, P.1 Available at: https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/arbitrators_impartiality_and_independence/mullerat_ilability_arbs.pdf [Accessed on 16/02/2021]

⁵⁸Olson v. National Ass'n of Sec. Dealers, 85 F.3d 381, 382 (8th Cir. 1996)

is *Cahn v. International Ladies' Garment Workers Union*⁵⁹, the plaintiffs charged the arbitrator with harassment, and the court concluded that the arbitrator is protected and shielded by immunity. This immunity only applies to arbitral acts or arbitrator's quasi-judicial, where "Arbitral acts" are as broad as judicial acts i.e. the arbitrator is like a judge, that he will only enjoy the absolute immunity because of function comparability, that he is resolving disputes between parties, however, there are certain aspects when the arbitrator will not be granted absolute immunity like:

- 1- If the arbitrators acted in excess of their jurisdiction, then, they will not be covered by absolute immunity, in *Kemner v. District Council of Painters and Allied Trades*⁶⁰, where the court said that arbitration committees were not immune from a suit seeking relief from acts allegedly in excess of their jurisdiction.
- 2- If the arbitrators fail to render any award within specified time, then, they will not be expected to be immune from liability for failure to perform and do their obligations, in *Graphic Art Int'l Union "the Union" v. Standard Register Co. "the Company"*⁶¹, the arbitrator failed to issue and render his award 3 years after briefs were filed to him. The Union endeavored the Company's agreement to replace the arbitrator, but the Company rejected and then, the Union sued both, the arbitrator and the Company seeking compensation for damages. The court ruled in favor of the Union by firing the arbitrator and prohibiting him from collecting his fees.

From the foregoing, we can conclude that the arbitrator, once the arbitral capacity and the jurisdiction over the dispute are established, then an absolute immunity is established for him that while carrying out his arbitral mission, by preventing exposure to the arbitrator and interfering with his work except in narrow exceptional cases that have been discussed previously. However, one would wonder that, how the aggrieved parties would get their rights if the arbitrator is shielded with immunity that helps him to be exempted from his liabilities towards the parties to the disputes except in very rare circumstances as mentioned previously, further doesn't this immunity will keep the disputed parties away from resorting their cases to arbitration?

⁵⁹*Cahn v. International Ladies' Garment Union*, 311 F.2d 113 (3d Cir. 1962)

⁶⁰*Kemner v. District Council of Painters and Allied Trades*, 768 F.2d 1115 (9th Cir. 1985)

⁶¹*Graphic Arts Int'l Union, Local 508 v. Standard Register Co.*, 103. L.R.R.M. (BNA) 2212 (S.D. Ohio 1979)

Let us move to the next section to figure out whether, we can get some answers to the previous questions or coming up with further better type of immunity that will work to the interests of all parties of the arbitral process.

4.2 Restricted / Relative Immunity.

The aim of Arbitral Immunity is to shield and protect arbitrators from the burden of being prosecuted for the purpose of preserving and reaching final independent judgment,⁶² but, there are some arbitrators who misused this Arbitral Immunity and deviated from the notion of that arbitrator is a third impartial person, by not performing their duties in a way that is not fair to one of the disputed parties, either by misconducting the arbitration process, showing gross negligence, not disclosing their relation with any of the disputants or breaching the contract, and not reaching to final judgment on time.

Therefore, and in order protect the right of the disputant parties, some jurisprudence and legal systems enacted Restricted/ Relative Immunity in their laws for the aim of restricting the arbitrators and keeping them aware of the consequences of not fulfilling their obligations towards the disputant parties.

This section is divided into three subsections, subsection one is going to define the relative immunity, and sub section two will address the justifications for the relative immunity, whereas subsection three will highlight the scope of the relative immunity.

4.2.1 Definition of Restricted / Relative Immunity.

Restricted / Relative Immunity is a judicially doctrine that protects government officials from being sued and held liable for violations, as long as the officials did not violate “clearly established” law⁶³, it “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”⁶⁴

⁶²Abrams and Nolan, Arbitral Immunity, Industrial Relation Law Journal, Volume II, No.2, 1989, P.241, available at: <https://repository.library.northeastern.edu/files/neu:333082/fulltext.pdf> [Accessed on 2/02/2021]

⁶³(<https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform>) [accessed on 31/07/2021]

⁶⁴Pearson v. Callahan - 555 U.S. 223,231, 129 S. Ct. 808 (2009)

4.2.2 Justifications for Restricted / Relative Immunity.

The trend in favor of the idea of Restricted/Relative Immunity was based on several justifications that served as a sympathetic response to what was based on the trend in favor of Absolute Immunity as follows:

- 1- By providing the arbitrators with Restricted / Relative Immunity, it will provide protection to the parties that if the arbitrator acts in bad faith⁶⁵, then, they can sue him and ask for compensation, thus, the arbitrator will be under the pressure to take care, to proceed diligently and to act impartially, and this point is considered as an answer to the questions raised at the end of the previous section.
- 2- The arbitrator will be forced to render a strong decision as a result of being feared to be prosecuted.⁶⁶
- 3- Restricted / Relative immunity will prevent the arbitrator from breaching of contract obligations, fraud, negligence, violations of statutory, misconducting the arbitration process and failure to render an award on time.⁶⁷

4.2.3 Scope of Restricted / Relative Arbitral Immunity.

The Model Law did not contain an express provision making arbitrators liable or immune from their acts or omissions when it is originally proposed. In fact, the issue of the immunity of the arbitrators was specifically ignored during legislating the model law because “the liability problem is not widely regulated and remains highly controversial”.⁶⁸

Besides the arbitrator should perform a judicial function in order to enjoy Restricted/Relative Immunity,⁶⁹ several national laws and/or arbitration institutions allow extensive arbitrator

⁶⁵Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution, Volume(2009), issue1, Article 10, P.7, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 18/02/2021]

⁶⁶Brown.J, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, (Journal of Dispute Resolution, Volume(2009), issue1, Article 10, P.11, Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed on 18/02/2021]

⁶⁷Weston, Maureen A., Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, Minnesota Law Review, vol88:449, 2004., P517, Available at: <https://scholarship.law.umn.edu/mlr/713> [Accessed on 15/03/2021]

⁶⁸Weston, Maureen A., Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, Minnesota Law Review, vol88:449, 2004., P517, Available at: <https://scholarship.law.umn.edu/mlr/713> [Accessed on 15/03/2021]

⁶⁹Franck.S, The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity,

immunity, but limits it in cases of bad faith,⁷⁰ recklessness and misconduct, examples of such can be found in:

- 1- Under the English 1996 Arbitration Act, the Arbitrator is granted general immunity in anything done or omitted in the discharge of his duties as an arbitrator unless it is proved that the act or omission was made in bad faith⁷¹, or the courts determines that withdrawal from the arbitration process is unreasonable.⁷²
- 2- Willful misconduct and recklessness⁷³ as it is the case for the 2011 Spanish Arbitration Act.
- 3- The Singapore International Arbitration Act “the SIAC” states that, an arbitrator is immune for any negligent acts under his capacity, mistake in law procedures or facts made in the course of arbitral proceedings.⁷⁴
- 4- The Belgium law doesn’t provide immunity for the arbitrators,⁷⁵ despite, the Civil Court of Brussels stated that arbitrators are not shielded by judicial immunity and that they could be liable for damages resulting from serious mistakes.⁷⁶
- 5- At the regulatory level, some arbitral institutions carefully limited the scope of immunity by excluding its applicability to deliberate wrongdoing and conscious, as stated in the London Court of International Arbitration “the LCIA” 2014 Rules on Arbitration that exclude the liability:
“of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any

Articles in Law Reviews & Other Academic Journals. 1581, 2000 available at:
https://digitalcommons.wcl.american.edu/facsch_lawrev/1581/ [Accessed on 18/09/2021]

⁷⁰Weston, Maureen A., Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, Minnesota Law Review, vol88:449, 2004., P517, Available at: <https://scholarship.law.umn.edu/mlr/713> [Accessed on 15/03/2021]

⁷¹Article 29 of the English 1996 Arbitration Act

⁷²Article 25 (4) of the English 1996 Arbitration Act

⁷³Article 21 (1) of the Spanish 2011 Arbitration Act

⁷⁴Article 25 (4) of the English 1996 Arbitration Act

⁷⁵https://www.linklaters.com/-/media/files/linklaters/pdf/mkt/brussels/international_arbitration_chapter_on_belgium.ashx?la=en&rev=181500b1-2d1e-4487-9921-24f7c23891e5&hash=92EDD42FA65545D4BC5A6F9E45D0333D8EFCFFB8 [Accessed on 23/10/2021]

⁷⁶Franck.S, The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity, Articles in Law Reviews & Other Academic Journals. 1581, 2000 available at:
https://digitalcommons.wcl.american.edu/facsch_lawrev/1581/ [Accessed on 18/09/2021]

deputy Registrar), any arbitrator, any Emergency Arbitrator, any tribunal secretary and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law".⁷⁷

In light of the above, the researcher finds that it is obvious, in a way, that the restricted immunity relieved the litigants of the fear that they were carrying on them in the event that they did not obtain their rights if the arbitrator was not impartial, neutral and did not perform his duties as agreed upon or as it should and imposed by the laws and morals.

But, this could lead to, any litigant who is not satisfied with judge of the arbitrator for any reason, to take the chance and sue the arbitrator, which consequently will lead that, arbitrator to feel uncomfortable in the performance of his duty, therefore, an ideal environment must be provided for all parties to the arbitral process, whether the arbitrator or the parties to the dispute, by protecting the arbitrator from being prosecuted by parties who are not satisfied with his judgment, and also working and ensuring that the parties to the dispute obtain the necessary justice.

So, can the parties to the arbitral process agree on excluding liabilities that may result from the wrong doing or omissions, the next section will have a look on this case.

4.3 Contractual Arbitral Immunity.

There were some attempts to adopt the immunity rules by some arbitral institutions and the same were criticized,⁷⁸ Article 34 of the 1998 ICC Rules states that, the arbitrators, the Court and its members, the ICC and its employees and the ICC National Committees shall not be liable to any person for any act or omission with regards to the arbitration.⁷⁹ The previous provision was changed and redrafted in the 2012 ICC Rules on arbitration by following a clear

⁷⁷Article 31 (31.1) of the LCIA 2014 rules on Arbitration.

⁷⁸Arbitration, The International Journal of Arbitration, Mediation and Dispute Management, Thomson Reuters, Volume 83, Issue 4, November 2017, p.441 available at: <https://www.ciarb.org/media/1381/november-2017.pdf> [Accessed on 24/10/2021]

⁷⁹Article 34 of the ICC 1998 rules on Arbitration.

declaration of invalidity of article 34 by the Paris Court of Appeal in 2009.,⁸⁰ and the new Article 40 reads as follows: “The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law”.⁸¹

Although the parties that conclude contracts have the right to agree on the terms they deem appropriate, including the exclusion and limitation of liabilities, which are guaranteed to them by the legal systems through the principle of will power, but this right is restricted to certain conditions, for instance, provisions exempting liabilities resulting from the illegal act, bad faith, misconduct, and gross negligence are considered null and void, therefore, the arbitral immunity under the contractual regime is subjected to the validity of the limitations and exclusions under the applicable law.

This section is divided into three subsections, subsection one is going to define the contractual immunity, and sub section two will address the justifications for contractual immunity, whereas subsection three will highlight the scope of the contractual immunity.

4.3.1 Definition of Contractual Immunity.

Contractual Immunity is an agreement that provides releases to the arbitrator and, where relevant, the arbitral institution from any liability,⁸² or it can be defined by An agreement between the arbitrator and the parties to the arbitration in the arbitration contract concluded between them or by a subsequent agreement to lift the liability of the arbitrator or limit it to a certain extent or scope before the damage occurred.

4.3.2 Justification for the Contractual Immunity

“A rule of legal immunity is inconsistent with the market-based model. It discourages the use of arbitration by forcing the parties involuntarily to surrender a remedy when there is

⁸⁰Arbitration, The International Journal of Arbitration, Mediation and Dispute Management, Thomson Reuters, Volume 83, Issue 4, November 2017, p.441 <https://www.ciarb.org/media/1381/november-2017.pdf> [Accessed on 24/10/2021]

⁸¹Article 40 of the ICC 2012 rules on Arbitration.

⁸²Peter B. Rutledge, *Toward a Contractual Approach to Arbitral Immunity* (2004), Available at: https://digitalcommons.law.uga.edu/fac_artchop/518 [Accessed on 25/10/2021]

misconduct by the decision maker. It drives up the price of arbitration by allowing the arbitrators to reap the benefits of immunity without having to make a transfer payment in return for the parties' foregoing the right to sue. Finally, it undermines competition among providers of dispute resolution services because arbitrators cannot differentiate themselves along this axis".⁸³

The proponents of the contractual immunity believe that, it provides the ideal environment for all parties by preserving the parties' freedom to structure the arbitration along their preferred lines, assuring that any waiver of remedies by the parties to the dispute, will be effectively compensated in the form of a transfer payment from the arbitrator and enabling competitors in the dispute resolution marketplace to differentiate themselves by offering the parties the complete remedies partial as an assurance of their performance.⁸⁴

4.3.3 Scope of the Contractual Immunity

The scope of contractual immunity encompasses that, arbitrator should be performing his judicial function and there should be a contract between the arbitrator and the parties to the disputes. The contract should contain the provisions excluding and limiting the liabilities, bearing in mind that liabilities resulting from the illegal act, bad faith, misconduct, and gross negligence, are null and void under the applicable law, however some arbitral institutions still provide wide immunity to their arbitrator, for instance, rules of the ICC arbitral institution provide for the restriction of the liability of arbitrators, the arbitral institutions, their employees and other staff of the arbitral institutions. The ICC Rules extend the immunity to the ICC Court and its members, ICC national Committees and their employees and representatives.⁸⁵ Some Rules including the SIAC Rules⁸⁶ provide for absolute immunity for the arbitral tribunal and the institutions. Thus, arbitrators and the institution are not liable for any negligence, acts or omissions. The LCIA grants a qualified immunity exempting intentional wrongdoing.⁸⁷ The Cairo Regional Centre for International Commercial Arbitration "the CRCICA" is likewise of

⁸³Peter B. Rutledge, *Toward a Contractual Approach to Arbitral Immunity* (2004), Available at: https://digitalcommons.law.uga.edu/fac_artchop/518 [Accessed on 25/10/2021]

⁸⁴Peter B. Rutledge, *Toward a Contractual Approach to Arbitral Immunity* (2004), Available at: https://digitalcommons.law.uga.edu/fac_artchop/518 [Accessed on 25/10/2021]

⁸⁵Article 40 of the ICC 2012 rules on Arbitration

⁸⁶Rule 38 of the SIAC Rules

⁸⁷Article 31 of the LCIA rules on Arbitration

the SIAC position as they also provide for absolute immunity for the arbitral tribunal and the institution.⁸⁸ The Stockholm Chamber of Commerce “the SCC” Rules exempt willful misconduct or gross negligence.⁸⁹

By studying the types of arbitral immunity, the researcher sees that, the optimal immunity that the arbitrator should enjoy with is the relative immunity, through which the interests of all parties to the arbitral process are preserved: the protection of the arbitrator in the event of being pursued from the losing party in the event that the same party does not show Evidence or proofs that the arbitrator committed a serious mistake during the arbitral process, while at the same time degrading the parties to the dispute by holding the arbitrator liable in the event of his gross negligence and his failure to fulfill his obligations towards the parties to the dispute as dictated by the contract and the rules for showing justice.

⁸⁸Articles 16 of the CRCICA rules on Arbitration.

⁸⁹Articles 52 of the SCC rules on Arbitration.

5.0 Immunity of Arbitrators in Civil and Common Law Jurisdictions.

In common law countries, especially the U.S the immunity of arbitrators is considered absolute, except for some rare cases which will be discussed in the next section, conversely, the civil law approaches are quite more qualified, by allowing for civil liability in cases of willful harm, negligence and bribery, on the basis that there is a contractual relationship between the arbitrator and the disputed parties.

In this chapter, we will shed the light on the situation of the arbitral immunity in in some common and civil law jurisdiction.

5.1 Unites States of America

The U.S. is almost considered the only country which embraces the notion of Absolute Immunity.⁹⁰ The legal system in the U.S. protects the arbitrators even if they are acting in bad faith, not disclosing their relationship with any party of the disputants if any, making clear factual mistake and clear legal errors.⁹¹ Furthermore, they are absolutely immune from being sued if they carried out administrative functions in improper way⁹², and damages for all acts within the scope of the arbitral process⁹³. The scope of absolute immunity for the arbitrators is extended to include situations where the arbitrators acted grossly negligent and shown careless of their duties.⁹⁴ Section 14 of the U.S. Uniform Arbitration Act 2000 states that “An Arbitrator or an Arbitration Organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity”⁹⁵.

Moreover, the absolute immunity is considered mandatory in the U.S., that means, that even if the disputant parties want to contract it out, they cannot do so, as the absolute immunity has

⁹⁰Frank. S, The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity, Articles in Law Reviews & Other Academic Journals.1581, (2000) P59. Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/1581/ [Accessed on 18/09/2021]

⁹¹Rutledge B. Peter, Toward a Contractual Approach to Arbitral Immunity, (Faculty Scholarship at Digital Commons @ Georgia Law: Vol. 39:151, (2004) P152. Available at: https://digitalcommons.law.uga.edu/fac_artchop/518

⁹²Honn v. National Ass'n of Securities Dealers, Inc. 182 F.3d 1014 (8th Cir. 1999)

⁹³Austern v. Chicago Bd. Options Exchange, Inc 898 F.2d 882 (2d Cir. 1990)

⁹⁴Frank. S, The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity, Articles in Law Reviews & Other Academic Journals.1581, (2000) P31-32. Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/1581/ [Accessed on 18/09/2021]

⁹⁵Section 14 of the U.S. Uniform Arbitration Act 2000

been granted by means of legislation and case law.⁹⁶

However, the scope of absolute immunity does not encompass situation where the arbitrator exceeds his jurisdiction or delays in issuing an award within specified time and even absolute arbitral immunity “does not act to bar claims for equitable reliefs”⁹⁷

5.2 United Kingdom.

The immunity of arbitrator has been addressed in United Kingdom Arbitration Act 1996 “the UK Arb. Act”, where section 29 states that “An Arbitrator is not liable for anything done or omitted in the discharge or purposed discharge of his function as arbitrator unless the act or omission is shown to have been in bad faith.”

The arbitral immunity applies to the arbitral institution as well unless act or omission are done in bad faith, further, it applies to acts or omissions made in carrying out functions of nominating arbitrators.⁹⁸

Therefore, it is obvious that in the United Kingdom, the arbitrators enjoy relative immunity and the house of lords assured that, arbitrator enjoy judicial immunity because of the judicial capacity that they serve, further, they added that, without this immunity, the arbitrator would be prosecuted.⁹⁹

5.3 France

In French law, the liability of the arbitrator is based on contractual nature.¹⁰⁰ He is immune with relative immunity and not liable for factual errors, but he would be liable for gross

⁹⁶Lin Yu. H, A Theoretical Overview of the Foundations of the International Commercial Arbitration, (CONTEMP.ASIA ARB.J.255, (2008) P271. Available at:

<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.555.2751&rep=rep1&type=pdf>

⁹⁷Pulliam v. Allen, 466 U.S. 522 (1984)

⁹⁸Rasmussen.M, Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France, (Fordham International Law Journal.Vol. 26, issue.6,Article 9 (2002)) P.1853 available at:

<https://core.ac.uk/download/pdf/144225774.pdf> [Accessed on 12/10/2021]

⁹⁹Rasmussen.M, Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France, (Fordham International Law Journal.Vol. 26, issue.6,Article 9 (2002)) P.1853 available at:

<https://core.ac.uk/download/pdf/144225774.pdf> [Accessed on 10/01/2021]

¹⁰⁰Arbitration, The International Journal of Arbitration, Mediation and Dispute Management, Thomson Reuters, Volume 83, Issue 4, November 2017, p.439 <https://www.ciarb.org/media/1381/november-2017.pdf> [Accessed on 24/10/2021]

negligence¹⁰¹, and failure to stick in time limit for making an award¹⁰².

Arbitrators or arbitral institution are liable in case of breach of their contract with the parties and failure to meet contractual obligations¹⁰³, or involvement in criminal matters such as corruption or bribery of persons exercising a judicial function¹⁰⁴.

5.4 Italy

Pursuant to article 813 of Italian Code of Civil Procedure, arbitrators may be held liable for damages suffered by the parties in case of the followings: omission or delay in the proceedings caused by fraud or gross negligence; delay in rendering the award caused within the time limit set by the parties or by law and resignation without proper cause after accepting the appointment.¹⁰⁵ Therefore, the immunity granted to the arbitrator could be considered as a relative immunity.

5.5 Egypt.

The Egyptian Arbitration Act didn't mention the immunity of arbitrators. However, arbitrators generally enjoy immunity from suit except in exceptional cases of corruption, fraud and/or gross negligence as per article 217-2 of the Egyptian Civil Code precludes the exclusion of liability in the case of fraud or gross negligence.

5.6 Jordan.

The Jordanian Arbitration Law is devoid of any provision that grants arbitral immunity to the arbitrator or establishes the civil liability of the arbitrator for errors or misconduct that he may commit while performing his duties. Despite, the Jordanian court of cassation stated that, arbitration is a contract where parties agree to refer the dispute that has arisen between them in the implementation of the contract on the arbitrators for decision instead of resorting to

¹⁰¹Cass, 1st Civ, 15 January 2014, No. 11-17.196

¹⁰²Rasmussen.M, Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France, (Fordham International Law Journal.Vol. 26, issue.6,Article 9 (2002)) P.1862 available at: <https://core.ac.uk/download/pdf/144225774.pdf> [Accessed on 10/01/2021]

¹⁰³Rasmussen.M, Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France, (Fordham International Law Journal.Vol. 26, issue.6,Article 9 (2002)) P.1864 available at: <https://core.ac.uk/download/pdf/144225774.pdf> [Accessed on 12/10/2021]

¹⁰⁴Articles 434-9 of French Penal Code

¹⁰⁵Articles 813 of the Italian Code of Civil Procedure

litigation,¹⁰⁶ therefore, arbitrator could be sued in case of breaching the contract terms and not performing his obligations towards the parties to the conflict.

It becomes clear to the researcher that how the arbitrator's arbitral immunity differs from one system to another, and even countries that adopt the absolute immunity system, such as the U.S, there are some special cases in which the arbitrator is held accountable, which raises the question, isn't the absolute immunity is complete immunity that protects its enjoyer from any liability in light of performing his task that he was entrusted with, as we believe that this immunity should be clarified further, because once the arbitrator is held accountable under this immunity, it becomes relative immunity. on other hand, we see that the systems that are adopting relative immunity differ in their implementation in many respects, some of which make them include negligence, and others make them include gross negligence, fraud and bribery, which leads to some parties to the conflict not resorting to the systems of these countries for arbitration, and even the arbitrators' reluctance to accept cases that are made in those countries for the reason that both of them may fear of not getting their interests in these systems.

¹⁰⁶Al Khataibeh.O & Zahdeh,The Civilian and Judicial Immunity Arbitrator Responsibilities, (International Institute for Science, Technology and Education. Vol. 16, 2013, available at: [file:///C:/Users/HP/Downloads/8818-10875-1-PB%20\(1\).pdf](file:///C:/Users/HP/Downloads/8818-10875-1-PB%20(1).pdf) [Accessed on 15/10/2021]

6.0 Immunity of Arbitrators in the United Arab of Emirates

In this chapter, we will shed light on the position of the arbitrators' immunity in the United Arab Emirates "the UAE", by looking at the UAE Arbitration Law issued in 2018, and other laws that perhaps be related to the immunity of arbitrators. In the first section, we will discuss the position of the UAE Arbitration Law on the immunity of arbitrators, and then in the second section, we will look at other laws of the UAE that may be related to the immunity of arbitrators, and finally in the third section, the position of arbitral institutions and their rules on the immunity of arbitrators will be addressed.

6.1 The position of the UAE Arbitration Law

The Federal arbitration law of the UAE – Federal Law No. 6 of 2018 on Arbitration ("New Law") – was published on 15 May 2018 and came into effect on 16 June 2018. Through the researcher's extrapolation of the articles of this law, there is no explicit article regarding the arbitrators' immunity or his legal liabilities towards the conflict members in any case. However, the researcher believes that there is an implicit immunity provided by the new to the arbitrator through some articles, for instance, article (10/4) states that whoever is informed of his candidacy to take over the arbitration mission must declare in writing everything that might raise doubts about his impartiality or independence, he must, since his appointment and during the arbitration procedures, take the initiative without any delay to notify the parties and the other arbitrators in the event of any circumstance that may raise doubts about his impartiality or independence, unless he had previously informed them of that circumstance.¹⁰⁷ And also Article (14), which states that the arbitrator may not be dismissed unless circumstances arise that raise serious doubts about his impartiality or independence,¹⁰⁸ further article (15/4), states that the arbitrator's relinquishment of his mission or the parties' agreement to dismiss him is not considered his acknowledgment of the validity of any of the reasons for the response,¹⁰⁹ also article (26), states that the arbitration parties are treated on an equal manner, and each of them is given an equal and full opportunity to present his requests and defense,¹¹⁰ therefore; it

¹⁰⁷ Article 10/4 of the Federal Law No. 6 of 2018 on Arbitration

¹⁰⁸ Article 14 of the Federal Law No. 6 of 2018 on Arbitration

¹⁰⁹ Article 15/4 of the Federal Law No. 6 of 2018 on Arbitration

¹¹⁰ Article 26 of the Federal Law No. 6 of 2018 on Arbitration

becomes clear to the researcher that the new law did not clarify whether the arbitrator will be questioned in the event of his non-compliance with his aforementioned duties towards the parties.

Accordingly, the researcher believes that the new law, although it does not directly and clearly state the existence of immunity for the arbitrator, but that there is a vaguely defined immunity granted to him, which is not known whether it is absolute immunity or relative immunity.

The researcher was not able to find some cases related to arbitral immunity that were decided upon based on the new law so that it would be easy to determine the type of the immunity granted to the arbitrator based on the new law.

6.2 Relevance of other UAE laws

UAE Penal Code:

The UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (7) of 2016 in Article 257, deals with the issue of the immunity of the arbitrator, where it said that he shall be punished whoever issues a decision, expresses an opinion, submits a report, presents a case, or proves an incident in the interest of a person or against him, contrary to what is required by the duty of impartiality and integrity, as an arbitrator, expert, translator or fact-finder appointed by the administrative or judicial authority or chosen by the parties;¹¹¹ and this indicates the absence of immunity for the arbitrator, however, the text of the article was amended by Decree-Law No. (24) of 2018 to become as follows: he shall be punished with temporary imprisonment, whoever issues a decision, expresses an opinion, submits a report, presents a case, or establishes a fact for the benefit of or against a person, contrary to what is required by the duty of impartiality and integrity, as an arbitrator, or an expert, translator, or fact-finder appointed by the administrative or judicial authority or chosen by the parties.¹¹² The researcher believes that excluding the arbitrator from being punished under the previous article, gives him a kind of immunity and gives some satisfaction to the arbitrator to perform his duties without

¹¹¹ Article 257 of the The UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (7) of 2016

¹¹² Article 257 of the The UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (24) of 2018

any pressure.

Despite of what have been mentioned previously, pursuant to article 236 of the UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (24) of 2018, the arbitrator is considered a public servant within the limits of the work assigned to him¹¹³, and therefore, he shall be punished with temporary imprisonment if it is proven that he took the bribe.¹¹⁴

UAE Civil Code:

The legal nature of arbitration under the UAE courts is contractual.¹¹⁵ Article 272/1 of the Federal Law No 5 of 1985 – Civil Code (the “Civil Code”) states, in contracts binding on both sides, if one of the contracting parties does not fulfill what he is obligated to do in the contract, the other contracting party may, after warning the debtor, demands execution or termination of the contract, further, article 272/2 of the Civil Code states that, the judge may order the obligor to perform the contract immediately or he may postpone performance to a specified time and he may also order that the contract shall be canceled and compensation shall be paid in any way if appropriate. Moreover, article 282 of the Civil Code states the Any harm done to the others shall render the doer thereof, even though not a person of discretion, liable to make good the harm. The Dubai Courts stated that, if it is not proven that the arbitrator committed a serious error, fraud, then he is no longer liable towards any.¹¹⁶

Here, the researcher believes that the arbitrator, under this law, is liable to accountability in the event of his failure to comply with his duties towards the parties to the dispute, due to the existence of a contractual relationship between them, which obliges him to carry out his job in proportion to what has been agreed upon of equality between the parties and to show justice.

¹¹³ Article 236 of the UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (24) of 2018

¹¹⁴ Articles 234 & Article 235 Article 257 of the UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (24) of 2018

¹¹⁵ Dubai Court of Cassation in Appeal No. 484 of 2017 - Civil Appeal

¹¹⁶ Dubai Court of Cassation in Appeal No. 484 of 2017 - Civil Appeal

6.3 Attitudes of Institutional Arbitration Rules in the UAE

The position of arbitrator's immunity in arbitral institutions in the UAE differs from the other laws that are previously addressed, as most of the rules of arbitral institutions relating to arbitral immunity expressly state that the arbitrator is not responsible for the actions he performs, although there is some disparity in granting immunity by these institutions as some of them do not hold the arbitrator any liability whatsoever towards the parties to the dispute, and others do not hold him liable if the error occurred in good faith, for instance; article 40 of Dubai International Arbitration Center "DIAC" rules 2007 state that "No member of the Tribunal or of the Executive Committee, nor the Centre and its employees, nor any expert to the Tribunal shall be liable to any person for any act or omission in connection with the arbitration."¹¹⁷ On the other hand, article 32 of Abu Dhabi Commercial Conciliation and Arbitration Centre "the ADCCAC" rules states that, the Center, any of its employees, the authority, or any expert appointed by the Commission or any of the members of the Committee shall not hold liability to any of the parties or third parties for any act, or omission in connection with the arbitration taken in good faith.¹¹⁸

In order to consider how the courts dealt with the rules of arbitral institutions regarding the responsibility of the arbitrator towards the parties, the Dubai Court of Cassation stipulated in appeal No. 212 of 2014 - Civil Appeal that, assuming that an error was established in the arbitrator's decisions, it is not considered a breach of the contract requiring the liability of the defendant (The arbitrator) under the contract linking the plaintiff to the arbitration center, unless the arbitrator committed a serious professional error or negligence.

¹¹⁷ Article 40 of DIAC rules 2007

¹¹⁸ Article 32 of ADCCAC

7.0 Conclusion

Since arbitration is an alternative mechanism for the litigation to resolve disputes that arise between any two parties, it was necessary to encourage the parties to the dispute to resort to it, and also to encourage the arbitrators to apply to work on this task, which is the settlement of the dispute between the opposing parties. But because some parties to the dispute who are not satisfied with the judgment of some arbitrators resort to the judiciary and file lawsuits against the arbitrators, it was necessary to provide a kind of immunity that protects the arbitrator from these lawsuits in order to carry out the task entrusted to him with satisfaction, further, and in order for the arbitrator to be objectively impartial and fair in his judgment, he must be completely and personally independent in his work from any party, whether governments or people who may exercise certain political or financial pressures on the arbitrator to force him to pervert justice in favor of a certain party, and the principle is to ensure that the arbitrator's work proceeds impartially and independently, therefore, it is fair that he enjoys sufficient immunity that protects him and makes him safe from falling under such influences. But at the same time this immunity should not be a gateway to open the door to negligence and manipulation of judgments and receiving bribes to rule in favor of one party against another, and not to give the necessary importance to the arbitral process by the arbitrators.

Therefore, in this research and in order to reach the extent of the arbitrator's entitlement to arbitral immunity and what is the optimum immunity that he should enjoy, arbitral immunity was studied from its inception and its relationship with judicial immunity, and then both judicial immunity and arbitral immunity were defined, and then limping into types arbitral immunity and studying the position of common laws, private laws and some Arab countries' laws related to arbitration by looking at their position on arbitral immunity, and finally summarizing some of the results that have been reached and recommendations that the legislator can adopt in order to protect the rights of the arbitrator and the parties to the dispute.

8.0 Results and Recommendations:

Results:

- 1- The legal nature of the arbitration and the relationship between the arbitrator and the parties to the dispute plays a big role in determining the type of immunity that the arbitrator should enjoy.
- 2- The principle underlying the doctrine of arbitral immunity is the same as that giving rise to the doctrine of judicial immunity which is the protection of the finality and the integrity of the decision-making process from requital by dissatisfied litigants.
- 3- The arbitrator, as he is performing function similar to the function of the judge which is to settle the disputes between the conflicted parties, must enjoy immunity from lawsuits that may be raised by the parties who are not satisfied with his ruling.
- 4- There is some kind of similarity between the function of the arbitrator and the function of the judge, especially in the matter of separating between the parties to the dispute and issuing judgments.
- 5- Arbitral Immunity is divided into three main immunities which are Absolute Immunity, Restricted/ Relative Immunity and Contractual Immunity.
- 6- The main point on which advocates of absolute immunity are based is that the function of the arbitrator is similar to the function of the judge and therefore it was necessary for the arbitrator to enjoy the same immunity as the judge.
- 7- The supporters of the contractual immunity believe that, it provides the ideal environment for all parties by preserving the parties' freedom to structure the arbitration along their preferred lines
- 8- The main point on which the proponents of relative immunity relied is that because of the contractual relationship between the arbitrator and the parties to the dispute, it was necessary for the arbitrator to bear the responsibility in the event of his breach of the terms of the contract and his failure to comply with his duties towards the parties to the dispute.
- 9- Only the arbitrator carrying out an arbitral mission qualifies him to enjoy arbitral immunity.
- 10- Arbitrator should be liable if he commits gross negligence, bribery, not disclosing his relationship with any party of the disputes, delaying in issuing the award and fraud.
- 11- Failure to regulate the immunity of arbitrator's matter, could lead the disputant parties not to resort to arbitration as an alternative dispute resolution method.

12- Lack of clarity in many laws about the type of arbitral immunity that the arbitrator should enjoy with.

Recommendations:

- 1- The necessity of reaching a clear legal text related to arbitral immunity that clearly states the liability of the arbitrator, which must be issued and adopted by a global international treaty signed by all countries.
- 2- Legislative authorities should enact very clear provisions related to immunity of arbitrator, and that arbitrator should be provided with broad relative immunity save that the interest of the conflicted parties to be protected as well.
- 3- The states should establish standard requirements and qualifications for the arbitrators to be compared with.
- 4- The necessity of qualifying everyone who wants to carry out the arbitration mission and assurance of the experience they have.
- 5- A panel of 3 arbitrators, one of them should has legal background or to be a lawyer is a must to be added in the arbitration laws.
- 6- The state should assign a lawyer for any arbitrator, who is brought before the courts, as a result of filing a law suit against him by the losing party.
- 7- Bad faith, negligence and gross negligence to be defined widely in order to facilitate the process of holding the arbitrator accountable in the event of his failure to comply with the task he was entrusted with
- 8- Arbitrator who would like to practice arbitration, should enjoy with sufficient experience in the same disputed subject matter, besides, he should have some legal background.
- 9- Imposing a fine or an appropriate penalty for any party who files a malicious case against the arbitrator.

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Model Law

Article 28 (1) of the Model Law

U.A.E Laws

Article 12 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

Article 22 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

Article 23 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

Article 37 of the U.A.E Federal Law No. (6) of 2018 on Arbitration

Article 10/4 of the Federal Law No. 6 of 2018 on Arbitration

Article 14 of the Federal Law No. 6 of 2018 on Arbitration

Article 15/4 of the Federal Law No. 6 of 2018 on Arbitration

Article 26 of the Federal Law No. 6 of 2018 on Arbitration

Article 257 of the The UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (7) of 2016

Article 257 of the The UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (24) of 2018

Article 236 of the UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (24) of 2018

Articles 234 & Article 235 Article 257 of the UAE Penal Code No. (3) of 1987, as amended by Decree-Law No. (24) of 2018

Rules

Article 31 (31.1) of the LCIA 2014 rules on Arbitration.

Article 34 of the ICC 1998 rules on Arbitration.

Article 40 of the ICC 2012 rules on Arbitration

Rule 38 of the SIAC Rules

Article 31 of the LCIA rules on Arbitration

Articles 16 of the CRCICA rules on Arbitration.

Articles 52 of the SCC rules on Arbitration.

Article 40 of DIAC rules 2007

Article 32 of ADCCAC

Cases

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Forrester v. White, 108 S.Ct. 538, 544 (1988)

O'Shea v. Littleton, 414 U.S. 488, 503 (1974)

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Kemner v. District Council of Painters and Allied Trades, 768 F.2d 1115 (9th Cir. 1985)

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Dictionary

Oxford Dictionary

Cambridge Dictionary