

IMMUNITY OF ARBITRATORS

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Abstract

Unlike the works of other commentators on the subject matter, this ground-breaking oeuvre approaches the concept of arbitral immunity in an innovative and unique method. Instead of analysing the theoretical advantages and drawbacks of the immunity of arbitrators and then attempting to shape the reality to match the scholarly opinion, this thesis focuses on the practical impact of arbitral immunity and suggests unique and insightful solutions.

In a comprehensive and cutting-edge analysis, the thesis gives an in-depth overview of the immunity of arbitrators from a global standpoint. Embarking on the contentious and changing issue of the scope of arbitral immunity, the thesis analyses a vast amount of case-law to thoroughly draw the boundaries of the immunity of arbitrators. Apart from that, the thesis explores the ignored and almost undiscovered area of the burden of proof in the context of arbitral immunity.

In its most exciting part, the thesis features unique research on how arbitral immunity is used by powerful corporations to abuse customers and how the immunity of arbitrators makes its own seedy contribution to fostering development inequality by means of investment arbitration. Taking a well-reasoned critical stance on the idea of qualified immunity, the thesis invents and justifies two brand-new solutions that are equally effective and do not hinder the functionality of international arbitration as a system: equitable reliefs and the doctrine of piercing the liability shield of arbitrators.

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Introduction

‘A man will be imprisoned in a room with a door that’s unlocked and opens inwards;
as long as it does not occur to him to pull rather than push it.’¹

Ludwig Wittgenstein

‘Chaos is merely order waiting to be deciphered.’²

José Saramago

Arbitration has been relied on as a means of resolving commercial disputes for decades, if not centuries,³ since ancient times.⁴ Arbitration is of especial use for resolving disputes in an international context⁵ and the rising economic globalisation has made arbitration even more frequently used than ever before.⁶ Arbitration offers a wide variety of advantages compared to other methods of settlement of disputes,⁷ such as a speedy resolution, the allure of lesser formality and the sense of control over the proceedings,⁸ as well as the finality of settlement and the opportunity to resolve the disagreement with a neutral forum;⁹ this explains why

¹ LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* (1980).

² JOSÉ SARAMAGO, *THE DOUBLE* (2002).

³ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 93 (2nd ed. 2014).

⁴ Sara Roitman, *Beyond Reproach: Has the Doctrine of Arbitral Immunity Been Extended Too Far for Arbitration Sponsoring Firms?* 51 *BOSTON COLLEGE LAW REVIEW* 557, 559 (2010).

⁵ JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 1 (2003).

⁶ Asif Salahuddin, *Should Arbitrators Be Immune from Liability?* 33 *ARBITRATION INTERNATIONAL* 571, 571 (2017).

⁷ BORN, *supra* note 3, 96.

⁸ Christian Hausmaninger, *Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform* 7 *JOURNAL OF INTERNATIONAL ARBITRATION* 7, 7 (1990).

⁹ Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity* 20 *NEW YORK LAW SCHOOL JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 1, 1 (2000).

arbitration is so popular nowadays notwithstanding sometimes very high costs of arbitral proceedings.¹⁰ Not only parties to arbitral proceedings benefit from different features of international arbitration but also state organs win as well because arbitration relieves courts of law from a whole bunch of disputes when such courts are already heavily overloaded.¹¹ This popularity stimulates jurists' heightened attention to arbitration and, at least, partially, justifies further investigation into particular features of arbitration, one of those being the immunity of arbitrators.

Albeit its utmost practical importance and theoretical sophistication, the immunity of arbitrators remains to be quite an undiscovered area of international arbitration that has not been sufficiently studied yet.¹² The thesis aims to fill in the existent lacuna in an innovative and unique fashion.

This thesis is a comprehensive study of the immunity of arbitrators from a global perspective. For the comparative part of this oeuvre, the USA, England, and Switzerland have been chosen as focal points. There are two arguments for this choice: first, these countries are popular destinations for international arbitration;¹³ second, these jurisdictions represent the full gradient of arbitral immunity.¹⁴

¹⁰ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 36-37 (6th ed. 2015).

¹¹ Nadia Smahi, *The Arbitrator's Liability and Immunity Under Swiss Law – Part I* 34 ASSOCIATION SUISSE DE L'ARBITRAGE BULLETIN 876, 880-81 (2016)

¹² Dennis R. Nolan, Rogers I. Abrams, *Arbitral Immunity* 11 INDUSTRIAL RELATIONS LAW JOURNAL 228, 229 (1989).

¹³ See JAN PAULSSON, LISE BOSMAN (eds.), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (2008) (providing an overview of nearly all the possible jurisdictions for arbitral proceedings).

¹⁴ See *infra* notes 85-146 and accompanying text.

In its research ambit, the thesis pursues two ultimate goals: to wholly understand the impact of the immunity of arbitrators and to put forward some solutions in response to the problems arbitral immunity's impact represents. While other existing writings tend to identify the pros and cons of arbitral immunity in a purely theoretical manner and deliver some kind of judgment on the existential perspectives of the immunity, this thesis takes a revolutionary new approach and looks at the practical implications of arbitral immunity and then suggests solutions that perfectly fit into the present system of arbitration without disrupting it.

This work is divided into three chapters. The first chapter provides the necessary background and is, in essence, a comprehensive overview of the immunity of arbitrators.¹⁵ In order to be so, the first chapter examines the theoretical foundations of arbitral immunity¹⁶ and the relevant norms contained in international instruments,¹⁷ the works of UNCITRAL,¹⁸ the institutional rules,¹⁹ national laws,²⁰ and *receptum arbitri*.²¹ The second chapter dives deep into the most sophisticated, fluid and changing aspect of arbitral immunity – the scope of the immunity.²² The thesis explores the scope of arbitral immunity *ratione personae*²³ and *ratione materiae*.²⁴ The second chapter then ends investigating the undiscovered and mistakenly ignored in the literature problem of the burden of proof.²⁵ Finally, the third chapter is the most ground-

¹⁵ See *infra* notes 32-151 and accompanying text.

¹⁶ See *infra* notes 46-61 and accompanying text.

¹⁷ See *infra* notes 62-68 and accompanying text.

¹⁸ See *infra* notes 69-73 and accompanying text.

¹⁹ See *infra* notes 74-83 and accompanying text.

²⁰ See *infra* notes 84-146 and accompanying text.

²¹ See *infra* notes 147-151 and accompanying text.

²² See *infra* notes 152-282 and accompanying text.

²³ See *infra* notes 162-214 and accompanying text.

²⁴ See *infra* notes 215-271 and accompanying text.

²⁵ See *infra* notes 272-282 and accompanying text.

breaking and innovative part of this analysis.²⁶ Stemming from the research presented in the preceding parts, the chapter identifies what impact the immunity of arbitrators does. Particularly, the thesis examines the abuse in the fields of consumer transactions²⁷ and investment arbitration.²⁸ After that, the thesis critically analyses the idea of qualified immunity that now circulates in the literature.²⁹ In the end, the thesis culminates in offering two brand-new and cutting-edge solutions, namely equitable reliefs³⁰ and the doctrine of piercing the immunity shield of arbitrators.³¹

The thesis ends in a conclusion that summarises the conducted research and reflects on the overall significance of the subject matter.

²⁶ See *infra* notes 283-364 and accompanying text.

²⁷ See *infra* notes 292-315 and accompanying text.

²⁸ See *infra* notes 316-328 and accompanying text.

²⁹ See *infra* notes 329-336 and accompanying text.

³⁰ See *infra* notes 337-357 and accompanying text.

³¹ See *infra* notes 358-364 and accompanying text.

1. The Legal Underpinnings of the Immunity of Arbitrators

The immunity of arbitrators is a legal concept that is shaped by the rules and norms coming from different sources. The three major ones are institutional rules,³² national legal systems³³ (in this thesis, the USA,³⁴ England,³⁵ and Switzerland³⁶ have been chosen as the points of a comparative review), and parties' agreements³⁷ (*receptum arbitri*).³⁸ For the purposes of providing a full picture and in-depth analysis, this chapter examines not only these three but also the theoretical underpinnings of the immunity of arbitrators³⁹ (in common law⁴⁰ and civil law⁴¹ traditions, the latter been criticised), as well as the rules found in international treaties⁴² and in the works of the UNCITRAL⁴³ (the Arbitration Rules⁴⁴ and the Model Law⁴⁵).

1.1. Theoretical foundations

The immunity of arbitrators is, naturally, a concept applicable to the liability of arbitrators. Therefore, the concept should be examined as a part of the broader picture of arbitrators' liability. Apart from that, it should be noted right from the beginning that, usually, the immunity

³² See *infra* notes 74-83 and accompanying text.

³³ See *infra* notes 84-146 and accompanying text.

³⁴ See *infra* notes 100-125 and accompanying text.

³⁵ See *infra* notes 85-99 and accompanying text.

³⁶ See *infra* notes 126-146 and accompanying text.

³⁷ See *infra* notes 147-151 and accompanying text.

³⁸ BORN, *supra* note 3, 2026.

³⁹ See *infra* notes 46-61 and accompanying text.

⁴⁰ See *infra* notes 51-55 and accompanying text.

⁴¹ See *infra* notes 56-61 and accompanying text.

⁴² See *infra* notes 62-68 and accompanying text.

⁴³ See *infra* notes 69-73 and accompanying text.

⁴⁴ See *infra* notes 69-71 and accompanying text.

⁴⁵ See *infra* notes 72-73 and accompanying text.

does not cover mediators;⁴⁶ the immunity of arbitrators applies only to arbitration and does not apply to other forms of alternative dispute resolution.

Also, the immunity of arbitrators should not be confused with other, somewhat look-alike concepts that may help the parties to arbitral proceedings to somehow remedy their dissatisfaction with the award rendered. Particularly, the parties may try to remove an arbitrator before the award is rendered (challenging arbitrators), the parties eventually may try to set the award aside or, in case of fraud or corruption, hold the arbitrators criminally liable.⁴⁷ This thesis does not concern any of these aspects.

The immunity of arbitrators forms one of the core elements of their status.⁴⁸ Commentators indicate that this element distinguishes arbitrators from service-providers who are usually liable and do not have any immunity.⁴⁹ This argument may be very well criticised as, essentially, it makes the very basic mistake of cognition and logics confusing the consequences with the causes. Instead, it would be a much stronger premise to say that the immunity is granted to arbitrators because what they do is not service providing; the core question then would be proving that arbitration is not a service. In its turn, this is a separate issue addressing which is a matter of separate longer analysis.

Proceeding to the essence, the rationale of any concept of the immunity of arbitrators lays in the very basic principle of ensuring that arbitrators are free in their decision-making and are not intimidated by the possibility of any further liability for the award they are about to render. As Dennis R. Nolan and Roger I. Abrams rightly put it, '[a]s recipients of bad news are inclined

⁴⁶ BORN, *supra* note 3, 2026.

⁴⁷ Hausmaninger, *supra* note 8, 7-8.

⁴⁸ BORN, *supra* note 3, 2027.

⁴⁹ *Id.*

to blame the messenger, so many a losing party in an arbitration will blame the arbitrator.’⁵⁰ Avoiding such a situation is the ultimate aim of the immunity of arbitrators in any shape it comes.

The key to understanding the different views on the immunity of arbitrators and its impact among scholars and the different approaches adopted by national laws is the nature of arbitration that reflects the general split between common law and civil law.

1.1.1. Common law

The common law approach understands the immunity of arbitrators as some kind of judicial immunity because judges and arbitrators are doing more or less the same from the standpoint of common law jurists.⁵¹ The ‘judicial’ approach of common law to the immunity of arbitrators is based on the assumption that arbitrators and judges perform, essentially, the same role.⁵² This role is called by some commentators ‘quasi-judicial function’⁵³ or ‘quasi-judicial capacity.’⁵⁴ The practical considerations are that, absent the immunity, arbitrators would be afraid of being haunted by the losing party and thus there would be a substantial impediment to rendering a just and decisive award.⁵⁵

1.1.2. Civil law and critique

The contrasting civil law approach sees arbitrators as rather service providers who perform their contractual obligations and thus awarding one of the parties to those contracts some kind

⁵⁰ Nolan, Abrams, *supra* note 12, 229.

⁵¹ See Salahuddin, *supra* note 6, 574.

⁵² LEW, *supra* note 5, 290.

⁵³ Hausmaninger, *supra* note 8, 9.

⁵⁴ Salahuddin, *supra* note 6, 572.

⁵⁵ LEW, *supra* note 5, 290.

of immunity does not make any sense.⁵⁶ The civil law understanding of arbitration is based on the assumption that '[o]n the basis of their arbitration agreement, parties designate ... an arbitrator to resolve their dispute.'⁵⁷ Although this explanation is useful in providing an insight into the logic of taking a hard stance on the immunity of arbitrators in the civil law tradition, this whole construction is wrong. Whenever parties decide to adjudicate their disagreement in a court of law, they essentially designate a judge to decide on their dispute. Therefore, the perception of arbitration as a purely contractual concept is not valid.

Another point of critique of the contractual theory of arbitration is the corollary consequences of labelling the relationship between arbitrators and the parties as contractual. Particularly, the Swiss Code of Obligation specifies that '[t]he agent generally has the same duty of care as the employee in an employment relationship.'⁵⁸ As shown below, arbitral agreements classify exactly as agency contracts in Switzerland.⁵⁹ Therefore, arbitrators, at least theoretically, have some fiduciary duties to the parties in such a wrong paradigm. This cannot be reconciled with the process of independent and impartial decision-making which is obviously expected from arbitral proceedings.

Acknowledging all the correlated problems, the civil law jurists and lawyers resort to the overused Latin phrase that is able to explain everything and nothing at the same time – *sui generis*.⁶⁰

⁵⁶ See Salahuddin, *supra* note 6, 574-75.

⁵⁷ Smahi, *supra* note 11, 881.

⁵⁸ Obligationenrecht (Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)), Art. 398(1).

⁵⁹ See *infra* notes 126-146 and accompanying text.

⁶⁰ Smahi, *supra* note 11, 884.

There are also some attempts to offer a mixed understanding of arbitration that leads to understanding the status of arbitrators as both judicial (or quasi-judicial) and contractual.⁶¹ Although this view offers a good-looking decision for academic debates, it cannot be viable on practice. The reasons are that such a construction would lead to the conflicts between the duties of an arbitrator as a ‘private judge’ and the duties of arbitrators as a contractor of the parties to the proceedings.

1.2. International level

Notwithstanding the striking importance of the issue, international treaties usually avoid providing anything on the immunity of arbitrators.⁶² Illustratively, the New York Convention is completely silent on the matter.⁶³

The ICSID Convention⁶⁴ reserves a special section that stipulates rules regarding the immunities. Particularly, Art. 20 provides that ‘[t]he Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.’⁶⁵ Further, in Art. 21(a), the Convention stipulates that the arbitrators ‘shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity.’⁶⁶ The ICSID Convention, both in Arts. 21 and 22, broadens the immunity even further; the immunity covers ‘the officers and employees of the

⁶¹ *See id.*, 897-880.

⁶² BORN, *supra* note 3, 2027.

⁶³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

⁶⁴ Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 575 U.N.T.S. 159.

⁶⁵ *Id.*, Art. 20.

⁶⁶ *Id.*, Art. 21(a).

Secretariat'⁶⁷ and even 'persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts.'⁶⁸

1.3. UNCITRAL Rules, UNCITRAL Model Law

UNCITRAL is a commonly adopted shorthand for the United Nations Commission on International Trade Law. It has developed two documents that are of relevance for this thesis: the Arbitration Rules and the Model Law.

1.3.1. UNCITRAL Rules

The UNCITRAL Arbitration Rules⁶⁹ are neither an international treaty nor an institutional set of rules. However, due to its wide-spread employment, the Rules have to be examined in a separate subdivision. The Rules were developed by the United Nations Commission on International Trade Law.

In the relevant part, the Rules provide that '[s]ave for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators ... based on any act or omission in connection with the arbitration.'⁷⁰ The Rules thus provide for the applicable law backstop but are quite distinct in providing a limit on immunity, namely allowing claims against arbitrators for their 'intentional wrongdoing[s].' Finally, the UNCITRAL Rules grant immunity not only to the arbitrators but also to 'the appointing authority.'⁷¹

⁶⁷ *Id.*, Art. 21.

⁶⁸ *Id.*, Art. 22.

⁶⁹ United Nations Commission on International Trade Law Arbitration Rules, available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (2011).

⁷⁰ *Id.*

⁷¹ *Id.*

1.3.2. UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration⁷² is also neither an international convention nor institutional rules. The Model Law has been developed by the United Nations Commission on International Trade Law.⁷³

The issue of the liability of arbitrators in general and the issue of the immunity of arbitrators in particular are not addressed in the Model Law.

1.4. Institutional level

Most institutional rules have provisions on the immunity of arbitrators.⁷⁴

The Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce feature a provision on the immunity of arbitrators. Particularly, in Art. 40, the Rules provide that '[t]he arbitrators, ... the Court and its members, the ICC and its employees ... shall not be liable ... for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.'⁷⁵ Like the ICSID Convention, the Rules bestow immunity not only upon the arbitrators but also upon the institution itself. However, the Rules do not grant absolute immunity and establish that the immunity of arbitrators stop where the applicable law starts.

⁷² UNCITRAL Model Law on International Commercial Arbitration, reprinted in JAN PAULSSON, LISE BOSMAN (eds.), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (2008).

⁷³ Aron Broches, Commentary on the UNCITRAL Model Law 2-3, in JAN PAULSSON, LISE BOSMAN (eds.), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (2008).

⁷⁴ BORN, *supra* note 3, 2035.

⁷⁵ ICC Rules of Arbitration 2012 Art. 40, reprinted in HERMAN VERBIST ET AL., ICC ARBITRATION IN PRACTICE 295 (2nd ed. 2015).

It is interesting that the ICC Rules did not always limit the immunity of the ICC arbitrators by the applicable law. Indeed, back in 1998, the Rules provided, in Art. 34, that ‘[n]either the arbitrators, nor the Court and its members, nor the ICC and its employees ... shall be liable ... for any act or omission in connection with the arbitration.’⁷⁶ Clearly, there was a departure from absolute immunity to a limited one. Nevertheless, the reservation in the current Rules is still narrow and appeals to an express prohibition in the applicable law; thus, the move may be interpreted rather as a matter of necessity and some reluctance.

A little bit stricter approach is taken by the Arbitration Rules of the London Court of International Arbitration, although it follows the same historical pattern as the ICC Rules. In Art. 31.1, the Rules provide that

‘[n]one of ... the LCIA Court ..., any arbitrator, ... shall be liable ... for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown ... to constitute conscious and deliberate wrongdoing ... or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law.’⁷⁷

Like many other rules do, the LCIA limits the liability of its arbitrators ‘by any applicable law’ and goes further stripping the immunity from those arbitrators who have done something wrong deliberately (like in the UNCITRAL Rules). The LCIA Rules thus give arbitrators some immunity but its scope is quite narrow.

Regarding the applicable law limitation, the LCIA followed the same pattern as the ICC did. Back in 1981, the LCIA Rules Art. 14(1) provided that ‘[n]either the Court nor the arbitrator

⁷⁶ *Id.*, Art. 34.

⁷⁷ LCIA Arbitration Rules 2014 Art. 31.1, reprinted in LISA RICHMAN ET AL., *ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE* 385 (2015).

shall be liable ... for any act or omission ..., save that the arbitrator (but not the Court) shall be liable for the consequences of any conscious and deliberate wrongdoing.’⁷⁸ Even then the arbitrators could not count on the immunity shield if they did anything wrong on purpose but the applicable law provision was added later.

The Swiss Rules⁷⁹ are notably short in comparison with other institutional rules and do not have any provisions on the issue of the liability of arbitrators or the arbitral institution.⁸⁰

The VIAC Rules⁸¹ takes a pro-immunity approach and provide that ‘[t]he liability of arbitrators ... for any act or omission in relation to the arbitration is excluded to the extent legally permissible.’⁸² Also, the Vienna Rules shield ‘the Austrian Federal Economic Chamber and its employees’ from the claims of liability.⁸³ Therefore, having the applicable law backstop, the Vienna Rules do not feature an exception for intentional wrongdoings.

1.5. National level

In most jurisdictions, national laws bestow immunity upon arbitrators.⁸⁴ The variety of existing jurisdictions and the peculiarities of national legal systems allow producing large-scale analysis and thick handbooks for practitioners. However, this thesis is not such a handbook and

⁷⁸ LCIA Arbitration Rules 1981 Art. 14(1), reprinted in Pieter Sanders (ed), 7 YEARBOOK COMMERCIAL ARBITRATION 223 (1982).

⁷⁹ Internal Rules of the Arbitration Court of the Swiss Chambers' Arbitration Institution, reprinted in ELLIOTT GEISINGER, NATHALIE VOSER (eds), INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 373 (2nd 2013).

⁸⁰ *Id.*

⁸¹ Vienna International Arbitral Centre Arbitration Rules, available at <https://www.viac.eu/en/arbitration/content/vienna-rules-2013-online> (2013).

⁸² *Id.*, Art. 46.

⁸³ *Id.*

⁸⁴ BORN, *supra* note 3, 2027.

specifically focuses on the comparative analysis of the US, England, and Switzerland. These jurisdictions are analysed below.

1.5.1. England

The immunity of arbitrators finds its roots in two prominent cases decided at the beginning of the seventeenth century that created the grounds for all the further evolvement of the concept of arbitral immunity.⁸⁵

The first one is *Floyd v. Barker*.⁸⁶ The case concerned a judge who rendered a decision in the matter of felony.⁸⁷ The *Floyd* Court found that ‘a Judge, for anything done by him as Judge, by the authority which the King hath committed to him, ... shall not be drawn in question before any other Judge, ... except before the King himself.’⁸⁸ This finding was explained, *inter alia*, by reasons that the decision issued by a Judge is a means by which the monarch himself or herself delivers justice.⁸⁹

The second case is *The Marshalsea*.⁹⁰ The case initially concerned issues of trespass, assault and false imprisonment.⁹¹ The case was decided by the Marshalsea Court and subsequently its jurisdiction was questioned.⁹² The Court found that even if a warrant had been issued

⁸⁵ Lord Dyson, The proper limits of arbitrators' immunity (lecture) 84 ARBITRATION 196, 196 (2018).

⁸⁶ *Floyd v. Barker*, 77 E. R. 1305 (1607).

⁸⁷ *Id.*, 1306 (1607).

⁸⁸ *Id.*, 1307 (1607).

⁸⁹ *Id.*

⁹⁰ *The Case of the Marshalsea*, 77 E.R. 1027 (1612).

⁹¹ *Id.*, 1028.

⁹² *Id.*, 1028-32.

mistakenly, still neither the sheriff nor the judges could be held liable due to their judicial immunity.⁹³

Unlike in the US (where the Federal Arbitration Act⁹⁴ does not contain any provisions on the matter of arbitral immunity or the liability of arbitrators) and in Switzerland (where the Code on Private International Law⁹⁵ features a chapter⁹⁶ on international arbitration but does not have anything on arbitrators' liability), England does have a comprehensive legislative act dealing with arbitral immunity. Specifically, the Arbitration Act⁹⁷ provides that '[a]n arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.'⁹⁸ Apart from this provisions, sec 29(3) refers to sec 25 which provides that '[t]he parties are free to agree with an arbitrator as to the consequences of his resignation as regards ... any liability thereby incurred by him.'⁹⁹ It might be inferred that the English approach to arbitral immunity stays somewhere between the US, where the immunity is almost absolute, and the civil law jurisdictions, where the immunity is very little.

1.5.2. USA

The concept of arbitral immunity in the US has evolved initially from the above-cited *Floyd v. Barker*¹⁰⁰ and *The Marshalsea*¹⁰¹ cases.¹⁰² Employing the English doctrine for quite a long

⁹³ *Id.*, 1038-42.

⁹⁴ Federal Arbitration Act, 9 U.S.C. §§ 1-16.

⁹⁵ Bundesgesetz über das Internationale Privatrecht (Federal Code on Private International).

⁹⁶ *Id.*, Ch. 12.

⁹⁷ Arbitration Act 1996.

⁹⁸ *Id.*, sec 29(1).

⁹⁹ *Id.*, sec 25(1)(b).

¹⁰⁰ *Floyd v. Barker*, 77 E. R. 1305 (1607).

¹⁰¹ *The Case of the Marshalsea*, 77 E.R. 1027 (1612).

¹⁰² Nolan, Abrams, *supra* note 12, 229-30.

time, the US Supreme Court turned to the concept of judicial immunity in two frequently-cited cases decided in the second half of the nineteenth century.

The first one is *Randall v. Brigham*.¹⁰³ The case was initiated by a former attorney who was disbarred by a judge for malpractice and misconduct.¹⁰⁴ The attorney brought a suit against the judge who removed him from the bar for civil damages.¹⁰⁵ Although without providing much of analysis, the Court found for the judge due to the doctrine of judicial immunity.¹⁰⁶

The second one is *Bradley v. Fisher*.¹⁰⁷ This case has a similar factual background: an attorney was removed from the legal practice by a judge.¹⁰⁸ Unlike in *Randall*, the *Bradley* Court dismissed the claims put forward by the attorney providing a more elaborate explanation, namely noting that ‘judges ... are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, or are alleged to have been done maliciously or corruptly.’¹⁰⁹ Expanding on the rationale underpinning this ruling, the Supreme Court noted that it is ‘a general principle of the highest importance to the proper administration of justice that a judicial officer ... [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.’¹¹⁰

After *Randall* and *Bradley*, the Supreme Court made a major leap forward in its decision on the case of *Stump v. Sparkman*.¹¹¹ The story behind the case is dramatic and reveals rather the

¹⁰³ *Randall v. Brigham*, 74 U.S. 523 (1868).

¹⁰⁴ *Id.*, 524.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, 526.

¹⁰⁷ *Bradley v. Fisher*, 80 U.S. 335 (1871).

¹⁰⁸ *Id.*, 336-37.

¹⁰⁹ *Id.*, 351.

¹¹⁰ *Id.*, 347.

¹¹¹ *Stump v. Sparkman*, 435 U.S. 349 (1978).

ugly side of contemporary justice. The case concerned Mrs Sparkman who underwent sterilisation while being a minor due to a court order issued on the request of her mother.¹¹² Being a child, she did not know about the true nature of the surgery performed and found out about her irrevocable inability to conceive babies only in adulthood.¹¹³ Absent due process and any reasonable causes for sterilisation, Mrs Sparkman sued the judge who issued the fatal order.¹¹⁴ The Court understood that '[t]he fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit.'¹¹⁵ Controversially, the Supreme Court found that the judge was 'immune from damages liability even if his approval of the petition was in error.'¹¹⁶

Having given a short summary of the doctrine of judicial immunity developed in the US, it is appropriate now to focus on the moment when the judicial immunity was extended to those who are not judges – arbitrators. The earliest such instance is the case of *Burchell v. Marsh*.¹¹⁷

The *Burchell* case arose out of a request to set the award issued aside due to the errors in law made by arbitrators.¹¹⁸ The Supreme Court extrapolated the judicial immunity on arbitrators and in doing so the Court believed that this principle was 'too well settled by numerous decisions to admit of doubt.'¹¹⁹ Moreover, the Court famously noted that '[a]rbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal.'¹²⁰ The position of the Court was clearly in favour of arbitration as a means of settling

¹¹² *Id.*, 351-53.

¹¹³ *Id.*, 353-54.

¹¹⁴ *Id.*, 353-55.

¹¹⁵ *Id.*, 364.

¹¹⁶ *Id.*

¹¹⁷ *Burchell v. Marsh*, 58 U.S. 344 (1854).

¹¹⁸ *Id.*, 346-47.

¹¹⁹ *Id.*, 349.

¹²⁰ *Id.*

disputes and, in view of the Court, arbitration ‘should receive every encouragement from courts of equity.’¹²¹

Turning from the case-law to statutes, it has to be pointed out that, surprisingly, the Federal Arbitration Act¹²² does not contain any provisions on the matter of the liability of arbitrators. However, the very introduction of this Act replied to the growing demand for arbitration and increased use of this means of resolving disputes significantly.¹²³ To add even more ambiguity, the ‘United States Supreme Court has never specifically endorsed arbitrator immunity.’¹²⁴ Therefore, the pro-absolute immunity approach in the US exists only in a form of doctrine found in case-law.¹²⁵ Nobody knows how potential US Supreme Court ruling on the matter may look like and what shift or disruption it may cause.

1.5.3. Switzerland

Switzerland represents a truly interesting case study. Switzerland is a civil law country¹²⁶ and a very popular destination for international arbitration,¹²⁷ be it sports arbitration, commercial arbitration, interstate arbitration etc. But, unlike many other civil law countries, Switzerland does bestow a certain degree of immunity upon arbitrators.¹²⁸

¹²¹ *Id.*

¹²² Federal Arbitration Act, 9 U.S.C. §§ 1-16.

¹²³ Roitman, *supra* note 4, 569.

¹²⁴ Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINNESOTA LAW REVIEW 449, 476 (2006).

¹²⁵ *Id.*

¹²⁶ Smahi, *supra* note 11, 881.

¹²⁷ MANUEL ARROYO (ed.), *ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE*, 3 (2nd ed. 2018).

¹²⁸ GABRIELLE KAUFMANN-KOHLER, ANTONIO RIGOZZI, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE IN SWITZERLAND* 236 (2015).

The primary source of statutory regulation of arbitration-related matters is the Federal Code on Private International Law.¹²⁹ Although covering many different matters, the Code features only one chapter that is of relevance for international arbitration.¹³⁰ Interestingly, the Code does not say anything on the matter of the immunity of arbitrators.¹³¹ The same is true for the Code of Civil Procedure that is of no relevance here as it applies only to domestic proceedings.¹³² Neither there is a substantial amount of scholarly opinion on the matter, and even less thereof is available in English.¹³³

Hence, the issue of arbitrators' liability is decided in Switzerland through the prism of the arbitral contract and is, essentially, a case of the general contractual liability theory.¹³⁴ Therefore, arbitrator's contract is identified as an agency contract, as Code of Obligations provides that '[c]ontracts for the provision of work or services not covered by any other specific type of contract are subject to the provisions governing agency.'¹³⁵ As the arbitrators act out of contract, their civil liability might not arise out of torts in relation to arbitral proceedings; therefore, the arbitrators' liability is of contractual nature. Hence, under the Code of Obligations, an arbitrator can be held liable if (a) they have caused some damage, (b) they have breached an obligation under the contract, and (c) there is a link between the damages and

¹²⁹ Bundesgesetz über das Internationale Privatrecht (Federal Code on Private International Law).

¹³⁰ *Id.*, Ch. 12.

¹³¹ *Id.*

¹³² ARROYO, *supra* note 127, 9.

¹³³ See ANGELA OBRIST, DIE HAFTUNG DES SCHIEDSRICHTERS (2013).

¹³⁴ Smahi, *supra* note 11, 883.

¹³⁵ Obligationenrecht (Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)), Art. 394(2).

breach.¹³⁶ Examples of causes for arbitral liability may be intentional wrongdoing or gross negligence.¹³⁷

An entire exclusion of liability of arbitrators (such as respective clauses in a variety of institutional rules examined above) is invalid as per operation of law in Switzerland, as the Code of Obligations provides that ‘[a]ny agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.’¹³⁸

There are several theories that nevertheless undertake to invent some kind of arbitral immunity within the Swiss law. One of them is alleging that there is a form of an implicit agreement between arbitrators and the parties that assumes exclusion of liability to the maximum extent possible under Art. 100(1) of the Code of Obligations.¹³⁹ This concept is not viable as it is really hard to understand what exactly is excluded and the wording of Art. 100(1) is quite strict on the point. Another concept is assuming that the same exists as a custom within the federal law;¹⁴⁰ this argument does not stand for the same reasons. Finally, there are some attempts to extrapolate the immunity of the Swiss judges to the actions of arbitrators.¹⁴¹ This suggestion is the most promising one as it resembles the rationale behind the immunity of arbitrators in common law countries. However, commentators see this proposal as a failing one as well

¹³⁶ *Id.*, Art. 97(1).

¹³⁷ KAUFMANN-KOHLER, RIGOZZI, *supra* note 128, 237.

¹³⁸ Obligationenrecht (Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)), Art. 100(1).

¹³⁹ Nadia Smahi, *The Arbitrator’s Liability and Immunity Under Swiss Law – Part II* 35 ASSOCIATION SUISSE DE L'ARBITRAGE BULLETIN 67, 68 (2017).

¹⁴⁰ *Id.*, 69 (2017).

¹⁴¹ *Id.*, 72 (2017).

because there are no available mechanisms of establishing a bond between arbitrators and the state whatsoever.¹⁴²

Notwithstanding the current state of affairs, commentators from Switzerland themselves acknowledge that there is an outstanding need for the introduction of arbitral immunity in the Swiss law.¹⁴³

The case-law of the Federal Supreme Court of Switzerland is able to provide some useful insights into the peculiarities of the Swiss law on the subject matter,¹⁴⁴ although it has been admitted that even this last resort for some developments or certainty does include any notable precedents on the issue of the immunity of arbitrators in Switzerland,¹⁴⁵ '[a]s no civil liability claims against arbitrators have been brought before Swiss courts to date.'¹⁴⁶

1.6. *Receptum arbitri*

Usually, parties themselves are free to agree on the immunity of their arbitrators. The legal nature of such stipulations may be explained by means of the New York Convention. Particularly, the Convention provides that countries 'shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them ... concerning a subject matter capable of settlement by arbitration.'¹⁴⁷ This provision means that the national courts shall give full effect to an

¹⁴² *Id.*, 72-73 (2017).

¹⁴³ *Id.*, 78 (2017).

¹⁴⁴ ARROYO, *supra* note 127, 10.

¹⁴⁵ Smahi, *supra* note 139, 67.

¹⁴⁶ Smahi, *supra* note 11, 878.

¹⁴⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. II(1), June 10, 1958, 330 U.N.T.S. 3.

immunity provision that has been inserted into an arbitration agreement. This interpretation is supported by commentators.¹⁴⁸

However, the literature also suggests that Art. II(3) also enables the immunity of arbitrators stipulation in arbitration agreements.¹⁴⁹ This view is at least questionable and cannot be supported, as Art. II(3) clearly provides that ‘[t]he court of a Contracting State, ... at the request of one of the parties, [shall] refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’¹⁵⁰ The text of this provision requires that courts of law should refer parties to arbitration whenever there is an arbitration agreement; it does not require that the courts shall have any regard to the arbitration agreement when the case concerning arbitrators’ liability is brought before the judges as it entails careful examination and substantial evaluation of the arbitration agreement.

Receptum arbitri thus is able, at least theoretically, to contain provisions on the immunity of arbitrators that would be of contractual nature. However, this happens in practice very rarely. As Susan D. Franck points out, ‘[u]nfortunately, arbitrators rarely obtain immunity in their appointment contract with the parties.’¹⁵¹

Moreover, the question of arbitral immunity provisions in *receptum arbitri* can easily create significant legal headaches if seen from a comparative viewpoint. As shown above, in civil law countries (in Switzerland particularly), the immunity of arbitrators usually does not exist. Thus, arbitrators are under the general contractual theory that usually contains civil law prohibition on contractual clauses excluding liability of one of the parties to a contract. Thus, *receptum*

¹⁴⁸ BORN, *supra* note 3, 2027.

¹⁴⁹ *Id.*

¹⁵⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. II(3), June 10, 1958, 330 U.N.T.S. 3.

¹⁵¹ Franck, *supra* note 9, 54.

arbitri can come into conflict with *lex arbitri*. Of course, *lex arbitri* makes the liability exclusion provision of *receptum arbitri* yield; nevertheless, it results in a certain level of unpredictability and confusion.

2. The Scope of Arbitral Immunity and the Burden of Proof

The mere existence of the immunity of arbitrators worldwide is more or less undisputed nowadays.¹⁵² The really interesting question is rather the scope of the immunity of arbitrators (save for the issues of the impact of the immunity of arbitrators discussed in the last chapter). The scope of the immunity of arbitrators is quite an undiscovered area that is now beginning to attract appropriate attention and is subject to academic debates.¹⁵³ And in this regard, national laws provide with different answers,¹⁵⁴ as well as institutional rules do the same.¹⁵⁵

This chapter examines the scope of the immunity of arbitrators *ratione personae*¹⁵⁶ (featuring discussions on the liability of arbitral institutions¹⁵⁷ and on the conundrums of distinguishing arbitral proceedings from similar concepts¹⁵⁸) and *ratione materiae*¹⁵⁹ (separately outlining the types of misconduct that lead to liability despite arbitral immunity¹⁶⁰). After that, the thesis proceeds to explore the intriguing and undiscovered area of the burden of proof that often arises exactly in relation to the scope of arbitral immunity.¹⁶¹

¹⁵² BORN, *supra* note 3, 2027.

¹⁵³ Franck, *supra* note 9, 2.

¹⁵⁴ BORN, *supra* note 3, 2030.

¹⁵⁵ Salahuddin, *supra* note 6, 574.

¹⁵⁶ See *infra* notes 162-214 and accompanying text.

¹⁵⁷ See *infra* notes 164-189 and accompanying text.

¹⁵⁸ See *infra* notes 190-214 and accompanying text.

¹⁵⁹ See *infra* notes 215-271 and accompanying text.

¹⁶⁰ See *infra* notes 245-271 and accompanying text.

¹⁶¹ See *infra* notes 272-282 and accompanying text.

2.1. *Ratione personae*

This subdivision focuses on investigating the arbitral immunity of arbitral institutions¹⁶² and draws the bordering line between arbitration and similar proceedings,¹⁶³ as the problem of the scope of arbitral immunity often arises when it is contested whether the alleged arbitrator has performed indeed arbitral functions or something different.

2.1.1. The immunity of arbitral institutions

Many, if not all, institutional rules bestow immunity not only upon personalities of arbitrators but upon the entities of arbitral institutions as well. The ICSID Convention (although it is not a set of institutional rules, strictly speaking, but the Convention essentially fulfils similar functions) provide immunity not only for arbitrators but for the Centre as well.¹⁶⁴ The ICC Rules do the same.¹⁶⁵ The LCIA¹⁶⁶ and the VIAC¹⁶⁷ follow the same global pattern.

Even the personal immunity of arbitrators in the US is not perfectly firm as the concept exists only in the case-law and has never been specifically confirmed in federal statutory law (in

¹⁶² See *infra* notes 164-189 and accompanying text.

¹⁶³ See *infra* notes 190-214 and accompanying text.

¹⁶⁴ Convention on the Settlement of Investment Disputes between States and Nationals of other States Art. 20, Mar. 18, 1965, 575 U.N.T.S. 159.

¹⁶⁵ ICC Rules of Arbitration 2012 Art. 40, reprinted in HERMAN VERBIST ET AL., ICC ARBITRATION IN PRACTICE 295 (2nd ed. 2015).

¹⁶⁶ LCIA Arbitration Rules 2014 Art. 31.1, reprinted in LISA RICHMAN ET AL., ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE 385 (2015).

¹⁶⁷ Vienna International Arbitral Centre Arbitration Rules Art. 46, available at <https://www.viac.eu/en/arbitration/content/vienna-rules-2013-online> (2013).

Federal Arbitration Act,¹⁶⁸ there is nothing on immunities) or in the jurisprudence of the Supreme Court.¹⁶⁹ The same problem is with the immunity of arbitral institutions.¹⁷⁰

The case of *Cort v. American Arbitration Association*¹⁷¹ reveals the doctrine prevalent in the US on the subject matter. The case concerned arbitration proceedings that arose out of a consumer transaction and was administered by the American Arbitration Association (hereinafter AAA).¹⁷² The AAA refused to hand over arbitration-related documents to the consumer and the case concerned civil damages caused by such a refusal.¹⁷³ Beginning with mentioning the judicial immunity as being extended to arbitrators, the Court noted that ‘[t]he arbitral immunity ... extends to arbitration associations such as the AAA as well.’¹⁷⁴ Relying on this and dismissing the allegation that the actions of the AAA fall outside of the scope of judicial acts covered by the immunity, the Court found in favour of the AAA.¹⁷⁵

The rationale behind the extension of the arbitral immunity to arbitral institutions has been well explained in *Corey v. New York Stock Exchange*.¹⁷⁶ Mr Corey initiated arbitral proceedings against an investment firm after his losses in stock market turbulence; the proceedings were administered by the New York Stock Exchange.¹⁷⁷ Mr Corey lost in the arbitral proceedings.¹⁷⁸ After that, Mr Corey initiated proceedings in a court of law against the stock exchange that acted as arbitral institution alleging several procedural irregularities, such as being deprived of

¹⁶⁸ Federal Arbitration Act, 9 U.S.C. §§ 1-16.

¹⁶⁹ Weston, *supra* note 124, 476.

¹⁷⁰ Roitman, *supra* note 4, 576.

¹⁷¹ *Cort v. American Arbitration Association*, 795 F. Supp. 970 (N.D. Cal. 1992).

¹⁷² *Id.*, 971.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*, 972.

¹⁷⁶ *Corey v. New York Stock Exchange*, 691 F.2d 1206 (1982).

¹⁷⁷ *Id.*, 1207-08.

¹⁷⁸ *Id.*, 1208.

the right to appeal the arbitral award or present evidence in front of the tribunal, and civil damages connected to these violations.¹⁷⁹ The Court found against Mr Corey as the decision ‘to extend immunity to ... the boards which sponsor arbitration finds support in the case law, the policies behind the doctrines of judicial and quasi-judicial immunity and policies unique to contractually agreed upon arbitration proceedings.’¹⁸⁰ The Court applied the ‘functional comparability test’¹⁸¹ determining that the arbitrators and the institution in the case at hand essentially performed the same functions as judges and courts of law do. Apparently feeling need to provide some elusory sense of safety, the Court enumerated existing ‘safeguards’ that can protect parties to arbitral proceedings against possible abuses; among those are the adversarial nature of arbitral proceedings, the right to judicial review guaranteed by the Federal Arbitration Act, and the voluntary character of arbitration at all.¹⁸² After the safeguards, the Court provided elaborate policy consideration that drove the decision to extend the immunity to arbitral institutions.¹⁸³ These policy arguments include the necessity to protect independent decision-making by the arbitrators.¹⁸⁴

An interesting theoretical pitfall exists in relation to the matter of the immunity of arbitral institutions. While extending itself to arbitration, judicial immunity employed two limitations: arbitrators are protected by the immunity only when delivering judicial acts and only when they have proper jurisdiction. This rule stems from *Floyd v. Barker*¹⁸⁵ and *The Marshalsea*¹⁸⁶

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*, 1209.

¹⁸¹ *Id.*, 1209-10.

¹⁸² *Id.*, 1210.

¹⁸³ *Id.*, 1211.

¹⁸⁴ *Id.*

¹⁸⁵ *Floyd v. Barker*, 77 E. R. 1305 (1607).

¹⁸⁶ *The Case of the Marshalsea*, 77 E.R. 1027 (1612).

and is widely accepted as a general principle.¹⁸⁷ The question arises then whether the arbitral institutions are still covered by the arbitral immunity when a party unilaterally terminates the arbitration agreement. In the case with the personal immunity of arbitrators, the situation is clear as arbitrators do have jurisdiction thanks to the Kompetenz-Kompetenz doctrine¹⁸⁸ (arbitrators themselves should decide on their own jurisdiction). According to *New England Cleaning Services v. American Arbitration Association*,¹⁸⁹ the answer is that even in such a case the immunity of arbitrators does cover the respective arbitral intuitions.

2.1.2. Defining arbitration

Apart from the issue of arbitral institution, another problem often arises with the connection to the immunity of arbitrators. It is the evergreen question of who arbitrators are and what types of dispute resolution constitute arbitral proceedings.

A very good analysis of the issue may be found in the decision of the House of Lords in the case of *Sutcliffe v. Thackrah*.¹⁹⁰ The case arose out of a claim brought by Mr Sutcliffe, the owner of a building, against a group of architects working for a specialised firm.¹⁹¹ The problem was the alleged negligence of architects which led Mr Sutcliffe to hire a new group of architects that have successfully finished the job.¹⁹² The conflict was initially decided by a referee that found in favour of the building owner against two architects and in favour of one

¹⁸⁷ Nolan, Abrams, *supra* note 12, 230.

¹⁸⁸ See generally Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz* 2014 PEPPERDINE LAW REVIEW 17 (2014).

¹⁸⁹ *New England Cleaning Services v. American Arbitration Association*, 199 F.3d 542 (1999).

¹⁹⁰ *Sutcliffe v. Thackrah*, 1974 A.C. 727 (1974).

¹⁹¹ *Id.*, 729.

¹⁹² *Id.*

architect against the building owner.¹⁹³ The problem that was brought to the attention of the House of Lord was ultimately whether the referee was entitled to benefit from arbitral immunity.¹⁹⁴ The House eventually found that ‘[i]t is not contested that there is a class of persons who are not arbitrators but who perform a sufficiently judicial function to be entitled to immunity from suit, but an architect's position under such a contract as this does not attract that immunity.’¹⁹⁵ Therefore, the House has employed a thorough approach based solely on the functional test. Particularly, the Lords noted that

‘[n]o one should be entitled to judicial immunity who cannot show ... at least the following qualities of a judicial proceeding: (a) a submission to him of a formulated dispute or of a matter where there must nauseously be assumed to be a difference; (b) a decision binding on the parties.’¹⁹⁶

This simple and, at the same time, thoughtful test can be very well employed to determine whether someone is an arbitrator or whether some dispute resolution activity is arbitral proceedings. Justifying and elaborating their analysis, the Lords continue pointing out that ‘[o]ne of the features of an arbitration is that there is a dispute between two or more persons who agree that they will refer their dispute to the adjudication of some selected person whose decision upon the matter they agree to accept.’¹⁹⁷

¹⁹³ *Id.*

¹⁹⁴ *Id.*, 731.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, 733.

¹⁹⁷ *Id.*, 745.

Another very useful precedent dealing with the scope of arbitral immunity *ratione personae* is the decision of the House of Lords in the case of *Arenson v. Casson Beckman Rutley & Co.*¹⁹⁸ This case received a strikingly different final decision and thus is best read together with the *Sutcliffe* decision in order to grasp a full sense of peculiarities and delicacies of the scope of arbitral immunity *ratione personae*.

The initial conflict happened between Arenson and an auditing firm.¹⁹⁹ Arenson was a nephew of the controlling shareholder and chief executive of a corporation.²⁰⁰ He was employed by his powerful and wealthy relative on the condition of signing a contract under which Arenson was obliged to sell all his shares at fair value to his uncle in the vent of Arenson's exit from the corporation.²⁰¹ When such a situation happened, Arenson sold the shares but then found out that the shares, in fact, were worth several times more than the price of the transaction.²⁰² Arenson brought a claim against the auditors and the central issue before the Lords was whether the auditors can hide behind the shield of arbitral immunity.²⁰³

The House of Lords began its analysis pointing out that '[t]his is a case where the parties agree to abide by the opinion of a third party in order to avoid a dispute.'²⁰⁴ Continuing its devotion to the functional test and avoiding 'a misuse of semantics,' the House noted that 'it matters not what name is given to the person in question but his role is to be determined by what he does.'²⁰⁵ Going even further, the Lords proclaimed that '[t]he concept of a "quasi-arbitrator"

¹⁹⁸ *Arenson v. Casson Beckman Rutley & Co.*, 1977 A.C. 405 (1977).

¹⁹⁹ *Id.*, 415.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*, 407.

²⁰⁵ *Id.*, 408.

should be done away with.’²⁰⁶ The House of Lords determined that if the defendants are deemed accountants, then they are liable for any negligence, and if they are deemed arbitrators, then they are immune from being sued.²⁰⁷ The Lords found that the auditors were called upon to decide on some disagreement between the parties, namely as with regard to the price of the shares, and their decision was accepted by the parties as final’ hence, auditors acted as arbitrators and can benefit fully from the immunity of arbitrators.²⁰⁸

The House found that, in order to establish that some proceedings are arbitral proceedings, ‘[t]here must be a difference or dispute and it must be a dispute formulated at the time it falls to be decided.’²⁰⁹ Going deeper into the investigation of what constitutes arbitration proceedings, the Court also pointed out that ‘it must be a dispute between two views concerning the facts and/or the law.’²¹⁰ Addressing the theory underpinning the immunity of arbitrators, the Court came to the conclusion that ‘[w]hat clothes a real arbitrator with immunity is not only matters of public policy, but also because he is a kind of judge who does not decide the question before him solely by himself.’²¹¹ In the factual framework of that particular case, the Court made a big deal of analytical work distinguishing an accountant (a valuer) from an arbitrator without making any concessions to some kind of qualified consensus between the two roles noting that ‘the concept of a "quasi-arbitrator" is not justifiable in law.’²¹² Stepping slightly aside from the usual and ages-long conception of judicial act and jurisdiction as two prerequisites for judicial immunity, the Court proceeded to find that ‘[i]mmunity attaches to

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*, 412-13.

²⁰⁹ *Id.*, 409.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

any person appointed by two parties who agree that if they differ, they will abide by his decision on the question referred to him or any question that may arise on the reference to him.’²¹³

Apart from all of the above, the House of Lords outlined that ‘[a]n arbitrator only loses his protection in cases of fraud and collusion and, in the plaintiff’s submission, where the arbitrator has been guilty of recklessness.’²¹⁴ Therefore, it can be concluded that, at least in England, arbitrators can lose the protection of the judicial immunity extended to them in case of fraud, collusion, and recklessness. The *Sutcliffe* and *Arenson* test can together provide very useful guidance on separating arbitration from other proceedings.

2.2. Ratione materiae

The high expectations of the parties to arbitral proceedings result in creating different causes for the liability of arbitrators, such as delays in issuing the award, procedural errors that raise grounds for setting the award aside, and even non-disclosure of conflict of interests.²¹⁵ The material scope of the immunity of arbitrators has to correspond to this evolving spectrum.

Although different views and approaches exist as to the material scope of arbitral immunity, there is no substantial advocacy for a full immunity even among those commentators who are very much in favour of the immunity of arbitrators generally. This is explained by the fact that arbitrators always are appointed subject to their skills, knowledge, expertise and commitment.²¹⁶ Therefore, arbitrators are expected to be diligent and skilful enough.

²¹³ *Id.*, 411.

²¹⁴ *Id.*, 408.

²¹⁵ Sebastian Lukic, Anne-Karin Grill, *Arbitrators’ Liability: Austrian Supreme Court Reconfirms Strict Standards*, KLUWER ARBITRATION BLOG <http://arbitrationblog.kluwerarbitration.com/2016/09/01/arbitrators-liability-austrian-supreme-court-reconfirms-strict-standards/> (Sep. 1, 2016).

²¹⁶ LEW, *supra* note 5, 290, 295.

Within the judicial theory of the immunity of arbitrators, the immunity of arbitrators is justified by the role in delivering justice and drawing the parallel between them and judges. Surprisingly enough, this theory does not elaborate on the equal scope of both types of immunity and does not imply that the scope of the immunity of judges matches the scope of the immunity of arbitrators.²¹⁷

Just as with the theoretical underpinnings of the very concept of the immunity of arbitrators, the limits of arbitral immunity can be properly researched only by looking back at the outset of judicial immunity. In seventeenth-century England, the cases of *Floyd v. Barker*²¹⁸ and *The Marshalsea*²¹⁹ established the initial limits of the immunity of judges. Two such limits were outlined: first, the immunity covers only the consequences of judicial acts of judges and, second, the immunity applied only where the judge has jurisdiction.²²⁰

In the important *Burchell*²²¹ decision, the US Supreme Court, although deciding on the matters of setting the award aside, provided useful guidance on the limitations of the immunity of arbitrators. Particularly, the Court hinted that for the immunity to yield ‘there must be something more than an error of judgment, such as corruption in the arbitrator or gross mistake.’²²² However, the Court was very careful outlining what a ‘gross mistake’ is. Particularly, ‘the admission of illegal evidence’²²³ is not such a mistake. Summarising its discussion, the Court provided that the immunity of arbitrators cannot be stripped off if the arbitrators ‘have given their honest, incorrupt judgment on the subject matters submitted to

²¹⁷ Hausmaninger, *supra* note 8, 27.

²¹⁸ *Floyd v. Barker*, 77 E. R. 1305 (1607).

²¹⁹ *The Case of the Marshalsea*, 77 E.R. 1027 (1612).

²²⁰ Nolan, Abrams, *supra* note 12, 230.

²²¹ *Burchell v. Marsh*, 58 U.S. 344 (1854).

²²² *Id.*, 349-50.

²²³ *Id.*, 352.

them after a full and fair hearing of the parties.’²²⁴ Being the pioneering case in the field, *Burchell* was truly useful in extending the judicial immunity to arbitrators but the limitations provided by *Burchell* were rather draft: if the ‘incorrupt judgment’²²⁵ requirement can be easily understood, the ‘full and fair hearing’²²⁶ passage is too vague.

The US indeed provides the most useful insights into the limits of arbitral immunity because the immunity of arbitrators in the US is ‘seemingly impenetrable’²²⁷ and ‘automatic’²²⁸ so the boundaries drawn there are thoroughly delimited. One of the useful cases in this respect is *Baar v. Tigerman*.²²⁹

In *Baar*, the parties to arbitral proceedings were unhappy with their arbitrator who failed to render an award.²³⁰ Mr Tigerman served as an arbitrator and took an enormously long time to decide on the case, more than four years, without rendering an award at the end.²³¹ Having abandoned Mr Tigerman, the parties have successfully settled their dispute with another arbitrator and turned back to Mr Tigerman to have their impressive expenses reimbursed.²³²

From the very beginning of its analysis, the Court proclaimed that ‘[a]rbitral immunity covers only the arbitrator's quasi-judicial actions, not failure to render an award.’²³³ The Court, however, upheld the long-established principles concerning the immunity of arbitrators,

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Roitman, *supra* note 4, 565.

²²⁸ Elvi J. Olesen, *Baar v. Tigerman: An Attack on Absolute Immunity for Arbitrators!* 21 CALIFORNIA WESTERN LAW REVIEW 564, 564 (1985).

²²⁹ *Baar v. Tigerman*, 140 Cal. App. 3d 979 (1983).

²³⁰ *Id.*, 982.

²³¹ *Id.*, 981-82.

²³² *Id.*

²³³ *Id.*, 982.

particularly noting that ‘[a]rbitral immunity, like judicial immunity, promotes fearless and independent decision-making.’²³⁴ Making a significant departure from previous practices, the Court proceeded to state that the ‘contention that this court should extend immunity to an arbitrator who never renders an award fails to appreciate the nature of the arbitrator-party relationship and misperceives the policy underlying arbitral immunity.’²³⁵ The reasoning of the Court was a whole list of differences between judges and arbitrators;²³⁶ it should be noted that such an approach, in fact, jeopardises the very logic of granting arbitrators any kind of immunity at all. The Court outlined four major differences: first, the authority of arbitrators stems from the parties’ agreement while the authority of judges comes directly from the Constitution; second, trials in courts are public while arbitration is of private nature; third, unlike judges’ decisions, arbitral awards do not have the quality of precedents;²³⁷ fourth, unlike judges, arbitrators cannot impact anyone except the parties in front of them.²³⁸ Striking a fragile balance, the Court explained that ‘[w]hile we must protect an arbitrator acting in a quasi-judicial capacity, we must also uphold the contractual obligations of an arbitrator to the parties involved.’²³⁹ Ultimately, the Court found against Mr Tigerman as ‘an arbitrator is not a judge and that arbitration is not a judicial proceeding’²⁴⁰ and because ‘[t]he contractual agreement in this case specifically sets forth the time period within which Tigerman had to render his award.’²⁴¹

²³⁴ *Id.*

²³⁵ *Id.*, 983.

²³⁶ *Id.*

²³⁷ This one is quite contentious. Discussing this issue may be an exciting topic for a separate thesis. *See generally* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23 *ARBITRATION INTERNATIONAL* 357 (2007).

²³⁸ *Baar v. Tigerman*, 140 Cal. App. 3d 979, 984-85 (1983).

²³⁹ *Id.*, 985.

²⁴⁰ *Id.*

²⁴¹ *Id.*

The *Baar* decision may be heavily criticised, both on the accounts of policy consideration and integrity of its legal analysis. Some commentators rightly note that the application of *Stump v. Sparkman*²⁴² logic leads to a conclusion that Mr Tigerman did not do anything wrong as he indeed held hearings. Another point of critique may be that the Court was wrong in employing the differences of the sources of power between judges and arbitrators as an argument for delivering the decision against Mr Tigerman. Indeed, the arbitral proceedings were initiated out of an arbitration agreement between parties but the possibility to do so stems from the Federal Arbitration Act²⁴³ which has been adopted by Congress apparently using the authority vested within it by the Constitution. The same logic is adopted by Nadia Smahi when explaining the judicial understanding of arbitrators' status and the theory underpinning the quasi-judicial immunity of arbitrators: '[w]hile it is true that the powers of arbitrators stem from individual arbitration agreements in each arbitration, arbitration as such would not exist as a dispute resolution method if it were not originally implemented and encouraged by the States.'²⁴⁴

Ultimately, the *Baar* precedent establishes that even in an absolute-immunity jurisdiction like the US, arbitrators can be held liable for failing to render an award.

2.2.1. *Types of misconduct that lead to liability*

The immunity of arbitrators can shield arbitrators from being held liable for a variety of acts. Generally, two types of such acts can be distinguished: affirmative misconduct and failure to act.²⁴⁵

²⁴² *Stump v. Sparkman*, 435 U.S. 349 (1978).

²⁴³ Federal Arbitration Act, 9 U.S.C. §§ 1-16.

²⁴⁴ Smahi, *supra* note 11, 880.

²⁴⁵ Franck, *supra* note 9, 11.

The first category (affirmative misconduct) is also called misfeasance and is, in fact, an umbrella term covering many acts, such as withdrawal from the arbitral proceedings without a just cause, fraud, corruption, other intentional wrongdoing.²⁴⁶

An illustrative case is the decision of the Supreme Judicial Court of Massachusetts in the case of *Hoosac v. O'Brien*.²⁴⁷ The case arose out of proceedings for recovery of damages sustained due to a physical injury caused by the plaintiff to a private individual.²⁴⁸ Arbitral proceedings were instituted and O'Brien conspired with other arbitrators to render an award that made the firm to pay large sums of money although the arbitrators knew that it was not a just decision and the sustained injuries were not severe.²⁴⁹ The motive of arbitrators was simple: they received a part of the awarded money from the injured person.²⁵⁰ Surprisingly, the Court found that the arbitrators cannot be held liable,²⁵¹ although the fact of corruption was more than obvious.²⁵² The Court began its analysis with retelling that it is a very well-settled principle 'that every judge, whether of a higher or a lower court, is exempt from liability to an action for any judgment given by him in the due course of the administration of justice.'²⁵³ The case was nevertheless useful for Massachusetts as '[t]he question whether a like immunity extends to arbitrators seems never to have arisen.'²⁵⁴ The Court extended the judicial immunity to arbitrators.²⁵⁵ Importantly, the Court understood the immunity as absolutely absolute, so to say,

²⁴⁶ *Id.*

²⁴⁷ *Hoosac Tunnel Dock and Elevator Company v. James W. O'Brien*, 137 Mass. 424 (1884).

²⁴⁸ *Id.*, 424.

²⁴⁹ *Id.*, 425-26.

²⁵⁰ *Id.*, 426.

²⁵¹ *Id.*, 424.

²⁵² *Id.*, 426.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*, 426-27.

and made the attorney who bribed the arbitrators the scapegoat in that situation.²⁵⁶ Although this case can be distinguished from the endless variety of specific peculiarities, it very well illustrates that the immunity of arbitrators does cover affirmative misconduct even in its gravest forms such as corruption.

The second category (failure to act) is also called nonfeasance.²⁵⁷ This category encompasses situations when arbitrators do not fulfil their obligations and includes, most notably, failure to disclose conflicts of interest and failure to render an award.²⁵⁸

The most frequently-cited case that illustrates this category is, of course, *Baar v. Tigerman*. The case is discussed extensively in other parts of the thesis, so for the purposes of studying nonfeasance, another case is employed, namely the decision of the Court of Appeals for the Fifth Circuit in the case of *Ernst v. Manhattan Construction Company of Texas*.²⁵⁹ In *Ernst*, several claims were brought to the attention of the Court connected to numerous fails during a constructing project, but the one that is of interest here is the claim against Mr McCauley who failed to render a timely award acting as architecture arbitrator.²⁶⁰ The Court ultimately found that ‘McCauley’s activities regarding its arbitral responsibilities on the emergency generator submittals constituted negligence as a matter of law.’²⁶¹ Without being overpolite in its characterisation, the Court simply described the behaviour of the arbitrator as ‘a pattern of procrastination.’²⁶² The Court rejected the idea that Mr McCauley was protected against the

²⁵⁶ *Id.*, 427.

²⁵⁷ Franck, *supra* note 9, 13.

²⁵⁸ *Id.*

²⁵⁹ *E. C. Ernst v. Manhattan Const. Co. of Texas*, 551 F.2d 1026 (5th Cir. 1977).

²⁶⁰ *Id.*, 1031.

²⁶¹ *Id.*, 1032.

²⁶² *Id.*

claim of damages by the shield of the immunity of arbitrators.²⁶³ The Court took a reasonable stand at the purposes of the immunity of arbitrators as the immunity is called upon to protect an arbitrator for the award rendered but not having issued any award at all; as the Court put it, ‘the question is not the insulation of McCauley from suit because of a decision it made but, more accurately phrased, its immunity from suit for failing, or delaying, in making decisions.’²⁶⁴ Justifying its vision, the Court recalls that ‘[t]he arbitrator’s “quasi-judicial” immunity arises from his resemblance to a judge.’²⁶⁵ Proceeding the matter of the scope of the immunity, the Court notes that ‘[t]he scope of his immunity should be no broader than this resemblance.’²⁶⁶ Elaborating on the inherent duty of arbitrator to indeed render an award, the Court specifies that ‘[i]n his role as interpreter of the contract and as private decisionmaker, the arbitrator has a duty, express or implied, to make reasonably expeditious decisions.’²⁶⁷ The Court established that arbitrators lose their immunity in case of non-rendering an award; in particular, the Court found that ‘[w]here his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decision-making (good or bad), he loses his claim to immunity because he loses his resemblance to a judge.’²⁶⁸ However, the Court indicated that it was aware of the naturally connected problem of bad decisions although rendered in a timely fashion.²⁶⁹ In that regard, the Court wrote that ‘[t]he idea of a misfeasance-nonfeasance dichotomy has been subject to question.’²⁷⁰ Avoiding delivering an in-depth and insightful analysis on this topic, the Court resorts to pointing out that failing to render an award damages

²⁶³ *Id.*

²⁶⁴ *Id.*, 1033.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

both parties, in other words, all parties so it is obvious that in such a situation, the immunity of arbitrators yields; in the words of the Court, ‘McCauley’s actions constitutes a default to all parties in the contractual sense that we have described.’²⁷¹

2.3. Burden of proof

A minor but practically very important point that arises often with the connection to the immunity of arbitrators is the burden of proof. Interestingly and surprisingly, this point is almost absolutely ignored in the literature. The reason of inclusion of this subdivision in this chapter is that the problem of the burden of proof usually happens when there are doubts on whether a person acts as an arbitrator (i.e. the peculiarities of arbitral immunity *ratione personae*) or whether certain proceedings are arbitral proceedings (i.e. the peculiarities of arbitral immunity *ratione materiae*).

Some certainty on the matter can be found in the decision of the House of Lords in the case of *Arenson v. Casson Beckman Rutley & Co.*²⁷² Controversially, the Lords found that ‘[i]f it be right that he who claims quasi-judicial immunity now has the burden of proving it, it is here impossible for the respondents at the striking out stage to prove such a status.’²⁷³ Naturally, the Lords proceed to establish that ‘[t]his must be left for the court of trial,’²⁷⁴ so it can be assumed that their Lordships believe that no one of the parties should bear the burden of proving the existence or non-existence of the immunity of arbitrators in a particular case. However, contrary to these observations, the House then proceeds to note that ‘[t]he status of immunity always has to be fought for’ and that ‘[i]t is never self-evident.’²⁷⁵ Making sense out of its

²⁷¹ *Id.*, 1034.

²⁷² *Arenson v. Casson Beckman Rutley & Co.*, 1977 A.C. 405 (1977).

²⁷³ *Id.*, 408.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

confusions and lack of consistency in the analysis, the House concluded that the burden of proof is on the party who ascertains that they are protected by arbitral immunity.²⁷⁶

The *Arenson* decision is indeed the best authority on the matter that represents an authoritative view exactly on the matter of the burden of proof. However, to make the analysis even more comprehensive, one can be advised to have a look at the decision of the Court of Appeal in the case of *Sirros v. Moore*.²⁷⁷

The case arose out of the suit for damages brought by a foreigner who was detained in the UK due to the mistake of a judge regarding the jurisdiction.²⁷⁸ Without diving deep into the facts of the case that are not really relevant for the purposes of the thesis, it has to be noted that the judge indeed was entitled to benefit from the judicial immunity.²⁷⁹ The Court addressed the long-standing problem of the differences between ‘superior’ and ‘inferior’ courts existent in the English law that directly impacted the issue of the liability of judges.²⁸⁰ Particularly, the Court specified that ‘if anyone sought to make a judge of the superior court personally liable for an act in excess of his jurisdiction, the burden of proving excess of jurisdiction rested on the plaintiff,’ and that ‘if a similar claim was made against a judge of an inferior court, the burden of proof was held to rest upon the judge to prove that he had had jurisdiction.’²⁸¹ Elaborating broadly on the peculiarities of the constitutional order of the English judicial system, the Court came to the conclusion that it is upon the judge to prove that they have had

²⁷⁶ *Id.*

²⁷⁷ *Sirros v. Moore*, 1975 Q.B. 118 (1974).

²⁷⁸ *Id.*, 118.

²⁷⁹ *Id.*, 119.

²⁸⁰ *Id.*, 138-39.

²⁸¹ *Id.*, 138.

jurisdiction and thus it is upon the judge to prove that they are covered by the judicial immunity in that respect.²⁸²

Based on the above-cited decisions that deal with the burden of proof in the context of both judicial and arbitral immunities, the burden is always on the arbitrator who claims to be protected by the immunity shield in any case where there are doubts with regard to the scope of the immunity of arbitrators. This matter is of utmost importance on practice and is a necessary component of the analysis of the scope of arbitral immunity.

²⁸² *Id.*, 141.

3. Deciphering the Immunity of Arbitrators: lots of abuse, the failure of the qualified immunity concept, and two proposed solutions

From the perspective of international development, human rights and consumer protection, arbitral immunity comes into play in an unexpected and surprisingly sinister role.²⁸³ In light of the contemporary attempts²⁸⁴ to bring businesses worldwide to consciousness and make them a bit more responsible on the account of human rights, discussing this issue in the thesis is, at least, necessary, at most, morally indispensable.

Relying on the solid background presented in the first chapter²⁸⁵ and being aware of the myriads of the peculiarities of the scope of the immunity of arbitrators outlined in the second chapter,²⁸⁶ this part of the thesis makes this oeuvre truly distinct from other works on arbitral immunity. First, this chapter explores how abusively the immunity of arbitrators can be used by those in power: in the world of consumer transactions²⁸⁷ and in the area of international investment.²⁸⁸ After that, the thesis proceeds to describe the proposed concept of qualified immunity and why this idea fails to respond to the outstanding concerns.²⁸⁹ Finally, this chapter puts forward two equally possible and attractive solutions: equitable reliefs²⁹⁰ and the brand-new doctrine of piercing the veil of the immunity of arbitrators.²⁹¹

²⁸³ See generally Roitman, *supra* note 4.

²⁸⁴ See UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK (2011).

²⁸⁵ See *supra* notes 32-151 and accompanying text.

²⁸⁶ See *supra* notes 152-282 and accompanying text.

²⁸⁷ See *infra* notes 292-315 and accompanying text.

²⁸⁸ See *infra* notes 316-328 and accompanying text.

²⁸⁹ See *infra* notes 329-336 and accompanying text.

²⁹⁰ See *infra* notes 337-357 and accompanying text.

²⁹¹ See *infra* notes 358-364 and accompanying text.

3.1. Arbitral immunity abused against consumers

Nowadays, consumer transactions contracts frequently include a mandatory arbitration clause that obliges consumers to adjudicate any and all disputes outside of the courtroom.²⁹² The private arbitration firms administering such proceedings that enjoy broad arbitral immunity existent in the US tend to pursue profits rather than delivering justice.

In the case of *Komarova v. National Credit Acceptance*,²⁹³ the problem is vividly illustrated. In that case, Anastasiya Komarova was mistakenly haunted by a bank for a credit card debt that was mistakenly attributed to her while, in fact, the debtor was Anastasia Komorova.²⁹⁴ Without being even notified about the arbitral proceedings against her, Ms Komarova was obliged by the arbitral award issued to pay out another person's debt.²⁹⁵ The case raises well-reasoned doubts whether the arbitral immunity was really in the right place protecting the dodgy arbitral institution, especially in such a sensitive area as consumer transactions.

The problem of the immunity of arbitrators when they sit on consumer transactions cases is that arbitral institutions do not act as independent, third-party administrators or facilitators;²⁹⁶ instead they establish the rules, the procedure, the fees etc. and are ultimately interested in high rates of debt collection in order to attract more banks and other 'clients.' And indeed, the arbitral institutions serving banks are 'performing' very well for their clients: Public Citizen reported that ninety-four per cent of all claims are decided against consumers in California

²⁹² Roitman, *supra* note 4, 559.

²⁹³ *Komarova v. National Credit Acceptance, Inc.*, 175 Cal. App. 4th 324 (2009).

²⁹⁴ *Id.*, 331-32.

²⁹⁵ *Id.*, 333-35.

²⁹⁶ *See* Roitman, *supra* note 4, 560.

calling it unequivocally a ‘debt collection mechanism.’²⁹⁷ As an illustration of how far the abuse has gone, Public Citizen writes: ‘[o]ne arbitrator handled 68 cases in a single day – an average of one every seven minutes, assuming an eight-hour day – and ruled for the business in every case, awarding 100 percent of the money requested.’²⁹⁸

The National Arbitration Forum (hereinafter NAF) acquired an impressive level of notoriety for its practices. The public outcry made the Minnesota state legislature to convene a special investigative committee that ‘made some rather shocking findings against the NAF, including that more than 70% of the arbitrations the committee reviewed should have been dismissed by NAF rather than resolved in favor of the lender.’²⁹⁹ The insights into the practices of the NAF reveal quite disgusting practices as ‘a former NAF employee contends that NAF routinely engaged in fraudulent and corrupt practices, including telling arbitrators to rule in favor of creditors and asking creditors how the arbitrators should rule.’³⁰⁰

It is now necessary to look what the law has in its arsenal to protect consumers. The *Corey* judgment may be of help here.

²⁹⁷ PUBLIC CITIZEN, Mandatory Arbitration Stacks Deck Against Credit Cardholders, Data Show (Sep. 27, 2007) <https://www.citizen.org/media/press-releases/mandatory-arbitration-stacks-deck-against-credit-cardholders-data-show>.

²⁹⁸ *Id.*

²⁹⁹ National Arbitration Forum Trade Practices Litigation, 704 F.Supp.2d 832, 835 (D.Minn. 2010).

³⁰⁰ *Id.*

Perhaps one of the few decisions that really deserve to be labelled as landmark³⁰¹ is *Corey v. New York Stock Exchange*.³⁰² That is because *Corey*³⁰³ provides key to the extension of arbitral immunity to arbitral institutions in the US and also because of how vividly the Court's arguments illustrate the bigotry surrounding the judicial treatment of the abuse of arbitral immunity. Labelling the suit of the plaintiff-appellant as 'a collateral attack against the award,'³⁰⁴ the Court noted that abuses are prevented by, among others, the fact that the arbitral proceedings are adversarial.³⁰⁵ Also, the Court noted that parties have 'a right to be represented by an attorney.'³⁰⁶ This argument does not stand: first, the adversarial nature of proceedings is a minimum must-have standard existent in democratic societies and the fact that arbitration is adversarial does not guarantee any protection against abuses at all; second, the right to be represented by a lawyer is not a safeguard either as large corporations are usually represented by well-trained and high-paid in-house counsels in every single case while hiring an attorney is a financial challenge for an ordinary consumer. The next argument of the Court was that the Federal Arbitration Act provided for an opportunity of the judicial review of the award rendered.³⁰⁷ This feature is also unable to prevent abuses as the judicial review is very limited in order to ensure the finality of arbitral awards.³⁰⁸ But the final 'safeguard' invented by the

³⁰¹ The ubiquitous 'landmark case' or 'landmark decision' phrases are used so frequently in the literature that the degree of misuse of these words supersedes even the degree of abuse of arbitral immunity in the field of consumer transaction. Perhaps, many authors believe that any decisions they cite is landmark merely by the virtue of having drawn the authors' attention.

³⁰² *Corey v. New York Stock Exchange*, 691 F.2d 1206 (1982).

³⁰³ For a brief summary of the facts of the case, see *supra* note 177-179 and accompanying text.

³⁰⁴ *Corey v. New York Stock Exchange*, 691 F.2d 1206, 1213 (1982).

³⁰⁵ *Id.*, 1210.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ See Federal Arbitration Act, 9 U.S.C. §§ 1-16, § 10(a).

Court was a true slap in the face of consumer protection and common sense. The Court stated that abuses can be prevented by the fact of ‘the voluntary use of arbitration as a means of dispute resolution.’³⁰⁹ As noted above, banks nowadays include arbitration clauses in every single contract. Saying that consumers agree on this voluntarily is simply not true. The choice consumer face is rather not having a bank account at all in the twenty-first century or to agree on everything large banking corporations put forward.

Relying on the *Corey* decision, the arbitral institutions got away with violating procedures they establish themselves or not having notified consumers about the proceedings and hearings.³¹⁰

As noted above, judicial immunity has been extended to arbitration for the proper administration of justice because arbitrators are doing essentially the same what judges do.³¹¹

As a response to how arbitral immunity is used and abused, San Francisco City Attorney Dennis J. Herrera developed a prominent idea of revoking arbitral immunity upon its systemic abuse,³¹² just like the doctrine of piercing the corporate veil functions.³¹³ Another response is the decision on the case of *Baar v. Tigerman*³¹⁴ that at least embarked on the theoretical possibility of limiting the scope of arbitral immunity.³¹⁵

3.2. The murky area of investment arbitration

Another contentious area connected to the immunity of arbitrators is investment arbitration. Although there are several platforms for arbitration between private investors and state

³⁰⁹ *Corey v. New York Stock Exchange*, 691 F.2d 1206, 1210 (1982).

³¹⁰ Roitman, *supra* note 4, 574.

³¹¹ *See Stump v. Sparkman*, 435 U.S. 349 (1978).

³¹² Roitman, *supra* note 4, 565-66.

³¹³ *See David K. Millon, Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability* 56 EMORY LAW JOURNAL 1305 (2007).

³¹⁴ *Baar v. Tigerman*, 140 Cal. App. 3d 979.

³¹⁵ Roitman, *supra* note 4, 567. *See generally* Olesen, *supra* note 228.

authorities, the most important and well-known one is, of course, ICSID.³¹⁶ Usually, such academic debates focus on how developing countries suffer from powerful global corporations and what a convenient forum for enforcing the major corporations' interest arbitral tribunals represent nowadays.

The main argument against the current system of investment arbitration is, among others, how pro-investor biased arbitrators are.³¹⁷ This is particularly because arbitrators are often selected from the pool of international business law professionals.³¹⁸ And, of course, biased arbitrators are also immune.

Another problem is that the ICSID Centre itself is immune from any type of liability. Particularly, the ICSID Convention stipulates that '[t]he Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.'³¹⁹ It means that developing countries' governments or their nationals who have suffered from arbitrators' negligence, corruption or other intentional wrongdoing cannot recover anything from the ICSID Centre.

One of the many cases that vividly illustrate how abusive investment arbitration can get is *Metalclad*.³²⁰ The case concerned a Canadian corporation called Metalclad that embarked on establishing its activities in Mexico.³²¹ The activities concerned building a hazardous waste

³¹⁶ Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 575 U.N.T.S. 159.

³¹⁷ Sergio Puig, Anton Strezhnev, *The David Effect and ISDS* 28 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 731, 735 (2017).

³¹⁸ *Id.*

³¹⁹ Convention on the Settlement of Investment Disputes between States and Nationals of other States Art. 20, Mar. 18, 1965, 575 U.N.T.S. 159.

³²⁰ *Metalclad Corporation v. The United Mexican States*, NAFTA/ICSID, ARB(AF)/97/1, Award (30 August 2000).

³²¹ *Id.*, paras. 2, 30.

landfill; the project was initially authorised by the federal authorities.³²² Metalclad was assured on a number of occasions that its project is welcomed by the government.³²³ However, Metalclad then faced a very hostile treatment from the local authorities.³²⁴ Metalclad nevertheless managed to finish the landfill and get allowed to carry out its operations in exchange for considerable concessions to the local authorities and the community.³²⁵ Notwithstanding these concessions, the local representatives managed to end Metalclad's hazardous activities, particularly by declaring all the area Metalclad occupied a 'natural area.'³²⁶

The arbitral tribunal convened within the NAFTA/ICSID framework found against Mexico as it, in view of the arbitrators, expropriated Metalclad's investments.³²⁷ This case clearly demonstrated how the efforts of a local community to stop a powerful foreign corporation from setting up a lucrative enterprise that would be obviously very damaging to the nature of the place and to the health of the local inhabitants resulted in an award against a developing country and obliging it to pay large sums of money. Although the case facts available from the text of the award does not show any signs of arbitrators' misconduct, it is still quite appalling that the state authorities in principle cannot claim anything against the arbitrators and are, essentially, wholly dependent on arbitrators' diligence and sense of justice.

In investment arbitration, not only the biased attitude of arbitrators is often the cause of political turmoil but also the inequality of bargaining power between host nations and investor corporations; it is frequently the case that the investor has much more money than the whole

³²² *Id.*, paras. 28, 29.

³²³ *Id.*, para. 36.

³²⁴ *Id.*, para. 37.

³²⁵ *Id.*, para. 48.

³²⁶ *Id.*, paras. 54-59.

³²⁷ *Id.*, para. 112.

country.³²⁸ A step towards limiting the absolute immunity of arbitrators or, at least, the ICSID Centre as a legal person can be a move forward for better global investing without destroying the whole system of investment arbitration as such.

3.3. Qualified immunity: a failed response

From the sections and subdivisions above, one can get a grasp of numerous problems surrounding the immunity of arbitrators. Commentators come up with several proposes addressing those problems; one of such proposals is introducing a concept known as qualified immunity.³²⁹

The concept of qualified immunity tries to combine both judicial and contractual approaches to understanding arbitration as such.³³⁰ The idea is quite hard to be presented in a clear and understandable way. In most accessible terms, qualified immunity means that an arbitrator remains immune from suit for any civil damages but does not have the immunity shield when the actions go outside of the quasi-judicial capacity.³³¹

The obvious flaw of this concept is that it does not offer anything new at all. As per the English doctrine, the judicial immunity that has been extended to cover arbitrators applies only to (i) judicial acts (ii) delivered within the jurisdiction. Even in the US, where the doctrine of immunity has reached the highest possible picks, immunity yields in case of corruption.

Apart from this most important practical flaw, the concept of qualified immunity inherits all the problems connected to the so-called mixed approach to understanding arbitration.

³²⁸ Puig, Strezhnev, *supra* note 317, 758.

³²⁹ Salahuddin, *supra* note 6, 578.

³³⁰ *Id.*

³³¹ *Id.*

Another problem of qualified immunity is that it now exists purely in the writings of academics and, as it usually the case with academics, each commentator understands qualified immunity differently. For example, Susan D. Franck offers a particularly interesting view on the proposed concept.³³² She puts forward two ways of introducing qualified immunity. The first one is inserting special clauses on qualified immunity into each separate *receptum arbitri*.³³³ The second one is adopting a new statutory provision that provides for arbitral immunity with two exceptions: first, if arbitrator ‘unjustifiably fails to render an arbitral award,’ and second, liability ‘for bad-faith conduct done in ... capacity as arbitrator.’³³⁴ This proposed statutory provision can be criticised on both accounts: first, even in the US where arbitral immunity is (nearly) absolute, arbitrators are held liable for not having rendered the award (according to the *Baar v. Tigerman* decision) and second, ‘bad-faith conduct’ is too broad and is already outlawed (for example, acceptance of a bribe by an arbitrator).

The dissatisfaction of the parties to arbitral proceedings with the performance of their arbitrators and the same sentiments felt by stakeholders do not always result in going after the arbitrators for their wrongdoings. Another remedy suggested by some commentators in connection with the immunity of arbitrators and qualified immunity debates is setting aside the award rendered.³³⁵ In particular, the award can be vacated in case of corruption on the side of arbitrators.³³⁶ This approach can be criticised on a number of different accounts. In brief, such a practice would put the burden of sustaining the negative consequences of the arbitrators’ misconduct on the parties instead of the actual culprit. At the same time, in many common law

³³² Franck, *supra* note 9.

³³³ *Id.*, 54.

³³⁴ *Id.*, 58.

³³⁵ Mark A. Sponseller, Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators 44 HASTINGS LAW JOURNAL 421, 422 (1993).

³³⁶ *Id.*

jurisdictions, arbitrators would be still able to hide behind their immunity. Finally, this policy would not induce arbitrators to be more diligent while doing their job. Therefore, substituting the immunity of arbitrators with setting the award aside as a reaction to everything that is wrong with the peculiarities of the liability of arbitrators is definitely not a good idea.

3.4. Solution 1: equitable reliefs

The problems with the vague boundaries of the scope of the immunity of arbitrators cause much distress among the parties to arbitral proceedings and relevant stakeholders. The above-described concept of qualified immunity has appeared to be just another name for the same thing. Dismantling immunity at all would be quite damaging for the integrity of the arbitrators' decision-making and will negatively impact everyone at the end. Assessing the problems surrounding the immunity of arbitrators from a different angle is able to provide with an answer that is ambitious and new. This solution is the use of equitable reliefs.

In order to give a comprehensive overview of how equitable reliefs are able to save the situation, two cases should be examined: the decision of the New York District Court in the case of *Trans World Airlines v. Sinicropi*³³⁷ and the decision of the Court of Appeals for the Ninth Circuit in the case of *Kemner v. District Council of Painting and Allied Trades No. 36*.³³⁸

In *Trans World Airlines*, the initial conflict arose out of the compensation of one of the airline company's pilots, Mr Meusel.³³⁹ Upon his retirement, Mr Meusel received significant payments in accordance with airlines' policies on compensations.³⁴⁰ The matter was contested

³³⁷ *Trans World Airlines, Inc. v. Anthony V. Sinicropi*, 887 F.Supp. 595 (S.D.N.Y. 1995).

³³⁸ *Paul S. Kemner v. District Council of Painting and Allied Trades No. 36*, 768 F.2d 1115 (1985).

³³⁹ *Trans World Airlines, Inc. v. Anthony V. Sinicropi*, 887 F.Supp. 595, 600 (S.D.N.Y. 1995).

³⁴⁰ *Id.*, 601.

on behalf of the company and the initial proceedings were conducted with four members of the board of the company sitting as arbitrators.³⁴¹ As the number of the persons was even, the proceedings found itself in a deadlock; in order to resolve the situation, the fifth member was invited, Mr Sinicropi.³⁴² After Mr Sinicropi joined the group of adjudicators, the decision was handed down in favour of the pilot stating that the received benefit was in accordance with the company's relevant documents.³⁴³ As it is often the case, the disappointed company then went after Mr Sinicropi.³⁴⁴ The Court found that the immunity of arbitrators does not shield Mr Sinicropi in this particular matter as 'while the arbitrator's decision might have been outlandish, it also, as the arbitrator readily admitted, flowed from principles of equity, rather than the terms of the agreement itself.'³⁴⁵ Although these words may sound very unclear and hard to understand, the reasoning of the Court was quite simple: the plaintiff went after the arbitrator but without claiming monetary damages – only equitable relief. Basically, the airline company did not want money from arbitrator but wanted, naturally, to annul the award rendered and not to pay the pilot retirement benefits. Of course, any attentive reader would certainly raise doubts rightly pointing out that the decision of the Court was *de facto* setting the award aside rather than trying to make the arbitrator compensate for his allegedly wrong award. However, the law as it stands allows such proceedings and the case was cited by commentators as a precedent that illustrates that equitable reliefs fall outside of the scope of the immunity of arbitrators.³⁴⁶

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*, 601-02.

³⁴⁵ *Id.*, 615-16.

³⁴⁶ Roitman, *supra* note 4, 580.

The case of *Kemner* arose out of the claim brought by a painting worker against the labour union within the collective bargaining agreement and two arbitration committees.³⁴⁷ The award made was against Mr Kemner (the painter) so he brought the matter to the court of law seeking equitable relief.³⁴⁸ One of the main arguments of the arbitrators who sat on the arbitration committees was that they were protected by the well-established principle of the immunity of arbitrators.³⁴⁹ The Court of Appeals ultimately held that the arbitrators were not shielded against an equitable relief because ‘Kemner has sued only for relief from those acts allegedly taken in excess of the committees’ jurisdiction, not for damages against the committees or any individual.’³⁵⁰ Turning to the reasoning behind its findings, the Court elaborates that ‘the policy concerns underlying the doctrines of judicial and arbitral immunity from damages actions do not obtain.’³⁵¹ Summarising, the Court noted that ‘[t]he district court erred to the extent that it dismissed the case on the ground that defendants were immune from suit.’³⁵²

On the basis of these two cases, it can be concluded that arbitrators cannot hide behind the immunity of arbitrators when the matter is heard before a court of law regarding an equitable relief. The cases of *Trans World Airlines* and *Kemner* are quite similar not only in the interpretation of the available common law of the US on the matter of equitable reliefs but also are similar with regard to the factual pattern. The two cases concerned ordinary workers, not large wealthy corporations or corporate executives, who were in conflict with their employers regarding compensations and their workers’ rights. The immunity of arbitrators could play

³⁴⁷ Paul S. Kemner v. District Council of Painting and Allied Trades No. 36, 768 F.2d 1115, 1116 (1985).

³⁴⁸ *Id.*, 1117-18.

³⁴⁹ *Id.*, 1119-20.

³⁵⁰ *Id.*, 1119.

³⁵¹ *Id.*, 1120.

³⁵² *Id.*

quite an evil role and protect the corporation in their abuse of the employees. Fortunately, the doctrine underpinning equitable reliefs in the US came into play and arbitral immunity had to yield. In the context of this thesis, such a scenario of seeking equitable relief can be a really good response to the abuse of arbitral immunity in the situation of unequal bargaining power without disturbing or destroying ages-long principles on the immunity of arbitrators and its scope.

If the proposed strategy seems to be too complicated and too ineffective, one is kindly referred to the forefronts of the modern legal battlegrounds between the consumers and large corporations who abuse the concept of arbitration – California. Responding to the systemic abuse of consumers by banks through arbitration firms, San Francisco City Attorney Dennis J. Herrera began proceedings against the NAF, the main arbitration institution involved in the scandal.³⁵³ In its defence, the NAF invokes arbitral immunity, as it has been extended to arbitral institutions, against the claims.³⁵⁴ Although the issue is still not well-settled in academia, the arguments of the City Attorney are based on the principle that the immunity of arbitrators does not protect against equitable reliefs.³⁵⁵ At the time of publishing of Sara Roitman's frequently-cited article, the matter was not settled; however, now it is known that the proceedings ended up in a settlement agreement.³⁵⁶ Those who got damages received collectively nearly five million dollars and the NAF was obliged to change its practices substantially.³⁵⁷

³⁵³ The People of the State of California v. National Arbitration Forum, Inc., Complaint, Case No. CGC-08-473569 (Mar. 24, 2008).

³⁵⁴ Roitman, *supra* note 4, 583.

³⁵⁵ *Id.*, 584-85.

³⁵⁶ The People of the State of California v. National Arbitration Forum, Inc., Settlement Agreement and Release.

³⁵⁷ *Id.*

Although the settlement might be good for the consumers, the American society lost a chance to get a solid case-law precedent that would be used multiple times in individual cases. Nevertheless, equitable reliefs are innovative and powerful tool for fighting arbitral immunity abuse without changing anything in arbitration as such; the tool finds a solid ground in the case-law.

3.5. Solution 2: piercing the immunity shield

There have been attempts to establish that the liability shield given by the immunity of arbitrators should be able to be pierced in a case of systemic abuse just like the doctrine of piercing corporate veil works. Fortunately for those mistreated by arbitration abuse, this suggestion is indeed able to be something more than just a doctrinal proposal.

In *National Arbitration Forum Trade Practices Litigation*,³⁵⁸ the NAF put the arbitral immunity as its very first argument in defence against the class action.³⁵⁹ The Court began its analysis with carefully stating that “[t]his immunity is similar to judicial immunity, and “protects all acts within the scope of the arbitral process”” and that “[a]rbitral immunity is undeniably broad.”³⁶⁰ However, the Court revolutionary stated that such a systemically corrupt and biased approach means that acts performed by the arbitrators and the NAF as an arbitral institution are clearly outside of the scope of delivering justice; as the Court put it, “[i]f discovery bears out the extent of the biased, corrupt conduct Plaintiffs allege, then it cannot fairly be said that NAF’s actions were “within the scope of the arbitral process.””³⁶¹ In its reasoning, the Court reasonably applied the functional test not to the similarity between judges

³⁵⁸ *National Arbitration Forum Trade Practices Litigation*, 704 F.Supp.2d 832 (D.Minn. 2010).

³⁵⁹ *Id.*, 836.

³⁶⁰ *Id.*

³⁶¹ *Id.*

and arbitrators but to the purposes of the immunity of arbitrators, noting that ‘one of the purposes of arbitral immunity is “to protect decision-makers from undue influence.”’³⁶² In the case of the NAF, ‘the decisionmakers were not protected from the undue influence of both the creditors and NAF itself.’³⁶³ The Court concluded that ‘NAF cannot claim arbitral immunity’ because of the ‘systemic, pervasive, and far-reaching allegations of bias and corruption, rendering every single arbitration performed by NAF suspect.’³⁶⁴

One of the many advantages of the proposed solution is that it stems from the common law doctrine and its interpretation, so there is no need to make parliaments to pass any legislation which might be hard to pursue due to various political hardships and the powerful corporate lobby. Without destroying the immunity of arbitrators and without attempting to narrow its scope, this solution is able to provide ordinary people who suffer from unfair arbitration practices with much-anticipated protection without causing any distress to the system of commercial arbitration between parties with more or less equal bargaining powers. The legal justification of this construction is, as the *National Arbitration Forum Trade Practices Litigation* Court notes, a systemic abuse of the immunity of arbitrators pushes arbitrators and arbitral institution outside of the scope of delivering judicial acts. Therefore, relying on the foundations of arbitral immunity as rooted in common law, arbitrators are no longer protected by the immunity shield in such situations.

Summarising, it can be stated the second solution (piercing the immunity shield) allows to go after the arbitrators and get monetary compensations from them; the first approach does not

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

allow to do so but instead makes possible to get rid of an unjust award. Being equally brand-new and effective, these two solutions thus can be used together perfectly.

Conclusion

This thesis began with two quotations that served as epigraphs. Those quotations perfectly reflect on the approach of the present research and the outcome.

The quote from Ludwig Wittgenstein described the manner which the thesis employed in order to investigate the subject matter. The literature explores the matter of arbitral immunity inside out: arguing its theoretical advantages and disadvantages and then applying the purely theoretical result to the reality. Instead of doing the same mistake, this thesis pulls the door that is unlocked and opens inwards instead of pushing it desperately. This oeuvre studies the impact of arbitral immunity and only then, relying on the thorough research, puts forward some solutions that do not disrupt the whole construction of the immunity of arbitrators but carefully remedy the existing problems without negatively influencing the functioning of the international arbitration system as means of dispute resolution.

The quote from José Saramago reflects on the results of this research. The immunity of arbitrators nowadays is indeed a chaos: common law moves into the direction of absolute immunity, civil law further goes to the side of immunity denial and mechanical application of the contract theory; the commentators are divided – some praise the immunity, some fiercely dislike it. The idea of qualified immunity was an unthoughtful attempt to combine the two far ends and sell it as a panacea. Some areas, like the burden of proof, remained to be ignored and undiscovered. Making sense out of this chaos, the thesis offers a comprehensive study that suggests two alternative and equally effective solutions.

The conclusions made are diverse and require a detailed reflection. The most noteworthy of them are following.

The theoretical underpinnings of arbitral immunity not only reflect the split between common law and civil law but also, based on a close and thorough examination, demonstrate that the civil law approach is flawed both on the accounts of theoretical justifications and practical implications.³⁶⁵ The Swiss commentators' suggestions for the immunity of arbitrators in their home jurisdictions and the struggles such attempts face are a perfect illustration of the premise.

The scope of arbitral immunity appeared to be an incredibly undefined and fluid topic. Arbitral institutions are covered by the immunity of their arbitrators.³⁶⁶ However, drawing the borderline between arbitration and other proceedings is a hard task and only the functional approach is able to provide one with any certainty.³⁶⁷ Finally, the thesis innovatively and uniquely embarked on the issue of the burden of proof.³⁶⁸ Not only a definitive answer was provided but also impact considerations were provided.

How the immunity of arbitrators is used on practice and how the immunity is supposed to be used as described in the literature are very different and strikingly opposite things. The immunity of arbitrators is abused, and it is abused heavily. This is the case with consumer transactions where arbitration clauses have become anything but not a voluntary consent to resolve a dispute in a just and fair manner.³⁶⁹ The world of international investment uses arbitral immunity as just another tool for creating the allure of illusory legitimacy for the continuation and preservation of development inequality.³⁷⁰ The proposed idea of qualified immunity has definitely failed to provide any solutions for any of the problems associated with arbitral immunity and is yet another reflection of how wrong the prevailing treatment of arbitral

³⁶⁵ See *supra* notes 46-61 and accompanying text.

³⁶⁶ See *supra* notes 164-189 and accompanying text.

³⁶⁷ See *supra* notes 190-214 and accompanying text.

³⁶⁸ See *supra* notes 272-282 and accompanying text.

³⁶⁹ See *supra* notes 292-315 and accompanying text.

³⁷⁰ See *supra* notes 316-328 and accompanying text.

immunity research in the literature is.³⁷¹ Finally, the thesis has developed and justified the effectiveness and workability of two solutions: equitable reliefs³⁷² and the doctrine of piercing the liability shield of arbitrators.³⁷³ Not only these solutions remedy the identified problems but also do not disrupt the system of arbitration as a still effective means of alternative dispute resolution.

³⁷¹ *See supra* notes 329-336 and accompanying text.

³⁷² *See supra* notes 337-357 and accompanying text.

³⁷³ *See supra* notes 358-364 and accompanying text.

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