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Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France

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Abstract

This Note examines the relationship between the arbitral institution and the disputing parties. Part I demonstrates the decisions parties face when choosing between traditional litigation and arbitration; it also discusses the differences between an arbitral institution and an ad hoc arbitration, as well as major arbitral institutions' rules regarding their own liability. Part II introduces several nations' approaches to judicial immunity, and how it is applied to arbitrators and arbitral institutions. Part II also weighs differing views on how to characterize the relationship between disputing parties and the arbitral institution. Finally, Part II discusses several key criticisms to the immunity of arbitral institutions. Part III will demonstrate the need for arbitral institutions' contractual liability to disputing parties, and will address several potential criticisms and policy concerns of this approach.

OVEREXTENDING IMMUNITY: ARBITRAL INSTITUTIONAL
LIABILITY IN THE UNITED STATES,
ENGLAND, AND FRANCE

*Matthew Rasmussen**

INTRODUCTION

Fried Trading Company (“Fried”), an options trading partnership and a member of the Chicago Board Options Exchange (“CBOE”),¹ had a trading partnership agreement with Mr. and Mrs. Austern (“the Austerns”), residents of Israel.² A dispute arose between Fried and the Austerns over monies due under the trading agreement.³ Under the arbitration clause contained in the trading agreement, Fried filed a petition for arbitration with the CBOE in September 1984.⁴ When the Austerns answered the petition in November 1984, the CBOE accepted the matter for arbitration.⁵

The selection of the arbitration panel and the procedures to be followed in the arbitration were governed by the arbitration rules of the CBOE.⁶ These rules mandated that the panel be composed of five arbitrators, no more than two of whom could be from the securities industry,⁷ and that notice of the hearing

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1. See Chicago Board Options Exchange (“CBOE”), *About CBOE, The History of CBOE*, at <http://www.cboe.com/AboutCBOE/History.asp>. The CBOE was founded in 1973. *Id.* The CBOE created standardized, listed stock options. *Id.* Previously, options were traded on an unregulated basis. *Id.* The CBOE quickly became the second largest security exchange in the United States and the world’s largest options exchange. *Id.*

2. See *Austern v. Chi. Bd. Options Exch., Inc.*, 898 F.2d 882, 884 (2d Cir. 1990) (noting trading partnership agreement between parties in case).

3. See *id.* (indicating that dispute between parties arose regarding money due under trading agreement).

4. See *id.* (noting trading agreement contained arbitration clause for any disagreements arising from agreement and Fried Trading Company (“Fried”) filed petition for arbitration on September 1984 pursuant to that clause).

5. See *id.* (stating that Austerns initially answered petition and Chicago Board Options Exchange (“CBOE”) accepted matter for arbitration).

6. See *id.* (noting that CBOE arbitration rules govern arbitral proceedings).

7. See *Chicago Board Options Exchange Arbitration Rules*, in *SECURITIES ARBITRATION: PRACTICE AND FORMS* (W. Reece Bader, ed., 2002) [hereinafter *CBOE Arbitration Rules*] Rule 18.10(a)(1). Rule 18.10(a)(1) states:

be given to each of the parties at least eight business days in advance of the date of the hearing.⁸

In September 1986, the Austerns withdrew their appearance, answer, and counterclaim.⁹ Nonetheless, the CBOE continued with the arbitration selection and proceedings.¹⁰ One month later, the panel of five arbitrators designated by the CBOE conducted an *ex parte* hearing and issued an award in favor of Fried.¹¹

In administering the Fried arbitration, the CBOE failed to fulfill two of the requirements of its own rules: all five arbitrators were from the securities industry and, despite the CBOE's attempts, the Austerns never received any notice of the hearing.¹² The Austerns sued the CBOE for negligent empanelling and

In all arbitration matters involving public customers and nonmembers where the amount in controversy exceeds \$10,000 or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which shall consist of no less than three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

Id. Note that these rules have been amended, originally requiring five arbitrators, but still requiring at least a majority from outside the securities industry. *See Austern*, 898 F.2d at 884 (quoting rules in force at time of case).

8. *See CBOE Arbitration Rules*, at Rule 18.16. Rule 18.16 states:

Unless the law directs otherwise, the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the date fixed for the hearing by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this section. Notice for each hearing, thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.

Id.

9. *See Austern*, 898 F.2d at 884 (noting that Austerns withdrew appearance, answer, and counterclaim and discussing briefly Austerns' withdrawal noting Austerns were confused regarding with whom they were arbitrating but without illuminating why).

10. *See id.* (noting that panel continued with case despite having received withdrawal). The CBOE sent notice of the hearing to the Austerns' previous counsel, Sachnoff, Weaver, and Rubenstein ("Sachnoff"), even though the Austerns' had indicated they would be representing themselves. *See Austern v. Chi. Bd. Options Exch., Inc.*, 716 F.Supp. 121, 122-23 (S.D.N.Y. 1989). Furthermore, Sachnoff received the notice seven business days prior to the hearing. *Id.* Sachnoff informed the court that they no longer represented the Austerns, but noted they would forward the notice to the Austerns. *Id.* The Austerns never received notice. *Id.*

11. *See Austern*, 898 F.2d at 884 (noting panel, ruling *ex parte*, held for Fried awarding US\$158,000).

12. *See id.* (discussing attempt by CBOE to send notice of hearing, but noting Austerns never received it).

scheduling of the arbitration proceedings, claiming an injury of US\$612,000.¹³ The district court ruled that the CBOE, as the organization sponsoring the arbitration, was immune from civil liability under the doctrine of arbitral immunity.¹⁴

The Austerns claimed that the CBOE's acts did not merit arbitral immunity because they were administrative or ministerial in nature.¹⁵ The United States Court of Appeals for the Second Circuit affirmed the decision, noting that extending arbitral immunity to institutions that sponsor arbitration is both natural and necessary in order to protect the policies that underlie arbitral immunity; otherwise the arbitrator's immunity is merely an illusion.¹⁶ This case illustrates the issues courts face when deciding the liability of institutions that fail to uphold their administrative duties: What is the nature of the relationship between the arbitral institution and the disputing parties? Should these institutions be granted immunity as an extension of the immunity granted to arbitrators based on their quasi-judicial function or functional comparability to judges? If so, should this immunity be unlimited?

Part I of this Note will demonstrate the decisions parties face when choosing between traditional litigation and arbitration. Part I will discuss the differences between arbitrating with an arbitral institution versus participating in an *ad hoc* arbitration. Part I will explain the function of arbitral institutional rules and then discuss several major arbitral institutions' rules with regard to their own liability. Part II will introduce several nations' approaches to judicial immunity and how it is applied to, first, arbitrators and, second, arbitral institutions. Part II will also weigh differing views on how to characterize the relationship between the disputing parties and the arbitral institution.

13. *See id.* (noting that Austerns sued CBOE for negligent empanelling of arbitral panel and failing to provide proper notice of hearing).

14. *See Austern*, 716 F. Supp. at 123-24 (holding that arbitral institutions cannot be held liable for actions regarding arbitration because, as sponsors of arbitrations, they need same immunity as arbitrators).

15. *See Austern*, 898 F.2d at 885 (citing Austerns' argument that due to administrative nature of duties of CBOE, they should not be immune).

16. *See id.* at 886 (stating institutions sponsoring arbitrations must be granted immunity in order to protect arbitrators, or immunity protecting arbitrators is meaningless). *See also Corey*, 691 F.2d at 1211 (stating arbitral institutions must be granted immunity in order to protect integrity of arbitrators and their decisions, otherwise parties could collaterally attack arbitrators through attacking institutions).

Finally, Part II will discuss several key criticisms to the immunity of arbitral institutions. Part III will demonstrate the need for arbitral institutions' contractual liability to disputing parties, albeit a limited liability, requiring the institutions to fulfill their essential obligations, not provide a perfect arbitration. Part III will address several potential criticisms of this approach and general policy concerns.

I. WARMING UP: SHOULD A PARTY ARBITRATE A CLAIM AND IF SO, WITH WHOM?

International parties undergo a decision-making process when choosing between litigation and alternate dispute resolution and between the different methods of alternative dispute resolution.¹⁷ In choosing, the parties must weigh the advantages and disadvantages of each process.¹⁸ When a party chooses arbitration as a method, the party faces further decisions within the process of arbitration because of the choices created through the flexibility of the process.¹⁹

A. Choosing a Process

Arbitration is the most preferred form of dispute resolution in international commercial relations, making it the primary alternative to traditional litigation.²⁰ In international commercial

17. See Robert D. Fischer & Roger S. Haydock, *Drafting an Enforceable Arbitration Agreement*, in THE ARBITRATION PROCESS, COMP. L. Y.B. OF INT'L. BUS., SPECIAL ISSUE 2001 29, at 31-32 (Dennis Campbell ed., 2002) (noting that parties have choice regarding how their disputes can best be resolved). See also JOSEPH M. LOOKOFSKY, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 559 (1992) (discussing arbitration as alternative to traditional litigation and noting parties choose whether to arbitrate or litigate).

18. See LOOKOFSKY, *supra* n.17, at 559-60 (mentioning perceived virtues and drawbacks to international arbitration). See also Fischer, *supra* n.17, at 33-47 (weighing strengths and weaknesses of arbitration).

19. See Fischer, *supra* n.17, at 34-35 (noting flexibility of and adaptability of method and discussing ability to customize process whether that be choice between institutional or *ad hoc* arbitration or choice of law, applicable rules of procedure, selection of arbitrators, or even which languages proceedings will be conducted in). See also LOOKOFSKY, *supra* n.17, at 559-62 (noting arbitration is flexible creating choices for parties).

20. See MAHMOOD BAGHERI, INTERNATIONAL CONTRACTS AND NATIONAL ECONOMIC REGULATION: DISPUTE RESOLUTION THROUGH INTERNATIONAL COMMERCIAL ARBITRATION 106 (2000) (noting arbitration is more frequently used than any other form of alternative dispute resolution). See also LOOKOFSKY, *supra* n.17, at 559 (stating arbitration is used more than any other alternative to litigation); Fischer, *supra* n.17, at 29 (discussing

arbitration, the parties voluntarily contract away their right to litigate disputes in national courts, which otherwise would have had jurisdiction over the dispute.²¹ Because large sophisticated parties would not forego their access to national courts without carefully exploring the advantages and disadvantages of the process, they must perceive that the advantages of arbitration outweigh the disadvantages.²² Some commentators contend that arbitration will continue its present popularity so long as the law maintains sufficient hold over the process to prevent substantial injustice.²³

International businesses often prefer arbitration to litigation because they see arbitration as a faster and less expensive means of dispute resolution, though whether this is the case is debatable.²⁴ Arbitration allows for the possibility of more infor-

roots of alternative dispute resolution and noting its preeminence in international commercial dispute resolution).

21. See LOOKOFKY, *supra* n.17, at 559 (discussing that arbitrating is choice of parties by contracting away right to access national courts). See also Fischer, *supra* n.17, at 30-33 (noting that parties in international commercial arbitration choose voluntarily to arbitrate over traditional litigation).

22. See LOOKOFKY, *supra* n.17, at 559 (noting that businesses perceive advantages of arbitration as being lower cost and faster process). See also Fischer, *supra* n.17, at 32 (mentioning reasons why parties would prefer arbitration over traditional justice systems).

23. See *Czarnikow v. Roth Schmidt & Co* [1922] 2 KB 478, per Banks LJ at 484. (advocating that arbitration must be well governed, ensuring justice, in order to survive as alternative to litigation). This was with respect to English domestic arbitration. *Id.* It is of equal, if not greater, significance in international commercial arbitration. *Id.* See Martin Odams de Zylva, *Restraining the Exercise of Power: Of Institutions and Arbitrators*, in *INTERNATIONAL COMMERCIAL ARBITRATION: DEVELOPING RULES FOR THE NEW MILLENNIUM* 33, at 49 (Martin Odams de Zylva & Reziya Harrison ed., 2000) (arguing arbitration will continue to be popular so long as arbitral institutions, as service providers, demonstrate to users that they will be treated fairly and stating this is equally true if not more true in context of international arbitration).

24. See Thomas Allen, *Institutional Rules: Straitjacket or Scaffold?*, in *INTERNATIONAL COMMERCIAL ARBITRATION: DEVELOPING RULES FOR THE NEW MILLENNIUM*, *supra* n.23, at 59 (stating advantages of arbitration include lower cost and faster resolution than litigation). See also LOOKOFKY, *supra* n.17, at 559-60 (noting parties see arbitration as being faster and cheaper than litigation); BAGHERI, *supra* n.20, at 105 (discussing advantages of arbitration as being more speedy and less expensive process); Roger S. Haydock, *Mediation and Arbitration for Now and the Future*, in *THE ARBITRATION PROCESS*, COMP. L. Y.B. OF INT'L. BUS., SPECIAL ISSUE 2001 1, *supra* n.17, at 17 (mentioning speed and low cost as advantages of arbitration); RICHARD GARNETT ET AL., *A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* 12-13 (2000) (noting arbitration is typically faster and less expensive than litigation); GERALD AKSEN & ROBERT B. VON MEHREN, *INTERNATIONAL ARBITRATION BETWEEN PRIVATE PARTIES AND GOVERNMENTS* 56-58 (1982) (noting parties typically see arbitration as cheaper and faster). *But see* Allen, *supra*, at 59

mality and simplicity than litigation.²⁵ Some of the major costs of litigation may be reduced in arbitration due to the shorter proceedings.²⁶ The length of the proceedings is generally much more reasonable because the process is simplified,²⁷ discovery is limited,²⁸ and the expertise and experience of the arbitrator reduces the need of expert witnesses to prove foundational concepts in the field of the dispute.²⁹

Yet, not all commentators agree that arbitration is faster or cheaper than litigation.³⁰ Especially in longer and more complicated arbitration cases between international corporations, time or cost are rarely significantly reduced.³¹ Even so, arbitration in

(indicating arbitration can be longer and more expensive than litigation in longer and more complicated cases); GARNETT, *supra*, at 12-13 (noting arbitration may be longer than court cases with summary judgment and may be more expensive when factoring costs of arbitrators and resources of institution); AKSEN, *supra*, at 56-59 (noting that costs in complicated arbitration cases are comparable to that of litigation and may even be greater).

25. See Allen, *supra* n.24, at 59 (noting that nature of arbitration process is less formal and less involved than litigation). See also GARNETT, *supra* n.24, at 14 (indicating that arbitration is typically simpler than traditional litigation).

26. See Fischer, *supra* n.17, at 36-41 (discussing major costs of litigation, such as discovery, appeal, and lawyer expenses, that can be reduced by arbitrating). See also Haydock, *supra* n.24, at 17 (indicating that costs of lawyers and discovery are reduced under arbitration as compared with litigation); Allen, *supra* n.24, at 59 (noting that arbitration process is generally shorter than litigation and therefore lawyer fees are lower); GARNETT, *supra* n.24, at 12-13 (discussing lower costs in arbitration, compared to litigation, due to lack of discovery).

27. See Haydock, *supra* n.24, at 17 (noting connection between length of proceedings and simplicity of proceedings). See also Fischer, *supra* n.17, at 36-39 (indicating that arbitral proceedings are typically shorter than litigation).

28. See Haydock, *supra* n.24, at 17 (noting limited nature of discovery in most arbitrations). See also Fischer, *supra* n.17, at 36-39, 59 (noting lack of strict rules of evidence and procedure, but indicating that parties have ability to limit discovery and disclosure).

29. See Allen, *supra* n.24, at 58 (indicating that having arbitrators who are experts in subject area of dispute reduces necessity of presenting expert witnesses to "educate" adjudicator on subject area). See also LOOKOFSKY, *supra* n.17, at 565 (observing arbitrators are generally experts in several fields).

30. See Allen, *supra* n.24, at 59 (noting that more complex arbitrations are inclined to be as long and as expensive as traditional litigation). See also GARNETT, *supra* n.24, at 12-13 (indicating that traditional litigation may be much less expensive in case of summary judgment); AKSEN, *supra* n.24, at 56-59 (indicating that in arbitration selecting arbitrators and scheduling proceedings may create equivalent delays compared to that of backed up courts and indicating attorneys fees would be roughly equivalent).

31. See AKSEN, *supra* n.24, at 56-59 (discussing arbitration becomes as expensive as traditional litigation when dispute is complex and between large parties). See also Allen, *supra* n.24, at 59 (noting it is not uncommon for international arbitration to go as long as and cost as much as traditional litigation); GARNETT, *supra* n.24, at 12-13 (noting

general is less expensive and more expedient.³²

Aside from the relative cost and speed of arbitration, there remain several other advantages that enter the minds of the parties choosing to arbitrate.³³ The parties are able to agree to vary several different facets of the arbitral proceedings.³⁴ The parties can choose a neutral forum, selecting the forum that suits them best.³⁵ This choice may be based on fear of bias in the other party's home forum or simply the convenience of a preferred location.³⁶ The parties also have the ability to choose procedural rules.³⁷ This allows the parties to choose rules that may be familiar to both of them or even create a unique set of procedural

complex arbitrations are subject to high costs, making them comparable to traditional litigation costs).

32. See Allen, *supra* n.24, at 59 (noting that in general arbitration remains faster and cheaper than traditional litigation). See also GARNETT, *supra* n.24, at 12-13 (discussing that even though some complex cases will be as expensive or more expensive than traditional litigation, normally arbitration is faster and cheaper); BAGHERI, *supra* n.20, at 105 (noting arbitration is generally cheaper than traditional litigation); Haydock, *supra* n.24, at 17 (noting arbitration is usually faster and cheaper than traditional litigation).

33. See LOOKOFSKY, *supra* n.17, at 559-60 (noting advantages of arbitration include flexibility of process and ability to adjust proceedings to personal needs). See also Allen, *supra* n.24, at 57-59 (noting that arbitration also has advantage of customization of process); BAGHERI, *supra* n.20, at 104-106 (arguing that one advantage of international arbitration is party autonomy in tailoring proceedings); Haydock, *supra* n.24, at 17-19 (indicating that arbitration has advantages of flexibility in proceedings); GARNETT, *supra* n.24, at 13 (mentioning informality and confidentiality as advantages of arbitration over litigation); AKSEN, *supra* n.24, at 55-56 (noting that arbitration provides greater privacy than litigation).

34. See Haydock, *supra* n.24, at 15-16 (discussing various choices parties may make in arbitration, such as procedural rules, forum, or language of proceedings). See also Allen, *supra* n.24, at 57 (noting flexibility of arbitration process in choice of arbitrators, forum, and language of proceedings); GARNETT, *supra* n.24, at 13-14 (mentioning users ability to individualize different facets of process); BAGHERI, *supra* n.20, at 105 (indicating that arbitration allows for individualization of process).

35. See Allen, *supra* n.24, at 57 (noting that parties may avoid procedural or substantive disadvantage by selecting neutral forum). See also BAGHERI, *supra* n.20, at 105 (noting that parties may select neutral forum); GARNETT, *supra* n.24, at 13 (indicating that parties have substantial control over where to arbitrate); AKSEN, *supra* n.24, at 55 (noting parties can alleviate fears of bias by selecting neutral forum).

36. See AKSEN, *supra* n.24, at 55 (discussing parties' ability to reduce fear of bias through selecting neutral forum). See also Allen, *supra* n.24, at 57 (indicating that neutral forum may eliminate procedural or substantive disadvantages); GARNETT, *supra* n.24, at 13 (noting parties are free to choose most convenient location); BAGHERI, *supra* n.20, at 105 (mentioning parties' ability to select neutral forum).

37. See Haydock, *supra* n.24, at 17 (noting that arbitration allows parties to choose between sets of procedural rules). See also GARNETT, *supra* n.24, at 13 (mentioning parties' ability to select arbitral rules that govern proceedings); BAGHERI, *supra* n.20, at 105 (indicating that parties may choose procedural rules to apply to arbitration).

rules that accommodate for their specific needs.³⁸ Furthermore, the parties select the language or languages of the proceedings.³⁹ These various choices create powerful incentives for parties seeking flexible rules for their specific needs to arbitrate their disputes rather than pursue traditional litigation with its more rigid rules.⁴⁰

Scholars note that other advantages of arbitration include the informality or lack of confrontation within the process,⁴¹ the confidentiality of the proceedings,⁴² the expertise of the adjudicators,⁴³ and the enforceability of the award.⁴⁴ Many parties seek

38. See BAGHERI, *supra* n.20, at 105 (discussing parties' freedom to mutually designate procedural rules). See also Haydock, *supra* n.24, at 17 (noting ability to choose between sets of procedural rules); Allen, *supra* n.24, at 57 (discussing general flexibility of arbitral proceedings); GARNETT, *supra* n.24, at 13 (noting parties' ability to modify procedural rules).

39. See LOOKOFSKY, *supra* n.17, at 567 (stating that choice of language is important factor depending on background of parties and their lawyers). See also GARNETT, *supra* n.24, at 13 (noting that parties' ability to choose language of proceedings is advantageous for all involved); AKSEN, *supra* n.24, at 56 (indicating that parties may choose language or languages of proceedings).

40. See Allen, *supra* n.24, at 57-59 (explaining that arbitration is more flexible than litigation and that many advantages arise out of this flexibility, such as choice of forum, choice of language, and choice of procedural rules). See also GARNETT, *supra* n.24, at 11-14 (noting that parties generally prefer arbitration when needing greater flexibility in proceedings); Haydock, *supra* n.24, at 17 (noting that arbitration is attractive to parties seeking flexibility in proceedings); BAGHERI, *supra* n.20, at 104-06 (describing choices available in arbitration and that creating customized procedure meets specific needs of parties); AKSEN, *supra* n.24, at 54-60 (arguing international parties need more flexibility and therefore generally prefer arbitration); LOOKOFSKY, *supra* n.17, at 561 (indicating that flexibility is one major reason why arbitration is advantageous to some parties).

41. See Allen, *supra* n.24, at 58 (observing arbitration is less confrontational than traditional litigation). See also GARNETT, *supra* n.24, at 14 (noting arbitration is typically much less formal than traditional litigation).

42. See Allen, *supra* n.24, at 57-58 (discussing increased confidentiality of arbitration proceedings as compared with traditional litigation). See also GARNETT, *supra* n.24, at 14 (noting possibility for greater confidentiality in arbitral proceedings than in traditional litigation); BAGHERI, *supra* n.20, at 105 (noting confidentiality of arbitral proceedings); AKSEN, *supra* n.24, at 55-56 (indicating that privacy in arbitral proceedings exceeds that of privacy in traditional litigation).

43. See Allen, *supra* n.24, at 58-59 (explaining arbitrators often are, and should be, selected for their expertise). See also GARNETT, *supra* n.24, at 13 (noting that arbitrators generally are both legal and non-legal experts); BAGHERI, *supra* n.20, at 105 (characterizing arbitrators as qualified specialists); LOOKOFSKY, *supra* n.17, at 565 (noting that arbitrators often possess legal expertise in several systems of national law); Haydock, *supra* n.24, at 18 (noting that arbitrator is normally expert in area of dispute that they are chosen to handle).

44. See Allen, *supra* n.24, at 58 (indicating ease of enforcement of arbitral awards). See also LOOKOFSKY, *supra* n.17, at 559-60 (noting worldwide enforcement in vast majority of arbitration cases); Haydock, *supra* n.24, at 19 (noting wide recognition and en-

a less invasive alternative to traditional litigation.⁴⁵ The nature of the process and confidentiality allow parties to reach an agreement in a less confrontational and less public proceeding.⁴⁶ Furthermore, the expertise of the adjudicators gives parties confidence in the decision, eases their financial and time burdens, and allows for a more technical proceeding where needed.⁴⁷ Finally, arbitration awards are nearly universally enforceable, making it a very attractive alternative to litigation.⁴⁸

After deciding to arbitrate, a party then must decide whether to arbitrate independently, in an *ad hoc* arbitration,⁴⁹ or through an arbitral institution, a body established to administer arbitrations.⁵⁰ Proponents of institutional arbitration note that

forcement of arbitral awards); GARNETT, *supra* n.24, at 11-12 (discussing ease of enforcement of arbitral awards under New York Convention on Recognition and Enforcement of Arbitral Awards). See generally *id.* at 101 (discussing enforceability of arbitral awards).

45. See Allen, *supra* n.24, at 58 (noting less publicity and less intensive scrutiny by court in arbitration as compared to traditional litigation). See generally GARNETT, *supra* n.24, at 14 (mentioning informality and confidentiality of arbitral proceedings).

46. See Allen, *supra* n.24, at 57-58 (discussing more amicable nature of arbitral proceedings as compared to traditional litigation). See also GARNETT, *supra* n.24, at 14 (discussing that informality grants parties larger measure of control in reaching agreement); BAGHERI, *supra* n.20, at 105 (noting that arbitral proceedings are more confidential than traditional litigation); AKSEN, *supra* n.24, at 55-56 (noting that arbitration is more private than traditional litigation).

47. See Allen, *supra* n.24, at 58-59 (discussing that more efficient proceedings generally occur when arbitrators are experts in field of dispute resulting in lower costs and faster resolution of dispute). See also Haydock, *supra* n.24, at 18 (discussing that parties are better assured that arbitrator understands applicable laws, customs and practices involved in dispute when they are experts in field of dispute); GARNETT, *supra* n.24, at 13 (noting that when arbitrator is expert in field of dispute it is particularly beneficial to proceedings); LOOKOFSKY, *supra* n.17, at 565 (noting that arbitrators often have expertise in various legal systems).

48. See Allen, *supra* n.24, at 58 (noting that arbitral awards are often easier to enforce than court decisions from other nations). See also LOOKOFSKY, *supra* n.17, at 559 (noting that most arbitral awards are enforceable in nearly every jurisdiction); GARNETT, *supra* n.24, at 11-12 (noting that enforcing arbitral awards is nearly universal under New York Convention); Haydock, *supra* n.24, at 19, (discussing generally enforceability of arbitral awards).

49. See Allen, *supra* n.24, at 59 (defining *ad hoc* arbitration as one in which parties themselves choose or create procedures and self-administer arbitral proceedings, although often turning administration over to arbitrators, once chosen). See also GARNETT, *supra* n.24, at 33-34 (discussing *ad hoc* arbitrations in general); LOOKOFSKY, *supra* n.17, at 571-73 (discussing differences between *ad hoc* and institutional arbitral proceedings).

50. See Allen, *supra* n.24, at 59 (discussing institutions that administer arbitration proceedings, such as International Chamber of Commerce ("ICC"), London Court of International Arbitration ("LCIA"), or American Arbitration Association ("AAA"), and indicating that institutions have rules that form procedural framework for arbitrations).

some of the greatest benefits are in enforcement, foresight, and government.⁵¹ An institutional arbitration award is more easily enforced.⁵² The rules and procedures are more likely to produce consistent and predictable results, because of the institution's experience and assets, better anticipating unexpected and diverse circumstances, and providing greater resources to facilitate the arbitration.⁵³ An institution can better administer the proceedings with its superior organization, control, and management of the proceedings.⁵⁴

Proponents of *ad hoc* arbitration, on the other hand, applaud the lack of administrative fees.⁵⁵ In *ad hoc* arbitration, the parties are responsible for the administration of the proceedings.⁵⁶ Furthermore, *ad hoc* arbitration is less formal and more flexible than institutional arbitration.⁵⁷ Proponents of *ad hoc* ar-

See also GARNETT, *supra* n.24, at 33-34 (discussing institutionally administered arbitrations); LOOKOFISKY, *supra* n.17, at 571-73 (discussing differences between *ad hoc* and institutional arbitrations).

51. See Allen, *supra* n.24, at 60 (noting that advantages of institutional arbitration include ease of enforcement, institutions experience in arbitrating and thus greater foresight in anticipating problems, and oversight of proceedings). See also GARNETT, *supra* n.24, 33-34 (noting institutional arbitration awards are easy to enforce and that institutions provide structure for administering proceedings).

52. See Allen, *supra* n.24, at 60 (indicating that institutional arbitral awards are more easily enforced than *ad hoc* arbitral awards typically because reputation of highly regarded and well established institution makes it easier to seek enforcement than awards from temporary unaffiliated *ad hoc* arbitral tribunals). See also LOOKOFISKY, *supra* n.17, at 571-73 (explaining reputable institutions help enforcement of award).

53. See Allen, *supra* n.24, at 60 (discussing assets that help institutions provide better arbitral proceedings and more satisfactory results). See also GARNETT, *supra* n.24, 33-34 (comparing institutional arbitrations to *ad hoc*); LOOKOFISKY, *supra* n.17, at 571-73 (discussing resources available in institutional arbitrations).

54. See Allen, *supra* n.24, at 60 (indicating that institutions can provide for more efficient administration of arbitral proceedings than individuals on *ad hoc* basis and thus produce more satisfactory results). See also LOOKOFISKY, *supra* n.17, at 571-73 (noting that, due to resources available to institutions, institutional arbitrations tend to proceed more efficiently).

55. See Allen, *supra* n.24, at 59 (noting that *ad hoc* arbitrations avoid fees that institutions charge for administering proceedings). See also LOOKOFISKY, *supra* n.17, at 573 (noting administrative charge for arbitrating through institution).

56. See Allen, *supra* n.24, at 59-60 (noting that parties exercise control over administration of proceedings). See also LOOKOFISKY, *supra* n.17, at 562-71 (discussing each aspect of proceedings under *ad hoc* arbitration and parties' roles in administering proceedings).

57. See Allen, *supra* n.24, at 59-60 (noting that lower costs and greater flexibility are two main advantages of *ad hoc* arbitration). But see LOOKOFISKY, *supra* n.17, at 571-73 (noting possibility of similar proceedings and results in *ad hoc* and institutional arbitrations).

bitrations note that parties, by exercising greater control over the proceedings and better matching the proceedings to their specific needs, should produce greater expediency and efficiency.⁵⁸ However, some scholars note, one drawback to *ad hoc* arbitration is the lack of oversight over the arbitral tribunal and the inability to effectively sanction the arbitrators for undue delays or other disputes.⁵⁹

B. *The Function of Arbitration Rules*

The rules of the various institutions or administrative bodies serve to provide a framework within which to arbitrate the disputes brought before them.⁶⁰ These rules are generally amendable by the parties to fit their specific needs.⁶¹ The rules will likely contain several required provisions, covering numerous matters such as the number of arbitrators or place of arbitration.⁶² Experts note that because arbitration is a voluntary alternative to traditional litigation, a primary policy rationale behind arbitration rules is to ensure client satisfaction, ensuring the process remains an attractive alternative.⁶³ Client satisfaction usu-

58. See Allen, *supra* n.24, at 59-60 (noting that supporters of *ad hoc* arbitration see control over proceedings and greater flexibility of process as enabling parties to administer more efficient and expedient arbitral proceeding). See also LOOKOFSKY, *supra* n.17, at 559-60 n.4 (indicating that ICC arbitrations may move more slowly than *ad hoc* proceedings).

59. See Allen, *supra* n.24, at 60 (discussing difficulty of seeking recourse against arbitrator during *ad hoc* proceedings). See also LOOKOFSKY, *supra* n.17, at 571-73 (noting that institution can provide significant oversight role in proceedings).

60. See Michael F. Hoellering, *The Institution's Role in Managing the Arbitration Process*, 1993-94 *ARB. & L.* 151, 152-53 (1994) [hereinafter Hoellering, *The Institution's Role*] (noting institution's rules provide framework for arbitral proceedings and determine extent to which institution is involved). See also Allen, *supra* n.24, at 60 (indicating that institutions and their rules should serve to provide administrative and procedural support to arbitrations); GARNETT, *supra* n.24, at 13 (discussing freedom to choose both institution and rules that govern the proceedings).

61. See Allen, *supra* n.24, at 78-83 (discussing flexibility in arbitrating with institution and parties' ability to customize rules for their specific needs). See also Matthieu Boissezon, *The Arbitration Act 1996 and the New ICC Arbitration Rules 1998: A Comparative Approach*, 1(2) *INT. A.L.R.* 1998, 68-73, at 69, (discussing party autonomy under ICC and noting that parties' freedom to agree on rules of procedure is subject only to certain safeguards ensuring fair process).

62. See Fischer, *supra* n.17, at 48-49, 54-59 (indicating required provisions usually include number of arbitrators or place of arbitration but noting parties may add numerous other provisions, such as language of proceedings, choice of law and extent of discovery and disclosure). See also Allen, *supra* n.24, at 78-83 (stating need for flexibility in rules while offering framework to provide efficient procedure).

63. See Zylva, *supra* n.23, at 49 (arguing arbitral institutions, as service providers,

ally encompasses the goals of low cost, speed and justice.⁶⁴

Although the rules are flexible, giving only a loose framework within which the arbitrators have great discretion of how to act,⁶⁵ they still provide strict enough principles to ensure an efficient and somewhat predictable process.⁶⁶ Ultimately the rules are used to guarantee an orderly resolution of the dispute.⁶⁷ In many ways, it makes no difference which institution you choose; the institutions have enough flexibility to allow parties to fashion the rules as needed or desired.⁶⁸

Another purpose of arbitral institutions' rules is to tell parties what kind of arbitration they can expect.⁶⁹ The rules may tell the parties how the institution selects its arbitrators, protects the rights of the parties, or to what extent the institution is involved in the administration of the arbitration.⁷⁰ Finally, the

should demonstrate to users that they will be treated fairly in order to continue as viable option for resolving disputes). See also Robert Hunter, *Anticipating Trends in Dispute Resolution*, in INTERNATIONAL COMMERCIAL ARBITRATION: DEVELOPING RULES FOR THE NEW MILLENNIUM, *supra* n.23, at 15-16 (noting competition in dispute resolution and necessity of providing predictable and just results).

64. See Fischer, *supra* n.17, at 36-41 (discussing that goals and advantages of arbitration are typically low cost and quick and just resolution of dispute). See also Haydock, *supra* n.24, at 17 (discussing advantages of arbitration as being faster and less expensive than traditional litigation while remaining just); Allen, *supra* n.24, at 59 (comparing advantages of arbitration and traditional litigation and noting that arbitration is usually faster and less expensive than traditional litigation); GARNETT, *supra* n.24, at 12-13 (noting that two major goals of arbitration are fast and inexpensive resolution of dispute).

65. See Hunter, *supra* n.63, at 15-16 (describing rules as framework within which arbitrators may act with nearly complete discretion). See also Boisseson, *supra* n.61, at 69 (noting that institutional rules give flexibility to arbitrators in handling dispute yet simultaneously provide requirements necessary for fair process).

66. See Marc Blessing, *ICC Arbitral Tribunal Part III: The Procedure Before the Arbitral Tribunal*, in 3(2) ICC INT'L. CT. ARB. BULL. (1992), 18, 19 (indicating that institutional rules provide sufficiently proper and due process). See also Allen, *supra* n.24, at 81 (stating that institutional rules offer structure to arbitration process).

67. See Allen, *supra* n.24, at 81 (stating that institutional rules provide framework for orderly resolution of disputes). See also Blessing, *supra* n.66, at 19 (indicating that institutional rules provide structure for organized solution to disputes).

68. See Allen, *supra* n.24, at 80-81 (discussing that similarity of institutional rules and flexibility of rules makes choice of institution less important in many aspects). See also Boisseson, *supra* n.61, at 69 (discussing that flexibility of institutional rules enables parties to customize certain aspects of rules).

69. See Reziya Harrison, *Conduct of the Arbitration – Rules fit for the Purpose*, in INTERNATIONAL COMMERCIAL ARBITRATION: DEVELOPING RULES FOR THE NEW MILLENNIUM, *supra* n.23, at 94-95 (noting that institutional rules indicate type of arbitration to potential parties). See also Allen, *supra* n.24, at 61-77 (comparing goals and rules of ICC and LCIA).

70. See Harrison, *supra* n.69, at 94-95 (indicating that institutional rules tell parties

parties get the reputation of the institution, whether that is the overall reliability of the institution or the quality of its arbitrators.⁷¹

C. *Institutional Rules on Liability*

Institutional rules often limit or exclude the institution's own liability in performing its functions.⁷² The International Chamber of Commerce's ("ICC")⁷³ Rules on Arbitration, under article 34, clearly exclude the liability of the institution and its employees in performing its functions.⁷⁴ This rule broadly excludes liability for all acts and omissions relating to the arbitration.⁷⁵

The London Court of International Arbitration ("LCIA")⁷⁶ Rules, under article 31.1, also exclude liability for all acts and omission connected to the arbitration.⁷⁷ Different from the ICC

how many arbitrators, how they are selected, how involved institution is in proceedings and how parties may seek recourse for any alleged wrongdoings). *See also* Allen, *supra* n.24, at 61-77 (comparing ICC rules with LCIA rules under categories, such as speed of proceedings, and determining which set of rules better accomplishes goal of category).

71. *See* Allen, *supra* n.24, at 60 (noting that parties' awards bear institutions' reputations). *See also* Fischer, *supra* n.17, at 51-52 (noting that institution's arbitrators may have good reputation and institutions have advantage of day-to-day involvement with qualified international arbitrators).

72. *See* Boisseson, *supra* n.61, at 69 (noting most institutional rules have exclusion of liability clause). *See also* GARNETT, *supra* n.24, at 197 (providing ICC's exclusion of liability clause).

73. *See International Chamber of Commerce: What is ICC?*, at http://www.iccwbo.org/home/menu_what_is_icc.asp (describing organization and activities). The ICC is an organization dedicated to improving the world of business. *Id.* ICC activities range from arbitration and dispute resolution to lobbying governments for open trade and the market economy system to business self-regulation to fighting corruption or to combating commercial crime. *Id.*

74. International Chamber of Commerce: Rules of Arbitration, art. 34, (Jan. 1, 1998), 36 I.L.M. 1604, at (1997) [hereinafter ICC Rules]. Article 34 states, "Exclusion of Liability: Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration." *Id.*

75. *See id.* (noting that any act or omission in connection with arbitration is excluded from liability).

76. *See LCIA: London Court of International Arbitration*, at <http://www.lcia-arbitration.com/> (last visited April 20, 2003) (introducing history and purpose of organization and other information regarding organization). The London Court of International Arbitration ("LCIA") is one of the largest providers of arbitration administration. *Id.* The LCIA also provides other forms of alternative dispute resolution. *Id.*

77. London Court of International Arbitration Rules, art. 31.1. (January 1, 1998), at <http://www.lcia-arbitration.com/lcia/arb/uk.htm> [hereinafter LCIA Rules]. Article 31.1 states:

though, the LCIA allows for liability for any deliberate wrongdoing.⁷⁸ The LCIA's provisions further state, in article 31.2, that none of the same persons may be under any legal obligation to testify regarding the arbitration once all possibilities of correction and appeal have elapsed.⁷⁹ The American Arbitration Association's ("AAA")⁸⁰ International Arbitration Rules, under article 35, exclude liability for all acts and omission connected to the arbitration.⁸¹ Like the LCIA, the AAA includes an exception for deliberate wrongdoing.⁸²

All three sets of rules clearly exclude liability for all acts and omissions in connection with the arbitration, regardless of whether or not they are judicial in function or administrative.⁸³

None of the LCIA, the LCIA Court (including its President, Vice-President and individual members), the Registrar, any deputy Registrar, any arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration conducted by reference to these Rules, save where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party.

Id.

78. *See id.* (stating that deliberate wrongdoing can lead to liability).

79. LCIA Rules, art. 31.2. Article 31.2 states:

After the award has been made and the possibilities of correction and additional awards referred to in Article 27 have lapsed or been exhausted, neither the LCIA, the LCIA Court (including its President, Vice-Presidents and individual members), the Registrar, any deputy Registrar, any arbitrator or expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.

Id.

80. *See American Arbitration Association: About Us*, at <http://www.adr.org/index2.1.jsp?JPSSid=15779> (describing organization). The AAA is one of the largest providers of arbitration administration and other forms of dispute resolution. *Id.*

81. *See American Arbitration Association, International Arbitration Rules*, art. 35, at http://www.adr.org/index2.1.jsp?JPSSid=15747&JPsrc=upload\LIVESITERules_Procedures\National_International\ \focus0Area\international\AAA175-1000.htm. [hereinafter AAA International Arbitration Rules]. Article 35 states:

The members of the tribunal and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these rules, except that they may be liable for the consequences of conscious and deliberate wrongdoing.

Id.

82. *See id.* (stating that conscious and deliberate wrongdoing may result in liability).

83. *See ICC Rules*, *supra* n.74, art. 31 (excluding liability for all acts in connection with arbitration); LCIA Rules, *supra* n.77, art. 31.1 (excluding all acts or omissions in connection with arbitration from liability); AAA International Arbitration Rules, *supra*

The LCIA and AAA, however, allow liability for any deliberate wrongdoing, whereas the ICC does not speak to deliberate actions.⁸⁴ These provisions provide a standard for liability when arbitrating with each respective institution regardless of choice of law provisions or forum.⁸⁵

II. DID YOU OVEREXTEND SOMETHING: DO ARBITRATORS AND ARBITRAL INSTITUTIONS ENJOY JUDICIAL IMMUNITY?

For the United States, England, and, though in a less direct way, France, the immunity of arbitrators and arbitral institutions developed out of each nation's approach to judicial immunity.⁸⁶

n.81, art. 35 (excluding from liability any act or omission in connection with arbitration).

84. See LCIA Rules, *supra* n.77, art. 31.1 (excluding all acts and omissions in connection with arbitration from liability except for deliberate wrongdoing). See also AAA International Arbitration Rules, *supra* n.81, art. 35 (excluding liability for acts and omissions in connection with arbitration except for conscious or intentional wrongdoing); ICC Rules, *supra* n.74, art. 31 (excluding liability for all acts and omissions in connection with arbitration).

85. See Emmanuel Gaillard, *International Arbitration Law: New Insight into the Duties of Arbitral Institutions*, 8/2/2001 N.Y.L.J. 3 (col. 1) (discussing that institutions' exclusion of liability clauses create uniform standard of liability for institution regardless of where arbitration takes place or suit against alleged wrongdoer takes place, but questioning whether clauses would be valid under national laws). See also FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 602-03 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD] (noting that exclusion of liability clauses provide standard regarding liability regardless of where arbitration is taking place and regardless of national laws regarding liability but questioning whether courts would give force to such provisions). Different nations have differing views on liability or immunity. *Id.* It is unlikely that institutional provisions excluding liability would be valid either because arbitrations are generally considered contracts of adhesion or because of other public policy considerations. *Id.* This author is unaware of any case where the institution was released from liability based on the institution's exclusion of liability rule. See Gaillard, *supra* (noting that arbitral institutions' exclusion of liability clauses have never been analyzed by courts).

86. See Julian M. D. Lew, *Introduction, in THE IMMUNITY OF ARBITRATORS* 1, at 4 (Julian D. M. Lew ed., 1990) [hereinafter Lew, *Introduction*] (discussing generally positions of United States, England, and France with regard to arbitrator's immunity). See also David J. Branson & Richard E. Wallace, Jr., *Immunity of Arbitrators under United States Law, in THE IMMUNITY OF ARBITRATORS, supra*, at 85-96 (discussing United States' basis for immunity of arbitrators and arbitral institutions); Julian M. D. Lew, *Immunity of Arbitrators under English Law, in THE IMMUNITY OF ARBITRATORS* 21-27, *supra*, at 21 [hereinafter Lew, *Immunity under English Law*] (discussing England's basis for immunity of arbitrators and arbitral institutions); Jean-Louis Delvolvé, *Immunity of Arbitrators under French Law, in THE IMMUNITY OF ARBITRATORS* 29-38, *supra*, at 29 (discussing France's basis for immunity of arbitrators and arbitral institutions).

The relationship between the arbitrator or the arbitral institution and the parties to the dispute greatly affects the basis for immunity or liability.⁸⁷ Viewing this relationship from a more contractual nature, several commentators draw criticism to granting arbitral institutions immunity.⁸⁸

A. *Differing Approaches to the Immunity of Arbitral Institutions*

There are several approaches to arbitral immunity, varying in different nations.⁸⁹ This section will discuss three nations' views on immunity and the basis for each view.⁹⁰ The nations discussed will be the United States, England, and France, representing the nations where three of the largest arbitration institutions are located: the AAA, the LCIA, and the ICC.⁹¹

87. See FOUCHARD, *supra* n.85, at 600-04 (discussing split in characterization of relationship between disputing parties and arbitrators and arbitral institutions). See also Hon-Lin Yu & Eric Sauzier, *From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration*, 3(4) INT. A.L.R. 2000, 114-121 (discussing differing characterizations of relationship between disputing parties and arbitrators and arbitral institutions); Julian Critchlow, *The Source of Power: A Critical Appreciation of the Relationship of the Arbitrator and the Parties*, (Fenwick Elliot Articles and Papers 1997) at <http://www.fenwick-elliott.co.uk/public/articles/power.htm> (discussing historical characterizations of relationship between disputing parties and arbitrators).

88. See Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, at 28 (2000) (arguing that institutions should not be permitted to disregard their own rules and parties' agreement). See also Harrison, *supra* n.69, at 94-95 (noting that institutional rules enable parties to anticipate type of arbitration); Mark A. Sponseller, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, at 439 (1993) (discussing that liability of institution for its own faults, as opposed to arbitrators' failures, would protect judicial independence); FOUCHARD, *supra* n.85, at 603-04 (discussing institutional rules excluding liability, and questioning their validity); Gaillard, *supra* n.85 (noting that validity of institutional rules excluding liability is of great importance where state laws may allow for liability of institutions).

89. See Lew, *Introduction*, *supra* n.86, at 4 (discussing positions of United States, England, and France with regard to arbitrator's immunity). See also Branson, *supra* n.86, at 85-96 (discussing United States' basis for immunity of arbitrators and arbitral institutions); Lew, *Immunity under English Law*, *supra* n.86, at 21-27 (discussing England's basis for immunity of arbitrators and arbitral institutions); Delvolvé, *supra* n.86, at 29-38 (discussing France's basis for immunity of arbitrators and arbitral institutions).

90. See Lew, *Introduction*, *supra* n.86, at 4 (discussing immunity of arbitrators and arbitral institutions in United States, England, and France). See also Branson, *supra* n.86, at 85-96 (discussing United States' basis for immunity of arbitrators and arbitral institutions); Lew, *Immunity under English Law*, *supra* n.86, at 21-27 (discussing immunity of arbitrators and arbitral institutions in England); Delvolvé, *supra* n.86, at 29-38 (discussing France's position on immunity of arbitrators and arbitral institutions).

91. See International Chamber of Commerce: What is ICC?, *supra* n.73 (describing ICC, headquartered in Paris, as one of the largest providers of arbitration administration). See LCIA: London Court of International Arbitration, *supra* n.76 (noting that

1. United States

In the United States, arbitrators and arbitral institutions are given an absolute immunity for all actions undertaken in fulfilling their duties as arbitrators.⁹² This immunity is rooted in and developed out of the concept of judicial immunity.⁹³ Thus, in order to better understand immunity for arbitrators and institutions, it is necessary to first understand the U.S. view on judicial immunity.⁹⁴

a. Immunity of Judges

Judges in the United States have enjoyed a nearly absolute judicial immunity for more than 100 years.⁹⁵ The United States' position finds its origins in two English cases.⁹⁶ The English courts in the two cases clearly stated that judges are not liable for their judicial acts, but each with a caveat.⁹⁷ The court in the

LCIA, headquartered in London, is one of largest providers of arbitration administration). See American Arbitration Association: About Us, *supra* n.80 (noting that AAA, headquartered in New York, is one of largest providers of arbitration administration and other forms of dispute resolution). See also Martin Odams de Zylva and Reziya Harrison, *Introduction*, in INTERNATIONAL COMMERCIAL ARBITRATION: DEVELOPING RULES FOR THE NEW MILLENNIUM, *supra* n.23, at xxv-xxxv [hereinafter Zylva and Harrison, *Introduction*] (discussing place of national laws in arbitration).

92. See Thomas Carbonneau, *The UK Arbitration Act 1996*, 8 WORLD ARB. & MEDIATION REP. 187, at 191 (mentioning that United States' nearly absolute, judge-like immunity is granted to arbitrators). See also Lew, *Introduction*, *supra* n.86, at 4 (characterizing immunity afforded to arbitrators in United States as absolute); Branson, *supra* n.86, 85-96 (describing immunity to arbitrators in United States as extending to all actions undertaken in fulfilling their duties).

93. See Branson, *supra* n.86, at 85-88 (describing development of United States' judicial immunity into arbitral immunity). See also Franck, *supra* n.88, at 16 (noting that arbitral immunity in United States developed out of judicial immunity); Sponseller, *supra* n.88, at 424-27 (indicating that arbitral immunity in United States is based on concepts of judicial immunity).

94. See Branson, *supra* n.86, at 87 (noting that United States grants absolute immunity to judges). See also Franck, *supra* n.88, at 15 (noting that judicial immunity in United States applies for all judicial acts); Sponseller, *supra* n.88, at 424 (discussing judicial immunity in United States as extending to all judicial acts).

95. See *Bradley v. Fisher*, 80 U.S. 335 (1871) (holding judge absolutely immune within judicial duties). See also Branson, *supra* n.86, at 87 (indicating judicial immunity in United States has been upheld for more than 100 years); Sponseller, *supra* n.88, at 424-425 (indicating that idea of judicial immunity can be traced back nearly 400 years).

96. See Franck, *supra* n.88, at 16 (noting that judicial immunity in United States originates from two English cases). See also Sponseller, *supra* n.88, at 424 (indicating that United States' view on judicial immunity can be traced back to two English cases). See generally PROSSER AND KEETON ON THE LAW OF TORTS 1056-59 (W. Page Keeton et al. eds., 5th ed. 1984) (discussing immunity of legislative and judicial officers).

97. See *Marshalsea*, 77 Eng. Rep. 1027 (K.B. 1612) (involving debtor who sued

Marshalsea Case held that a judge acting in complete absence of jurisdiction may be subject to personal liability.⁹⁸ In *Floyd*, Lord Coke held that a judge is immune from conspiracy charges for any actions he takes in court as part of his functions as a justice of peace, noting that the law will not admit any evidence against the presumption that a judge sworn to do justice would do injustice.⁹⁹ Even so, he later stated that this immunity does not apply to “extrajudicial” acts.¹⁰⁰

These principles have been tested in the U.S. courts.¹⁰¹ In *Bradley v. Fisher*, the U.S. Supreme Court granted immunity to federal judges.¹⁰² The Court stated that a judge or judicial officer, in carrying out his judicial duties, must be free to act upon his own convictions, without fear of reprisal by discontented par-

judge for ruling against him and holding judge immune so long as judge does not act clearly outside jurisdiction). See also *Floyd v. Barker*, 77 Eng. Rep. at 1305 (K.B. 1607) (involving criminal defendant who sued judge for conspiring against him and holding judge not liable so long as acting in judicial capacity). See generally Franck, *supra* n.88, at 16 (noting judges have immunity for judicial acts, and not for administrative, legislative, or personal acts, so long as they did not act in complete absence of jurisdiction); Sponseller, *supra* n.88, at 425 (noting judges do not have liability for judicial acts when acting outside jurisdiction).

98. See *Marshalsea*, 77 Eng. Rep. at 1027 (involving debtor who sued judge for ruling against him, claiming judge lacked subject matter jurisdiction). See also Michael R. King, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549, 553 (1978) (discussing *Marshalsea* and noting that judicial immunity protects judges who act within their jurisdiction); Franck, *supra* n.88, at 16 (discussing that judicial immunity applies to judges who act within their jurisdiction as indicated in *Marshalsea*); Sponseller, *supra* n.88, at 425 (noting that *Marshalsea* established caveat for judicial immunity noting that judges who act clearly outside their jurisdiction may be held liable).

99. See *Floyd*, 77 Eng. Rep. at 1305 (involving criminal defendant who sued judge for conspiring against him because judge would not hear his arguments and holding that judges are immune for what they do judicially). See also Franck, *supra* n.88, at 16 (discussing *Floyd* and noting that for efficient administration of justice, judges cannot be held liable for their judicial functions); Sponseller, *supra* n. 88, at 424-25 (noting that *Floyd* confirms judicial immunity for judicial acts).

100. See *Floyd*, 77 Eng. Rep. at 1305 (holding English law will not admit any proof against judges for anything they do in fulfilling their judicial functions). See also Franck, *supra* n.88, at 16 (noting that non-judicial acts may lead to liability); Sponseller, *supra* n.88, at 424-25 (noting that when judges' acts are administrative, legislative, or personal, immunity is precluded).

101. See Franck, *supra* n.88, at 16-17 (noting that United States reflects same exceptions to judicial immunity as found in English cases: outside of jurisdiction and non-judicial or administrative acts). See also Sponseller, *supra* n.88, at 424-25 (noting that U.S. Supreme Court upheld these exceptions).

102. See *Bradley v. Fisher*, 80 U.S. 335, 346-47 (1871) (holding that judge cannot be subjected to liability for decision however erroneous act may have been, and however damaging it was to plaintiff).

ties.¹⁰³ The U.S. Supreme Court granted this immunity again in *Pierson v. Ray*.¹⁰⁴ The Court, in reaching its holdings, outlined the policy for protecting the integrity of judges' decisions and emphasized the availability of alternate means of ensuring justice, namely impeachment and the possibility of appeal.¹⁰⁵

Even though judicial immunity is considered absolute in the United States, courts have allowed parties to sue judges in certain narrow circumstances.¹⁰⁶ Where judges have acted with a complete lack of jurisdiction, parties have been able to sue for malicious prosecution and abuse of process.¹⁰⁷ Also, judges are not immune for non-judicial acts that are administrative or ministerial in nature.¹⁰⁸ In sum, judicial immunity in the United States is absolute for all judicial acts, unless performed clearly outside the bounds of the court's jurisdiction over the dispute.¹⁰⁹

103. *See id.* at 347 (noting that judge's freedom to act upon his own convictions, without fear of reprisal, was principle of highest importance).

104. *See Pierson v. Ray*, 386 U.S. 547 (1967) (holding that judges are not liable for what they do judicially in case concerning judge who convicted civil rights protestors for their actions at bus station in Jackson, Mississippi).

105. *See Bradley*, 80 U.S. at 350 (focusing on alternatives of impeachment, suspension or removal from office in holding for judicial immunity). *See also Pierson*, 386 U.S. at 554 (focusing on availability of appeal in justifying holding of immunity). *See generally Lew, Immunity under English Law*, *supra* n.86, at 21 (noting that English law supports judicial immunity in part because of availability of impeachment and appeal).

106. *See Franck*, *supra* n.88, at 17 (noting that exceptions to judicial immunity include when judges act in function not normally performed by judges and acting outside of jurisdiction). *See also Sponseller*, *supra* n.88, at 426 (stating judicial immunity has two exceptions: acts clearly outside jurisdiction and ministerial or administrative acts); King, *supra* n.98, at 571-76 (explaining that non-judicial acts and acts outside jurisdiction are not protected under judicial immunity).

107. *See King*, *supra* n.98, at 576 (noting that judges can be civilly liable for acts completely outside jurisdiction). *See also Sponseller*, *supra* n.88, at 426 (indicating that private remedies are available when judges act with complete lack of jurisdiction).

108. *See Sponseller*, *supra* n.88, at 426 (indicating acts considered administrative or ministerial do not enjoy immunity); King, *supra* n.98, at 576-77 (noting non-judicial acts performed by judges do not enjoy immunity). The U.S. Supreme Court held that impartial jury selection was administrative and therefore there was no judicial immunity for such acts. *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 348 (1879). The Supreme Court also held that a judge's hiring and firing decisions are administrative and without immunity. *Forrester v. White*, 484 U.S. 219, 229-30 (1988). The Supreme Court stated that immunity comes from the judicial process itself rather than the position. *Butz v. Economou*, 438 U.S. 478, 512 (1978).

109. *See Lew, Introduction*, at 4 (characterizing immunity in United States as absolute). *See also Sponseller*, *supra* n.88, at 425-426 (noting that judges have absolute immunity when acting judicially, within their jurisdiction); Franck, *supra* n.88, at 16-17 (indicating that judges enjoy judicial immunity for all judicial acts done within jurisdiction); Michael F. Hoellering, *Immunity from Liability*, 1991-92 *ARB. & L.* 41, 42 (1992)

b. Immunity of Arbitrators

In the United States, arbitrators have immunity for all actions undertaken in the fulfillment of their duties.¹¹⁰ Cases dating back to the late 1800s extend judicial immunity to arbitrators.¹¹¹ Courts based arbitral immunity on the quasi-judicial functions arbitrators serve.¹¹² U.S. courts granted immunity to arbitrators because they were concerned with protecting the integrity of their decisions, noting the functional similarity of arbitrators to judges.¹¹³ If immunity is necessary to protect the decisions of judges, freeing them from concern for liability, then the same logic applies to the decisions of arbitrators.¹¹⁴

[hereinafter Hoellering, *Immunity*] (explaining that judges enjoy absolute immunity for performance of judicial acts unless performed in clear absence of jurisdiction).

110. See Branson, *supra* n.86, at 85 (characterizing arbitral immunity in United States as absolute). See also Franck, *supra* n.88, at 19 (noting in United States arbitrators acting in quasi-judicial capacity have immunity); Hoellering, *Immunity*, *supra* n. 109, at 43 (noting arbitrators, like judges, enjoy immunity in United States); Lew, *Introduction*, *supra* n.86, at 4 (characterizing United States' position with regard to arbitral immunity as strongest of all nations); Sponseller, *supra* n.88, at 427-35 (noting arbitrators enjoy absolute immunity in United States for acts in fulfilling duties). See generally Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 *INDUS. REL. L.J.* 228, at 238 (1989) (discussing absolute nature of arbitrators' immunity in United States).

111. See *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424 (1884) (holding arbitrator not liable where arbitrator and one party conspired against other party for unjust award). See also *Jones v. Brown*, 6 N.W. 140 (Iowa 1880) (holding that arbitrator is immune from liability for judicial acts where one party alleged conspiracy to defraud by ruling before all evidence was presented); Branson, *supra* n.86, at 87 (noting that cases upholding arbitral immunity date back more than 100 years); Hoellering, *Immunity*, *supra* n.109, at 42-43 (discussing decisions upholding immunity of arbitrators from 1800s); Sponseller, *supra* n.88, at 427-28 (discussing *Jones* as one early example of immunity for arbitrators).

112. See Franck, *supra* n.88, at 19 (indicating that courts analogized arbitrators' functions to that of judges and thus extended immunity to them under similar justifications). See also Branson, *supra* n.86, at 87 (discussing similarity between arbitrators' functions and that of judges); Hoellering, *Immunity*, *supra* n.109, at 42-43 (noting courts extended immunity to arbitrators due to their judicial function); Sponseller, *supra* n.88, at 428 (discussing similarity of functions of arbitrators and judges and noting courts' extension of immunity to arbitrators based on this similarity).

113. See Branson, *supra* n.86, at 87 (noting that courts pointed to functional comparability in extending immunity to arbitrators). See also Franck, *supra* n.88, at 18-19 (indicating that courts extended immunity to arbitrators based on their functional comparability to judges); Nolan, *supra* n.110, at 238 (noting that both judges and arbitrators are required to adjudicate disputes and therefore both perform judicial functions).

114. See Branson, *supra* n.86, at 87 (noting need to protect decisional integrity of arbitrators). See also FOUCHARD, *supra* n.85, at 592-93 (indicating that courts were concerned with decisional autonomy of arbitrators); Hoellering, *Immunity*, *supra* n.109, at 43 (discussing need for arbitrators to be free from concern of liability in reaching decisions).

More recently, the courts have reinforced and even suggested expanding the idea of arbitral immunity.¹¹⁵ The Court of Appeals for the Ninth Circuit held that immunity is essential in order to protect arbitrators, as decision-makers, from improper influence and protect the integrity of awards from dissatisfied parties.¹¹⁶ The Sixth Circuit makes this position stronger, stating that the policy of protecting arbitrators should not only be upheld but, if need be, expanded.¹¹⁷

Another justification for granting arbitrators immunity is that many arbitrators are professionals in a field and choose to arbitrate disputes in addition to their primary career.¹¹⁸ Without immunity, it is argued, there would be a disincentive for arbitrators to serve.¹¹⁹ As arbitration grows,¹²⁰ the more damaging it would be for individuals to not serve as arbitrators out of fear of liability.¹²¹ Every U.S. Circuit Courts of Appeals that has ad-

115. See Branson, *supra* n.86, at 86 (noting cases reinforcing policy of extending arbitral immunity). See also Franck, *supra* n.88, at 18-20 (citing recent cases upholding arbitral immunity in carrying out arbitral duties).

116. See *Wasyf, Inc. v. First Boston Corp.*, 813 F. 2d 1579, 1582 (9th Cir. 1987) (strengthening arbitral immunity and justifying position with federal policy favoring arbitration). See also *Corey v. New York Stock Exchange*, 691 F. 2d 1205, 1211 (6th Cir. 1982) (upholding arbitral immunity). See generally Branson, *supra* n.86, at 86 (discussing recent cases fortifying immunity granted to arbitrators and noting courts often cite federal policy favoring arbitration as reason to protect process).

117. See *Int'l Union v. Greyhound Lines, Inc.* 701 F. 2d 1181, 1186 (1983) (suggesting that it is appropriate to expand immunity granted to arbitrators, if necessary). See generally Branson, *supra* n.86, at 86 (discussing cases reinforcing immunity to arbitrators).

118. See Branson, *supra* n.86, at 87-88 (mentioning that arbitrators typically have other careers and arbitrate only part-time). But see Sponseller, *supra* n.88, at 438-39 (noting growing number of professional arbitrators over part-time arbitrators as popularity of arbitration increases).

119. See *Tamari v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977) (arguing that arbitrators would be less likely to serve if not immune and federal policy favoring arbitration therefore encourages immunity). See also Branson, *supra* n.86, at 87-88 (asserting that burden on arbitrators to defend themselves from personal attacks would act as disincentive to serve as arbitrators). But see Sponseller, *supra* n.88, at 438-439 (noting that there are other professions where personal liability does not act as disincentive to practice career, but rather creates incentive to practice career in cautious and reasonable manner).

120. See Hoellering, *The Institution's Role*, *supra* n.60, at 151 (noting arbitration's rapid growth recently). See also BAGHERI, *supra* n.20, at 106 (discussing increasing popularity of arbitration); LOOKOFKY, *supra* n.17, at 559; FISCHER, *supra* n. 20, at 31-32 (indicating growth of arbitration as dispute resolution method).

121. See Branson, *supra* n.86, at 87-88 (noting arbitrators may not serve out of fear of liability). But see Sponseller, *supra* n.88, at 438-39 (discussing other professions where there is liability and yet professions continue to thrive). One scholar discusses

dressed the issue of liability has extended absolute immunity to arbitrators for all acts performed in their arbitral capacity.¹²²

c. Immunity of Arbitral Institutions

The question remains as to the United States' position on the immunity of institutions that administer or sponsor arbitrations.¹²³ Arbitral immunity generally protects persons who perform quasi-judicial functions.¹²⁴ In *Ruberstein v. Otterbourg*,¹²⁵ the Civil Court of the City of New York granted immunity to the AAA, holding that the same immunity that protects arbitrators should be extended to arbitral institutions because they are quasi-judicial organizations and immunity is increasingly being extended to them.¹²⁶

Commentators note that *Austern*¹²⁷ represents a clear view

the affects of liability on institutions, supporting liability because the institutions will remain profitable and the costs passed on to the clients will be minimal, if any. *Id.* at 439.

122. See *Wasyly*, 813 F.2d at 1582 (holding that case law establishes that arbitrators are immune from civil liability for all acts within their jurisdiction arising out of their arbitral functions). See also *Tamari*, 552 F.2d at 780 (holding that arbitral immunity should be extended to cases where authority of arbitrator to resolve dispute is challenged); *Cahn v. Int'l Ladies' Garment Union*, 311 F.2d 113, 114-15 (3d Cir. 1962) (per curiam) (holding that arbitrator acting in his capacity as arbitrator was performing quasi-judicial duties and therefore was clothed with immunity). See generally *Lew, Introduction*, *supra* n.86, at 4 (indicating that U.S. courts grant absolute immunity for arbitrators when acting within duties); *Branson*, *supra* n.86, at 85 (discussing immunity for arbitrators in United States and noting when arbitrators are performing their arbitral duties U.S. courts have granted absolute immunity).

123. See *Hoellering, Immunity*, *supra* n.109, at 41-49 (discussing extension of arbitral immunity to institutions). See also *Branson*, *supra* n.86, at 85-96 (indicating that courts have extended immunity to institutions that sponsor arbitrations).

124. See *Branson*, *supra* n.86, at 88-96 (noting that arbitral immunity is granted to persons acting in quasi-judicial function as arbitrator). See also *Nolan*, *supra* n.110, at 239-40 (indicating that arbitrators enjoy immunity because of quasi-judicial function); *Michael F. Hoellering, The Role of the International Arbitrator*, 51-Sep DISP. RESOL. J. 100, 106, (1996) [hereinafter *Hoellering, Arbitrator*] (referring to quasi-judicial role and functional comparability); *Hoellering, Immunity*, *supra* n.109, at 43-46, (discussing arbitrators' functional comparability to judges); *Franck*, *supra* n.88, at 19, (discussing immunity applying to arbitrators due to their functional comparability to judges).

125. See *Ruberstein v. Otterbourg*, 357 N.Y.S.2d 62 (1973) (involving party who sued AAA for failing to intervene and disqualify arbitrator).

126. See *Ruberstein*, 357 N.Y.S.2d at 64 (noting that there is expanding umbrella of protection being granted to arbitral institutions).

127. See *Austern*, 898 F.2d 882 (involving immunity granted to CBOE as sponsoring organization of arbitration where party sued CBOE for negligently impaneling arbitral tribunal and failing to provide notice).

of absolute institutional immunity in the United States.¹²⁸ The Austerns sued the arbitral institution directly for what they claimed were administrative aspects of the institution's duties.¹²⁹ However, the court refused to allow liability, holding that extending the immunity granted to arbitrators to institutions that administer arbitration proceedings is necessary to protect the policies underlying arbitral immunity; otherwise, the immunity granted to arbitrators would be an illusion.¹³⁰ The court based its decision solely on the doctrine of arbitral immunity,¹³¹ noting the contractual nature of the arbitration but relying on the functional comparability of the arbitrator's role to that of a judge.¹³² The court dismissed the argument that the acts complained of were administrative, stating that they were adequately associated with the judicial phase of the proceedings to justify immunity.¹³³

Another case involving an attack on an institution sponsoring an arbitration was *Corey v. New York Stock Exchange*.¹³⁴ The plaintiff sued the New York Stock Exchange ("NYSE") claiming

128. See JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES: THE APPLICATION BY THE IRAN-U.S. CLAIMS TRIBUNAL 46 (1991) (noting that *Austern* case represents United States' extension of absolute immunity to arbitral institutions). See also Hoellering, *Arbitrator*, *supra* n.124, at 106 (indicating that arbitral institutions have been granted absolute immunity, citing *Austern* case); Robert H. Smit & Nicholas J. Shaw, 8 AM. REV. INT'L ARB. 275, at 322-23 (1997) (noting that arbitral institutions enjoy absolute immunity in United States, citing *Austern* case).

129. See *Austern*, 898 F.2d at 884, 886 (arguing that failure to serve notice and improper selection of arbitration panel were administrative or ministerial functions).

130. See *Austern*, 898 F.2d at 886 (reasoning that extending arbitral immunity to arbitral institutions is necessary to protect judicial independence and citing federal policies favoring arbitration). See also Hoellering, *Immunity*, *supra* n.109, at 45 (noting that court held arbitral immunity without institutional immunity would merely shift liability to sponsoring institutions).

131. See *Austern*, 898 F.2d at 887 (citing arbitral immunity as absolute and encompassing institutions that administer arbitrations). See also Hoellering, *Immunity*, *supra* n.109, at 45 (indicating that court based immunity of institution on policies behind arbitral immunity).

132. See *Austern*, 898 F.2d at 886 (discussing similarity in arbitrator's role to that of judges and then extending this to sponsoring institutions). See also Hoellering, *Immunity*, *supra* n.109, at 44-45 (discussing that arbitral immunity is based on quasi-judicial role of arbitrator and noting that court extended arbitral immunity to institutions in order to protect arbitrator).

133. See *Austern*, 898 F.2d at 886 (holding that all acts integrally related to process are protected and holding that selection of panel was sufficiently connected to adjudicative phase and therefore dismissing Austerns' challenge as merely semantic characterization).

134. See *Corey*, 691 F.2d at 1205 (involving plaintiff who sued New York Stock Exchange ("NYSE") for improperly impaneling tribunal).

that the composition of the tribunal was violative of the NYSE rules and alleging other procedural irregularities.¹³⁵ The court dismissed the claim as an impermissible collateral attack on the arbitrators' award.¹³⁶ Even though the plaintiff sued the NYSE and not the individual arbitrators and stated procedural violations for which the NYSE was responsible, the court held that arbitral immunity must be extended to arbitral institutions; noting that otherwise, the immunity extended to arbitrators would be an illusion.¹³⁷ The court further held that the Federal Arbitration Act ("the U.S. Act")¹³⁸ was the exclusive remedy for the plaintiff.¹³⁹ Even though the U.S. Act does not mention the liability or immunity of arbitrators or arbitral institutions, the court held that this possibility is excluded because the Act provides the exclusive remedy for all claims against an arbitration award.¹⁴⁰

135. *See id.* at 1208 (noting that plaintiff sued claiming that irregularities prevented his presenting evidence, caused hearings to be postponed despite his objection and allowed panel to control proceedings with purpose of thwarting his claims).

136. *See id.* at 1207 (reasoning that extension of immunity to institution is necessary protect underlying principles of arbitral immunity). *See also* Branson, *supra* n.86, at 92 (discussing holding in *Corey* and noting that test of whether functions are quasi-judicial is liberal).

137. *See Corey*, 691 F.2d at 1211 (stating this would amount to merely shifting liability from arbitrators to sponsoring associations).

138. Federal Arbitration Act 1947, 9 U.S.C. Ch. 1.

139. *See Corey*, 691 F.2d at 1211-12 (noting that sections 10, 11 and 12 of Arbitration Act provide for judicial review of award).

140. *See id.* at 1211 (noting that arbitral immunity and arbitral institutional immunity are necessary for arbitration and that Federal Arbitration Act provides only remedy for all claims against arbitral awards). *See also* Federal Arbitration Act, 9 U.S.C. Ch. 1 sec. 10. Section 10 states:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[(5) Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Although there is no statutory basis for the immunity of arbitral institutions, the case law clearly extends judicial immunity to arbitrators and those who sponsor arbitrations.¹⁴¹ This immunity would appear to cover all acts that touch the arbitration proceedings, protecting the integrity and independence of the judicial process rather than the individual.¹⁴² Commentators con-

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Id.

141. *Id.* See also Federal Arbitration Act, 9 U.S.C. Ch. 1 sec. 11. Section 11 states: In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Id. See also Federal Arbitration Act, 9 U.S.C. Ch. 1 sec. 12. Section 12 states:

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Id.

See VAN HOF, *supra* n.128, at 46 (noting that arbitral institutions are protected by same immunity as arbitrators). See also FOUCHARD, *supra* n.85, at 594 (indicating that United States case law extends immunity to arbitral institutions); Hoellering, *Immunity*, *supra* n.109, at 45, 49 (stating that United States has extended immunity to include agencies sponsoring arbitration).

142. See FOUCHARD, *supra* n.85, at 592-93 (noting case law dating back to 1884 excluding all civil liability for arbitrators with respect to acts committed in that capacity). See also VAN HOF, *supra* n.128, at 46 (indicating that immunity extends to both arbitrators and institutions for their quasi-judicial activities); Hoellering, *Immunity*, *supra*

sider the protection afforded arbitrators in the United States as the most heightened of any nation.¹⁴³

2. England

Commentators agree that the English position on arbitral immunity, although similar to the United States position, is qualified.¹⁴⁴ The position, which recently has been codified in the Arbitration Act 1996 ("U.K. Act"),¹⁴⁵ developed through the common law, out of the English perspective on judicial immunity.¹⁴⁶ Judicial immunity was traditionally applied to arbitrators until two cases brought this immunity under question.¹⁴⁷ Soon thereafter, the U.K. Act clarified the English position on both arbitral immunity and arbitral institutional immunity.¹⁴⁸

n.109, at 44-45, 49 (noting necessary proceedings administered by arbitral institutions such as choosing arbitrators or application of rules have all been protected with immunity).

143. See Branson, *supra* n.86, at 85 (characterizing arbitral immunity in United States as absolute). See also Franck, *supra* n.88, at 19 (noting that arbitrators in United States enjoy absolute immunity in fulfilling duties); Hoellering, *Immunity*, *supra* n.109, at 43 (noting that arbitrators, like judges, enjoy absolute immunity in United States); Lew, *Introduction*, *supra* n.86, at 4 (characterizing United States' position with regard to arbitral immunity as absolute); Nolan, *supra* n.109, at 238 (discussing absolute nature of arbitrators' immunity in United States); Sponseller, *supra* n.88, at 427-35 (noting that, in United States, arbitrators enjoy absolute immunity in performing their arbitral duties).

144. See Lew, *Introduction*, *supra* n.86, at 4 (characterizing English position on arbitral immunity as qualified immunity). See also FOUCHARD, *supra* n.85, at 592 (noting that arbitral immunity in England is limited). However, one commentator notes that England, like the United States, extended immunity to arbitral institutions. *Id.* at 594. See also Franck, *supra* n.88, at 17 (noting similarity of judicial immunity in common law countries).

145. Arbitration Act 1996 Ch. 23 (Eng.). The preamble states, "[a]n Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes." *Id.*

146. See Lew, *Immunity under English Law*, *supra* n.86, at 21 (discussing development of arbitral immunity in England). See also Franck, *supra* n.88, at 17-21 (discussing English judicial immunity and perspective on arbitral immunity).

147. See *Sutcliffe v. Thackrah*, [1974] 1 Lloyd's Rep. 318 (holding that although arbitrators enjoyed immunity, architect who, in arbitrating dispute, did not rely on parties for argument and evidence in issuing decision but rather, conducted his own investigation, was not arbitrator and therefore not entitled to immunity). See also *Arenson v. Arenson*, [1976] 1 Lloyd's Rep. 179 (holding that, even though arbitrators enjoyed immunity, auditors were merely valuers in case and not arbitrators here and therefore did not extend immunity to them); Lew, *Immunity under English Law*, *supra* n.86, at 21 (stating that English position treated arbitrators akin to judges and thus extended them immunity, noting, however, that this was questioned in two cases: *Sutcliffe* and *Arenson*).

148. See 1996 Ch. 23 sec. 29 (granting arbitrators immunity for all actions in fulfil-

a. Immunity of Judges

In English law there is complete immunity for judges acting in their "judicial capacity."¹⁴⁹ Lord Tenterden, C.J., in the often quoted case, *Garnett v. Ferrand*,¹⁵⁰ clearly stated judges are immune from suit in carrying out their judicial duties.¹⁵¹ Although Lord Tenterden was referring to a judge, he used broad language allowing arbitrators to be included in this protection.¹⁵²

There are several other cases that assert this theme of judicial immunity in England.¹⁵³ As early as 1697, in *Sir Richard Raine's Case*,¹⁵⁴ the court noted that, although there is the possibility of an appeal, the judge was not liable, because he was acting in his role as a judge within proper subject matter jurisdiction.¹⁵⁵ In 1861, the well-established rule was stated in *Kemp v. Neville* that a judge could not be sued for an adjudication within proper subject matter jurisdiction.¹⁵⁶

ling arbitral duties). See also 1996 Ch. 23 sec. 74 (extending immunity to institutions sponsoring arbitrations). See generally FOUCHARD, *supra* n.85, at 593-94 (noting that Arbitration Act 1996 ("U.K. Act") grants arbitrators and arbitral institutions immunity).

149. See Lew, *Immunity under English Law*, *supra* n.86, at 21 (noting that judges in England enjoy complete immunity for judicial functions). See also Lord Justice Brooke, *Judicial Independence – Its History in England and Wales, Fragile Bastion Papers*, at <http://www.judcom.nsw.gov.au/FB/fbbrook.htm> (noting historical roots of judicial immunity in England); Critchlow, *supra* n.87 (discussing foundations of judicial immunity in England).

150. See *Garnett v. Ferrand*, 153 E.R. 577 (1827) (involving plaintiff who sued judge for assault where plaintiff entered room during inquisition and refused to exit upon request and thereupon, judge and officer of court removed plaintiff from room).

151. See *id.* at 581 (stating that this immunity from suit of individual is given to judges, not so much for their own sake as for sake of public, and for advancement of justice, enabling judges to be independent, as all who are to administer justice ought to be).

152. See *id.* at 581 (stating that all who are to administer justice enjoy this immunity). See also Critchlow, *supra* n.87 (noting that language in *Garnett* extending immunity to judges equally applies to arbitrators).

153. See *Sir Richard Raine's Case* 91 E.R. 1071 (1697) (supporting unquestioned principle of judicial immunity in English law). See also *Kemp v. Neville* 142 E.R. 556 (1861) (holding that no action lies against judges for what they do in fulfilling their duties).

154. See *Sir Richard Raine's Case*, 91 E.R. at 1071 (involving plaintiff seeking to compel judge to grant administration of will, where court held that judge was only proper judge to determine validity of will so court will not compel him and if he does not find will valid, no action can lie against him).

155. See *id.* at 1071 (stating that judge cannot be sued for what he does judicially).

156. See *Kemp*, 142 E.R. at 556 (holding that no action lies against judges for what they do in fulfilling their judicial duties and stating "a judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction").

There are two cases that establish the narrow points at which a judge would be liable for his actions.¹⁵⁷ In *Marshalsea*, the court held that a judge is liable for acts outside of his jurisdiction.¹⁵⁸ In *Floyd*, Lord Coke held that a judge is liable for “extrajudicial” acts.¹⁵⁹

In sum, English law clearly states that judges acting in their judicial capacity are immune from all liability.¹⁶⁰ This was justified, in part, because the disappointed party could seek appeal, and the judge could be punished criminally for any corruption on his part.¹⁶¹ As in the United States,¹⁶² the reasoning is that judges must be free to decide cases without fear of reprisal by

157. See *Marshalsea*, 77 Eng. Rep. at 1027 (stating that liability may lie if judges act clearly outside their jurisdiction); *Floyd*, 77 Eng. Rep. at 1305 (stating that judges may be liable when they are not performing judicial function).

158. See *Marshalsea*, 77 Eng. Rep. at 1027 (stating that judges may be liable when acting in complete absence of jurisdiction). See also Franck, *supra* n.88, at 16 (noting that *Marshalsea* held that acts done completely outside jurisdiction open judges to possibility of liability).

159. See *Floyd*, 77 Eng. Rep. at 1305 (stating that judges may be liable for administrative or ministerial acts). See also Sponseller, *supra* n.88, at 425 (noting that judicial immunity has “judicial acts” limit, precluding immunity when judges’ acts are non-judicial).

160. See ALFRED DENNING, *THE DUE PROCESS OF LAW* 64, (Buttersworth 1980). Lord Denning well summarized the English position on judicial immunity:

Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action . . .

Id. See also *Marshalsea*, 77 Eng. Rep. at 1027 (holding that judge is immune from suit so long as not acting completely outside jurisdiction); *Floyd*, 77 Eng. Rep. at 1305 (holding that judge is immune for any act carried out in performing judicial function); Lew, *Immunity under English Law*, *supra* n.86, at 21 (stating that English law grants immunity to judges for performance of their judicial functions).

161. See *Marshalsea*, 77 Eng. Rep. at 1027 (noting that party had remedy of appeal available despite not being able to sue judge directly). See also *Floyd*, 77 Eng. Rep. at 1305 (stating that judge may be criminally liable for corruption, but not civilly liable); Lew, *Immunity under English Law*, *supra* n.86, at 21 (discussing that although judges are immune from private action, they are subject to impeachment and their decisions are subject to review of higher courts).

162. See *Bradley*, 80 U.S. 335, 347 (stating that judges must be free to act upon their own convictions when performing their judicial duties, without fear of reprisal by disgruntled parties). See also Lew, *Immunity under English Law*, *supra* n.86, at 21 (noting that English position supports judicial immunity to protect judicial independence and citing availability of impeachment and appeal as further justification).

unsatisfied parties.¹⁶³ This judicial immunity has been applied to arbitrators both in English common law and under the U.K. Act.¹⁶⁴

b. Immunity of Arbitrators

Arbitrators in England enjoy a broad immunity, although it is characterized as “qualified immunity”¹⁶⁵ as opposed to the United States’ “absolute immunity.”¹⁶⁶ England has generally treated arbitrators “as akin to judges” and therefore has extended to them the same immunity as judges.¹⁶⁷ Although the U.K. Act codified the immunity of arbitrators,¹⁶⁸ there are two important historical cases worth discussing.¹⁶⁹

163. See *Garnett*, 153 E.R. at 577 (involving plaintiff who sued judge for assault where plaintiff entered room during inquisition and refused to exit upon request and thereupon, judge and officer of court removed plaintiff from room). The court stated that for the advancement of justice, judges must be immune, so that they may be free from fear of reprisal and independent in reaching their judgments, as all those administering justice should be. *Id.* at 581.

164. See Lew, *Immunity under English Law*, *supra* n.86, at 21 (discussing English case law applying judicial immunity to arbitrators). See also VAN HOF, *supra* n.128, at 46 (mentioning English case law supports judicial immunity for arbitrators); FOUCHARD, *supra* n.85, at 593 (indicating that both case law and U.K. Act support judicial immunity for arbitrators).

165. See Lew, *Introduction*, *supra* n.86, at 4 (noting that English position on arbitral immunity is qualified). See also VAN HOF, *supra* n.128, at 46 (classifying arbitral immunity as qualified in England).

166. See Lew, *Introduction*, *supra* n.86, at 4 (indicating that arbitral immunity in United States is absolute). See also Branson, *supra* n.86, at 85 (noting that United States grants immunity to arbitrators for all actions related to fulfilling their arbitral duties).

167. See Lew, *Immunity under English Law*, *supra* n.86, at 21 (noting England traditionally extended judicial immunity to arbitrators because of judicial function of arbitrators). See also VAN HOF, *supra* n.128, at 46 (noting that arbitrators have been treated similarly to judges); FOUCHARD, *supra* n.85, at 593 (noting that in England, judicial function of arbitrators justifies extension of immunity).

168. See 1996 Ch. 23 Sec. 29 (extending immunity to arbitrators for all acts in fulfilling their arbitral duties). See also Critchlow, *supra* n.87 (noting U.K. Act clarifies arbitral immunity); Carbonneau, *supra* n.92, at 191 (stating that U.K. Act grants immunity to arbitrators).

169. See *Sutcliffe*, [1974] 1 Lloyd’s Rep. at 318 (finding that arbitrators enjoy immunity but holding architect was not arbitrator where he, in arbitrating dispute, did not rely on parties for argument and evidence in issuing decision but rather, conducted his own investigation). See also *Arenson*, [1976] 1 Lloyd’s Rep. at 179 (holding that auditors were experts in role of valuation and therefore did not extend arbitral immunity). See generally Lew, *Immunity under English Law*, *supra* n.86, at 21 (noting judicial immunity was historically extended to arbitrators, however definition of arbitrator came under question in two cases: *Sutcliffe* and *Arenson*). Critchlow, *supra* n.87 discussing *Sutcliffe* and *Arenson* as important historical cases that questioned arbitral immunity in England); FOUCHARD, *supra* n.85, at 593 (noting that *Sutcliffe* and *Arenson* questioned

The first is *Sutcliffe*, where the House of Lords agreed that arbitrators clearly enjoyed judicial immunity.¹⁷⁰ Lord Reid stated that the public policy behind judicial immunity equally applies to arbitrators.¹⁷¹ The basis for the immunity, in large part, is clearly the “judicial capacity” which the arbitrator serves.¹⁷² The House of Lords reemphasized the public policy behind judicial immunity; indicating without immunity arbitrators’ decisions would be subject to the pressures of civil liability.¹⁷³

In *Arenson*, the House of Lords stated once again that arbitrators enjoy the same immunity as judges when acting in a judicial capacity.¹⁷⁴ *Arenson* concerned the liability of accountants in

scope of immunity of arbitrators); VAN HOF, *supra* n.128, at 46-47 (noting that *Sutcliffe* and *Arenson* support judicial immunity for arbitrators).

170. See *Sutcliffe*, [1974] 1 Lloyd’s Rep. (holding that architect who, in arbitrating dispute, did not rely on parties for argument and evidence in issuing decision but instead, conducted his own investigation and therefore did not grant arbitral immunity). See also Critchlow, *supra* n.87 (noting that judges agreed that judicial immunity extends to arbitrators due to their judicial function); Lew, *Immunity under English Law*, *supra* n.86, at 21-23 (noting that doubt arose over absolute immunity for arbitrators in *Sutcliffe*, but judges clearly found that arbitrators enjoy judicial immunity); VAN HOF, *supra* n. 128, at 46 (noting that arbitrators perform fundamentally the same functions as judges).

171. See *Sutcliffe*, [1974] 1 Lloyd’s Rep. at 320 (finding that argument for respondents started from undisputed rule, based on public policy, that judges are not personally liable for negligence in performing their judicial duties and following this, that those employed to perform duties of judicial nature are not liable to their employers for negligence and that this rule historically has been applied to arbitrators). See also VAN HOF, *supra* n.128, at 46 (noting that arbitrators perform essentially same functions as judges and therefore are granted same immunity)

172. See Lew, *Immunity under English Law*, *supra* n.86, at 22 (discussing that judicial immunity is extended to arbitrators due to policy of protecting independence of adjudicator). See also Critchlow, *supra* n.87 (noting that in *Sutcliffe*, four judges held that arbitral immunity was clear proposition in law); FOUCHARD, *supra* n.85, at 593 (indicating that arbitrators were granted immunity due to their judicial function).

173. See *Sutcliffe*, [1974] 1 Lloyd’s Rep. at 320 (noting policy granting judges immunity equally applies to arbitrators who perform judicial function). See also Lew, *Immunity under English Law*, *supra* n.86, at 22 (noting that public policy for immunity of judges applies also to arbitrators); Critchlow, *supra* n.87 (indicating same rationale for granting judges immunity in decision-making applies to arbitrators).

174. See *Arenson*, [1976] 1 Lloyd’s Rep. at 179 (holding that valuers were not arbitrators and therefore not extending immunity to them). See also Lew, *Immunity under English Law*, *supra* n.86, at 22 (noting that House of Lords based arbitral immunity on arbitrators’ judicial capacity and held in *Arenson* that valuers were not functioning in judicial capacity); Critchlow, *supra* n.87 (noting that House of Lords extends immunity to arbitrators for their judicial function, but held in *Arenson* that valuers were acting as experts).

valuing shares in a company, not arbitrators.¹⁷⁵ The House of Lords here considered the immunity of arbitrators and quasi-arbitrators¹⁷⁶ deciding that the quasi-arbitrator must perform a judicial function, not merely a fact-finding or investigative function.¹⁷⁷ There were Law Lords who disagreed with this reasoning and this caused the entire concept of arbitral immunity to be called into question.¹⁷⁸ Any questions that may have surfaced in the common law were answered in the U.K. Act.¹⁷⁹

Section 29 of the U.K. Act adopts a rule of general immunity for arbitrators in the performance of their judicial functions as arbitrators.¹⁸⁰ However, section 29 does allow liability in two

175. See *Arenson*, [1976] 1 Lloyd's Rep. at 187 (finding that accountants were valuers or fact-finders, and therefore they did not perform judicial function). See also Lew, *Immunity under English Law*, *supra* n.86, at 23 (noting valuers acted as experts not arbitrators); Critchlow, *supra* n.87 (noting valuers do not perform judicial function).

176. See *Arenson*, [1976] 1 Lloyd's Rep. at 179 (finding that auditors, architects and other experts are quasi-arbitrators). See also Lew, *Immunity under English Law*, *supra* n.86, at 23 (discussing that architects and auditors are quasi-arbitrators); Critchlow, *supra* n.87 (contrasting valuers to arbitrators).

177. See *Arenson*, [1976] 1 Lloyd's Rep. at 179 (holding that valuers are liable because they did not perform judicial function). See also Lew, *Immunity under English Law*, *supra* n.86, at 24 (discussing Lords Kilbrandon and Fraser, both challenging rationale behind allowing arbitrators immunity, noting difference in origin of authority, coming from parties in case of arbitrators and coming from state in case of judges). See also Critchlow, *supra* n.87 (noting Lords Kilbrandon and Fraser disagree with arbitral immunity on grounds of different status than judges, coming from relationship between arbitrator and parties, as opposed to basing on functions).

178. See *Arenson*, [1976] 1 Lloyd's Rep. at 191-93, 199-200 (Lords Kilbrandon, Fraser dissenting in part) (holding that valuers should not be granted immunity but because judges find power from state and arbitrators find power from contract and therefore finding that arbitrators should not enjoy same immunity of judges). See also Lew, *Immunity under English Law*, *supra* n.86, at 24-25 (discussing reasons for not extending judicial immunity to arbitrators, noting difference in relationship between judges and parties and arbitrators and parties); Critchlow, *supra* n.87 (discussing difference between immunity granted for status of arbitrator versus contractual nature of his relationship with parties); VAN HOF, *supra* n.128, at 47 (noting that two Law Lords dissenting speeches, Kilbrandon and Fraser, gave rise to doubts as to scope of arbitrators immunity).

179. See 1996 Ch. 23 sec. 29 (extending immunity to arbitrators when fulfilling arbitral duties). See also Critchlow, *supra* n.87 (noting that U.K. Act clarifies arbitral immunity); Carbonneau, *supra* n.92, at 191 (noting that U.K. Act confers immunity to arbitrators).

180. 1996 Ch. 23 sec. 29. Section 29 states:

Immunity of arbitrator:

(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

circumstances.¹⁸¹ If the arbitrator resigns from the case, he may be found liable under section 25 if he is unable to show good reason for resigning.¹⁸² Furthermore the arbitrator will be liable for any acts or omissions made in bad faith.¹⁸³ The statute clearly outlines when an arbitrator is immune and when he may be liable, but the statute does not define bad faith.¹⁸⁴ One commentator suggests that this clearly would not include negligent acts.¹⁸⁵

(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).

Id. See also Carbonneau, *supra* n.92, at 191 (noting that section 29 of U.K. Act excludes liability of arbitrators for all acts and omissions in carrying out their arbitral duties).

181. See 1996 Ch. 23 sec. 29 (stating that immunity is precluded when arbitrator resigns without good cause or acts in bad faith). See also Carbonneau, *supra* n.92, at 191 (noting that U.K. Act excludes immunity when arbitrator resigns without good reason or acts in bad faith); Critchlow, *supra* n.87 (noting resignation as exception to immunity).

182. 1996 Ch. 23 sec. 25. Section 25 states:

Resignation of arbitrator:

(1) The parties are free to agree with an arbitrator as to the consequences of his resignation as regards -

(a) his entitlement (if any) to fees or expenses, and

(b) any liability thereby incurred by him.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court -

(a) to grant him relief from any liability thereby incurred by him, and

(b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit.

(3)(a) on such terms as it thinks fit.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

Id. See also Carbonneau, *supra* n.92, at 191 (noting that Section 25 of U.K. Act excludes immunity when arbitrator resigns without showing that resigning was reasonable under circumstances).

183. See 1996 Ch. 23 sec. 29 (stating that arbitrator will not be immune for acts or omissions made in bad faith). See also Carbonneau, *supra* n.92, at 191 (noting that bad faith provision of Section 25 precludes immunity).

184. See 1996 Ch. 23 sec. 29 (stating that acts made in bad faith would preclude immunity without defining which acts would be considered bad faith). See also FOUCHARD, *supra* n.85, at 598 (noting that statute does not define what constitutes bad faith).

185. See 1996 Ch. 23 sec. 29 (stating that arbitrators acting in bad faith would be subject to liability). See also FOUCHARD, *supra* n.85, at 598 (noting that intentional faults

In sum, the historical development in England treated arbitrators as adjudicators and therefore in need of the same protection of judges.¹⁸⁶ There arose some question as to liability of arbitrators under certain circumstances in two famous cases.¹⁸⁷ Most all of the doubt was alleviated in the U.K. Act, which codified England's position on arbitrators' immunity.¹⁸⁸ Although the U.K. Act was clear in granting qualified immunity to arbitrators,¹⁸⁹ there remains a question as to what constitutes bad faith on the part of the arbitrator.¹⁹⁰

would likely fall into bad faith, but indicating that gross faults or gross negligence would not be uniformly considered bad faith, stating jurisdictions that traditionally assimilate gross fault and willful misconduct would consider both bad faith).

186. See Lew, *Immunity under English Law*, *supra* n.86, at 21 (noting that England traditionally extended judicial immunity to arbitrators because of judicial function of arbitrators). See also VAN HOF, *supra* n.128, at 46 (noting that arbitrators have been treated comparable to judges due to similarity of functions); FOUCHARD, *supra* n.85, at 593 (noting that judicial function of arbitrators in England led to extension of judicial immunity to arbitrators).

187. See *Sutcliffe*, [1974] 1 Lloyd's Rep. 318 (finding that architect conducted his own investigation in issuing decision and therefore holding that architect was not arbitrator and did not grant immunity). See also *Arenson*, [1976] 1 Lloyd's Rep. 179 (holding that, although arbitrators enjoy immunity, auditors who acted as expert valuers, and not arbitrators, were not protected by arbitral immunity); Lew, *Immunity under English Law*, *supra* n.86, at 21 (noting that arbitral immunity was questioned in two cases: *Sutcliffe* and *Arenson*); Critchlow, *supra* n.87 (discussing *Sutcliffe* and *Arenson* and noting that cases caused status of arbitral immunity to be questioned); FOUCHARD, *supra* n.85, at 593 (noting that *Sutcliffe* and *Arenson* questioned scope of immunity of arbitrators); VAN HOF, *supra* n.128, at 46-47 (noting that although *Sutcliffe* and *Arenson* support judicial immunity for arbitrators, cases acted to undermine this immunity by questioning its scope).

188. See 1996 Ch. 23 sec. 29 (stating that, with certain exceptions, arbitrators are immune for all acts and omissions made in carrying out duties as arbitrators). See also Critchlow, *supra* n.87 (noting issues that arose in *Sutcliffe* and *Arenson* are now put beyond doubt by U.K. Act).

189. See 1996 Ch. 23 sec. 29 (limiting arbitral immunity to acts and omissions made in discharge of functions). See also Carbonneau, *supra* n.92, at 191 (noting that U.K. Act grants general immunity for carrying out duties as an arbitrator); FOUCHARD, *supra* n.85, at 593 (noting that U.K. Act confirms case law extending immunity to arbitrators, but noting that U.K. Act excepts immunity under certain circumstances, namely bad faith and resignation).

190. See 1996 Ch. 23 sec. 29 (establishing bad faith exception to immunity without defining bad faith). See also Carbonneau, *supra* n.92, at 191 (noting that U.K. Act does not explain what constitutes bad faith); FOUCHARD, *supra* n.85, at 598 (noting that U.K. Act does not define bad faith but opining that intentional faults would likely fall into bad faith, and negligence would not be included as bad faith, but indicating that gross faults or gross negligence would not clearly be incorporated into bad faith, arguing that jurisdictions that traditionally assimilate gross fault and willful misconduct would consider both bad faith).

c. Immunity of Arbitral Institutions

In the United States, the courts determined it was necessary to extend immunity to the institutions that sponsor arbitrations; otherwise the immunity arbitrators enjoy would be an illusion.¹⁹¹ England does not protect institutions in as strong of a manner as the United States.¹⁹² The U.K. Act describes England's stance on institutional immunity.¹⁹³

Paragraph 1 of section 74 of the U.K. Act protects any institution that is chosen to nominate the arbitrators for a dispute.¹⁹⁴ This protection, however, is limited to the function of nominating an arbitrator.¹⁹⁵ The U.K. Act does not extend immunity to acts or omissions done in bad faith.¹⁹⁶

In paragraph 2 of section 74, the U.K. Act releases the institution from liability for any acts or omissions of the arbitrator.¹⁹⁷

191. See *Austern* 898 F.2d at 886 (holding that institutions must enjoy same protection as arbitrators or arbitral immunity will be illusion and finding that federal policies favoring arbitration provide reason to extend immunity to institutions). See also *Corey* 691 F.2d at 1211 (finding that holding institutions liable would amount to merely shifting liability from arbitrators to sponsoring associations).

192. See 1996 Ch. 23 sec. 74 (granting immunity to institutions). Compare FOUCHARD, *supra* n.85, at 592 (indicating that English arbitral immunity is limited), and Lew, *Introduction*, *supra* n.86, at 4 (characterizing English arbitral immunity as qualified), with FOUCHARD, *supra* n.85, at 594 (noting that U.K. Act extends arbitral immunity to sponsoring institutions). If the immunity of arbitrators in England is qualified and this immunity is also granted to institutions that sponsor arbitrations it logically follows that the immunity of the institution too will be qualified. Cf. *id.* at 592, 594 (noting that arbitral immunity in England is qualified and then that U.K. Act extends this immunity to sponsoring institutions).

193. See FOUCHARD, *supra* n.85, at 594 (explaining that U.K. Act grants arbitral immunity to arbitral institutions). See also Carbonneau, *supra* n.92, at 191 (noting that U.K. Act confers immunity to institutions sponsoring arbitrations).

194. 1996 Ch. 23 sec. 74 para. 1. Paragraph one of section 74 states:

An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.

Id. See also FOUCHARD, *supra* n.85, at 594 (noting that section 74 of U.K. Act extends arbitral immunity to institutions).

195. See 1996 Ch. 23 sec. 74, para. 1 (stating arbitral immunity applies to acts or omissions made in carrying out function of nominating arbitrators). See generally FOUCHARD, *supra* n.85, at 594 (mentioning that U.K. Act extends immunity to institutions to protect them against dissatisfied parties).

196. See 1996 Ch. 23 sec. 74, para. 1 (stating that arbitral immunity applies to institutions unless act or omission is made in bad faith).

197. 1996 Ch. 23 sec. 74 para. 2. Paragraph 2 of section 74 states:

An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him,

Although the section grants immunity to institutions for their own actions in nominating the arbitrators and for any actions of the arbitrators themselves, it is silent on the scope of that immunity outside those circumstances.¹⁹⁸ One English commentator asserts that immunity would not be granted to an institution for failing to comply with contractual obligations, such as failure to appoint arbitrators or failure to supervise the proceedings.¹⁹⁹ The U.K. Act does state clearly, though, that the institution will have no immunity for bad faith acts in selecting arbitrators,²⁰⁰ and since arbitrators themselves are liable for any bad faith acts, logically institutions would be liable for all bad faith actions as well.²⁰¹

3. France

The French approach to arbitral immunity represents greater liability than under English and American law.²⁰² Since most justifications for arbitral immunity are based on judicial immunity, it is important to first consider France's approach to ju-

for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.

Id.

198. See Boisseson, *supra* n.61, at 69-70 (noting that no immunity would likely be conferred for failing to comply with contractual obligations, such as failing to appoint arbitrators at required time or failing to supervise proceedings). See generally Robert Merkin, Arbitration Act 1996, An Annotated Guide, 111 (LLP 1996) (noting that U.K. Act narrowly defines circumstances for immunity of institutions).

199. See Merkin, *supra* n.198, at 111 (arguing that institutions would be liable when failing to meet basic elements of contractual obligations). See also Boisseson, *supra* n.61, at 69-70 (noting that immunity would not likely be granted to institutions where institution fails to fulfill contractual obligations).

200. See 1996 Ch. 23 sec. 74, para. 1 (stating that acts or omissions made in bad faith would exclude immunity).

201. See 1996 Ch. 23 sec. 25 (stating that arbitrators are liable when acting in bad faith). See also Carbonneau, *supra* n.92, at 191 (discussing bad faith provision of section 25). See generally Merkin, *supra* n.198, at 111 (indicating that institutional liability would occur for purposeful acts); Boisseson, *supra* n.61, at 69-70 (noting that institutions would be liable for purposeful acts).

202. See Lew, *Introduction*, *supra* n.86, at 4 (noting that United States provides strongest immunity and that England provides comparable immunity to United States although qualified and that France allows for liability of arbitrators). Compare Delvolvé, *supra* n.86, at 33, 37 (noting that arbitrators in France do not enjoy immunity, but have some protection in their decision-making function), with Branson, *supra* n.86, at 96 (describing United States' position on liability of arbitrators and arbitral institutions as absolute), and Lew, *Immunity under English Law*, *supra* n.41, at 27 (concluding that immunity of arbitrators in England is limited).

dicial immunity.²⁰³ France, however, does not have as direct of a connection between judicial immunity and that of arbitrators and institutions.²⁰⁴

a. Immunity of Judges

Historically, French judges were not personally liable for judicial acts except under very narrow circumstances.²⁰⁵ Under the provisions of article 505 *et seq.* of the Code of Civil Procedure, the French doctrine of *prise à partie* provided four circumstances in which a judge would be personally liable.²⁰⁶ Although this system permitted a claim for damages against a judge, the strict procedural requirements effectively denied its applicability.²⁰⁷

The law was reformed in 1972 to allow for liability in the case of *faute lourde* (gross negligence) or a *déni de justice* (denial

203. See Branson, *supra* n.86, at 87 (noting that United States continues to base arbitral immunity on that of judges). See also Lew, *Immunity under English Law*, *supra* n.86, at 21 (noting that arbitrators are treated akin to judges thus enjoy similar immunity); FOUCHARD, *supra* n.85, at 590 (noting that French law on judges does not apply to arbitrators); Franck, *supra* n.88, at 44-45 (noting that judicial liability and arbitral liability in France are comparable).

204. See FOUCHARD, *supra* n.85, at 590 (indicating that laws applying to judges are not applicable to arbitrators in France because arbitration is private form of justice). But see Franck, *supra* n.88, at 44-45 (noting comparability of judicial liability and arbitral liability).

205. See Code de Procédure Civil [C.P.C.] art. 505 (1830) (Fr.) (establishing four circumstances under which judge could be personally liable). See also Delvolvé, *supra* n.86, at 29 (noting that French Code of Civil Procedure allowed for liability but narrowly construed conditions under which liability could occur).

206. See C.P.C., art. 505 (stating judges may be held personally liable under four circumstances). See also Delvolvé, *supra* n.86, at 30 (noting four conditions under which judge could be held liable and noting that these were so narrowly construed that they were effectively useless). The four circumstances were, one, in the case of a judge having been held guilty of *dol*, *fraud*, *concussion*, that is to say the worst kind of misconduct which one can imagine of a judge, two, in the case of a law having specially provided for such a *prise à partie*, three, in the case of a law providing specifically that a judge be held liable to pay damages, and, four, in the case of a *déni de justice*. *Id.* See also Y. Lobin, *Responsabilité des magistrats Jurisclasseur Procédure civile*, I 74, No. 98 (discussing four elements of *prise à partie* for judges and noting difficulty of invoking them).

207. See Delvolvé, *supra* n.86, at 30 (noting that procedural requirements for claims against judges made it very difficult to win award against judges). The requirements were, one, only the judges of ordinary courts were subject to a *prise à partie*, two, there was no guarantee that the judge would be solvent, three, the conduct necessary for "*dol*, *fraude*, *concussion*" were so narrow even gross misconduct was not enough, and four, if the claim was dismissed, the claimant paid a heavy fine. *Id.*

of justice).²⁰⁸ The French law adopted the perspective that a judge's error is a fault in the judicial system and therefore the state should pay damages and not the judge.²⁰⁹ The *Cour de Cassation*, the highest court in France, defined gross negligence as an error so egregious that a reasonably conscientious judge would not have committed it.²¹⁰ A denial of justice is a judge's refusal to make a judgment when the matter is ready for a decision.²¹¹

In sum, French law states that judges can be liable, but only under very narrow circumstances.²¹² Therefore, a judge can be personally liable for a fault committed in carrying out his judicial functions.²¹³ Notably, however, the state, as the guarantor of the judicial system, pays any damages assessed against a judge.²¹⁴

208. Code de L'Organisation Judiciaire [C.O.] art. L781-1 (Fr.). Article L781-1 states in relevant part:

The State will make reparations for damages caused by a failure of justice.

This responsibility will only occur for a *faute lourde* or a *déni de justice*. . . .

The State guarantees the victims of the damage caused by the personal fault of judges and other magistrates, but may still be indemnified by the judges or magistrates.

Article 505 of the Code de Procédure Civil will remain in force, except for the sections concerning the personal liability of judges.

Id. (author's trans.). See Delvolvé, *supra* n.86, at 30-31 (discussing statute and noting that under new reform, judges can be liable for *faute lourde* (gross negligence) and *déni de justice* (denial of justice)); FOUCHARD, *supra* n.85, at 590 (indicating liability of French judges can only occur in case of gross negligence or denial of justice).

209. See Delvolvé, *supra* n.86, at 30-31 (noting state claims responsibility for any defects in system of justice). See also FOUCHARD, *supra* n.85, at 590 (noting that state, as guarantor, assumes liability for judge's actions).

210. See Cass. Civ. I. 13.10.1953, Bull. Civ. I. No. 224. See also Delvolvé, *supra* n.86, at 31 (noting that *faute lourde* is not statutorily defined but that *Cour de Cassation* defines it in opinion).

211. See C.P.C., art. 506 (stating that *déni de justice* is when judge will not make decision when matter is ready for decision); Code Civil [C. Civ.], art. 4 (Fr.) (stating that when judge refuses to render judgment regarding matter ready for decision, he committed *déni de justice*); Code Pénal [C. Pén.], art. 185 (Fr.) (defining *déni de justice* as when judge will not make judgment on matter ready for decision). See also Delvolvé, *supra* n.86, at 31 (defining *déni de justice* as judge's refusal to render judgment when matter is ripe for decision and citing Codes that define it).

212. See Delvolvé, *supra* n.86, at 32 (noting that judges are liable, even if liability is limited to narrow circumstances). See also FOUCHARD, *supra* n.85, at 590 (noting that judges are liable in either of two circumstances, namely gross negligence or denial of justice).

213. See Delvolvé, *supra* n.86, at 32 (concluding that judges in France are liable in carrying out their duties). See also FOUCHARD, *supra* n.85, at 590 (noting that liability of judges in France is possible, though limited).

214. See Delvolvé, *supra* n.86, at 30 (indicating that in case of liability state pays

This liability is narrowly construed, based on the public policy that judges need protection from liability for independence in their decision-making; but this narrow construction is not deemed "immunity."²¹⁵

b. Immunity of Arbitrators

The liability of arbitrators is comparable to that of judges, even though the French approach to arbitral liability is distinguishable from the approach to judicial liability.²¹⁶ The statutes regarding judges do not apply to arbitrators.²¹⁷ According to French law, the arbitrator is not a judge and is, therefore, more easily susceptible to liability.²¹⁸

Arbitrators, however, have been excluded from liability based purely on a disagreement with their decision because of their judicial function.²¹⁹ The Paris Tribunal of First Instance held that, because of this judicial function, an arbitrator could

damages). See also FOUCHARD, *supra* n.85, at 590 (noting that state must compensate parties for loss occurring as result of judge's liability).

215. See Delvolvé, *supra* n.86, at 30 (noting that limiting judicial liability is based, in part, on need for judicial independence). See also Franck, *supra* n.88, at 17-18, 45 (noting that concept of absolute immunity in civil law jurisdictions does not exist and further noting that judges can be liable for wrongdoing).

216. See FOUCHARD, *supra* n.85, at 589 (noting similarity of judges and arbitrators). See also Franck, *supra* n.88, at 45 (noting liability of arbitrators is comparable to that of judges in France).

217. See FOUCHARD, *supra* n.85, at 590 (noting that arbitration is private form of justice, whereas litigating in national courts is public and therefore statutes applying to judges do not apply to arbitrators). See also Delvolvé, *supra* n.86, at 32-33 (noting that legal text governing liability of arbitrators in France does not exist).

218. See Henri Motulsky, *Écrits*, 2 ÉTUDES ET NOTES SUR L'ARBITRAGE 5, 15 (1974) (noting that arbitrator does not become judge, even momentarily and therefore can incur liability under regime more straightforward than that of judge). See also FOUCHARD, *supra* n.85, at 590 (describing private nature of arbitration); Delvolvé, *supra* n.86, at 32-33 (noting that no legal text governs liability of arbitrators in France).

219. See TGI Reims, Sept. 27, 1978, *Florange v. Brissart et Corgié*, No. 482/77, (unpublished) (involving plaintiff who sued arbitrator for loss suffered as result of award against them and finding that plaintiff's arguments amounted to claiming that arbitrators reached wrong decision and noting that arbitrators could only be liable in event of gross fault, fraud or connivance with one of parties and therefore dismissed action). See also FOUCHARD, *supra* n.85, at 590-91 (noting plaintiff's argument amounted to nothing more than disagreeing with arbitrator and therefore court disallowed liability); Delvolvé, *supra* n.86, at 35 (noting arbitrators are not subject to suit for erroneous judgment); René David, *L'arbitrage dans le commerce international*, no. 2989, 381 (stating it is certain that arbitrators will not be liable for merely erroneous judgment).

not be sued as a substitute for an action against award.²²⁰ Although the Court was careful not to exclude an arbitrator's personal liability, the Court protected arbitrators in reaching its decision.²²¹

Even though there is no statutory provision dealing directly with arbitrator liability, French courts would likely hold an arbitrator liable for contractual obligations.²²² This liability may turn on whether the court characterizes the arbitrator's obligations as *résultat* (an obligation to produce a result) or *diligence* (a duty of care).²²³ An arbitrator will be contractually liable for resigning after his appointment and before meeting his obligations, committing a *déni de justice*, failing to make an award within the contractual time limit, bias, negligence, or breach of confidentiality.²²⁴

Although the reasoning and basis for the liability or exclusion thereof is different, the French law is in practice close to the English position.²²⁵ An arbitrator will be immune from liability

220. See *Floragne*, No. 482/77, (dismissing plaintiff's claim because it amounted to merely disagreeing with decision). See also FOUCHARD, *supra* n.85, at 590-91 (noting that courts disallow liability for attacks on arbitral awards); Delvolvé, *supra* n.86, at 35 (indicating that arbitrators cannot be sued merely because party disagrees with decision); David, *supra* n.219, at 381 (noting that arbitrators cannot be liable for erroneous judgment).

221. See June 13, 1990, *Bompard v. Consorts C.*, 1996 REV. ARB. 476, 1st decision, translated in 6 INT'L ARB. REP. F10 (Aug. 1991) (holding that action cannot lie against arbitrator's award because of judicial function). See also FOUCHARD, *supra* n.85, at 591-592 (noting no liability for arbitrators in reaching their award but potential for liability for fault); Delvolvé, *supra* n.86, at 35 (noting that even bad decisions should not result in liability); David, *supra* n.219, at 381 (stating as certain principle that arbitrators will not incur liability for bad decision).

222. See Delvolvé, *supra* n.86, at 34-36 (suggesting that contractual liability would result for failure to fulfill contractual duties). See also VAN HOF, *supra* n.128, at 47-48 (noting that, in France, there is contractual liability for arbitrators); FOUCHARD, *supra* n.85, at 591 (noting that arbitrators in France might incur contractual liability).

223. See Delvolvé, *supra* n.86, at 34 (asserting that courts in France will hold contractual duties to consist of one of two levels: *résultat* and *diligence*). See also VAN HOF, *supra* n.128, at 47-48 (discussing obligations under *résultat* and *diligence* and noting that failure to meet obligations under *résultat* would automatically result in liability).

224. See Delvolvé, *supra* n.86, at 34 (noting that arbitrators will be held contractually liable for failing to fulfill the terms of reference and noting specifically when this liability would occur). See also VAN HOF, *supra* n.128, at 47-48 (noting that, in France, arbitrators are contractually liable).

225. See 1996 Ch. 23 sec. 29 (extending immunity to arbitrators in England). See also Carbonneau, *supra* n.92, at 191 (noting that England grants general immunity for carrying out duties as an arbitrator under Act); FOUCHARD, *supra* n.85, at 593 (noting that England confirms case law extending immunity to arbitrators in U.K. Act, but not-

as to his decision.²²⁶ However, unlike England, in France an arbitrator would be contractually liable for *faute lourde*, or any gross or intentional fault, causing the arbitrator to fail to perform his contractual obligations.²²⁷

c. Immunity of Arbitral Institutions

French law protects arbitrators in a similar manner to how it protects judges, although, the basis for that protection is different,²²⁸ therefore the application of this protection to institutions is more attenuated.²²⁹ Under French law, courts affirm the contractual relationship between the parties and the institution.²³⁰ The French courts find it unnecessary to treat institutions as judicial bodies.²³¹

In a recent case, *Société Cubic Defense System v. Chambre de Commerce Internationale*, the *Cour de Cassation* recognized a contract between the parties to the arbitration and the ICC.²³² The

ing that U.K. Act excepts immunity under certain circumstances, namely bad faith and resignation).

226. See Delvolvé, *supra* n.86, at 34-36 (suggesting that contractual liability would result for failure to fulfill contractual duties). See also VAN HOF, *supra* n.128, at 47-48 (noting contractual liability for arbitrators in France); FOUCHARD, *supra* n.85, at 590-92 (noting that arbitrators enjoy protection in reaching decision).

227. See Delvolvé, *supra* n.86, at 34-36 (discussing that arbitrators have potential liability in France for failing to meet contractual duties). See also VAN HOF, *supra* n.128, at 47-48 (indicating that arbitrators' liability in France is limited to *faute lourde*); FOUCHARD, *supra* n.85, at 590-92 (concluding that arbitrators would likely be contractually liable for fault in France).

228. See Delvolvé, *supra* n.86, at 34-36 (noting that arbitrators are not viewed as judges and are held contractually liable, although they are protected in making decisions in order to protect judicial independence, not arbitrator). See also FOUCHARD, *supra* n.85, at 590-92 (noting that arbitrators are not judges and may be held contractually liable, but are granted protection against attacks for erroneous decisions).

229. See FOUCHARD, *supra* n.85, at 594, 602-04 (indicating that arbitral institutions do not act as arbitrators and therefore are not afforded same protection). See also Gaillard, *supra* n.85 (noting that arbitral institutions are civilly liable for failing to meet contractual obligations).

230. See FOUCHARD, *supra* n.85, at 602-03 (discussing that contractual relationship exists between parties and institution in France). See also Gaillard, *supra* n.85 (indicating that French courts look to contractual nature of relationship between parties and arbitral institution).

231. See FOUCHARD, *supra* n.85, at 594, 604 (noting that institutions are service providers and not judicial bodies and noting French courts correctly do not treat them as judicial bodies). See also Gaillard, *supra* n.85 (noting that institutions serve primarily as administrators).

232. See *Société Cubic Defense System v. Chambre de Commerce Internationale*, Cass. 1e civ., Feb. 20, 2001, available at http://lexinter.net/JPTXT/institutions_d'arbitrage.htm (Fr.) (involving plaintiff who sued ICC for failure to meet its con-

Court noted that the ICC will not be granted immunity but instead will incur liability for its contractual obligations.²³³ These obligations are not to ensure perfect arbitral proceedings, instead the *Cour de Cassation* held that the ICC forms a contract with each of the parties thereby committing to provide the means for an efficient arbitration.²³⁴ The institution will be obligated to provide an effective and efficient arbitration, suitable screening for impartial arbitrators, and a more involved oversight of the arbitral process.²³⁵

Although the *Cour de Cassation* held that the ICC was not liable under these facts, the court held that the ICC is contractually obligated to fulfill its essential function as an arbitral institution.²³⁶ This decision stands in contrast to the United States po-

tractual obligations). *See also* Gaillard, *supra* n.85 (noting that court recognized contractual relationship between ICC and parties and further recognized that institutions would be liable for failing to fulfill their contractual obligations); Franck, *supra* n.88, at 45 (noting that court found contract to exist between ICC and parties); FOUCHARD, *supra* n.85, at 594, 603 (citing *Cubic* case and noting relationship under French law between institution and parties is similar to contract of agency).

233. *See Cubic*, Cass. 1e civ. (finding that contractual relationship exists between arbitral institution and parties to dispute). *See also* Gaillard, *supra* n.85 (discussing court's holding and stating that institution will be liable for failure to fulfill essential aspects of contractual duty); Franck, *supra* n.88, at 45 (noting that although court rejected liability, court found contractual relationship to exist between institution and parties); FOUCHARD, *supra* n.85, at 594 (noting that although court will hold institution to fulfill contractual duties, court has yet to find institution liable).

234. *See Cubic*, Cass. 1e civ. (holding that ICC was not liable because contractual obligations do not create duty to provide perfect arbitral proceedings, but to provide effective and efficient arbitration). *See also* Gaillard, *supra* n.85 (noting that ICC, by permanently putting out offer to provide services, contracts with parties when they choose to arbitrate disputes through ICC, and incurs obligation to provide efficient arbitration).

235. *See Cubic*, Cass. 1e civ. (holding that ICC was not liable under the facts but that institutions would be liable for failing to provide efficient and effective arbitrations, suitably screening arbitrators, and sufficiently governed proceedings). *See also* Gaillard, *supra* n.85 (noting that court would hold institution liable for failing to provide efficient arbitration).

236. *See Cubic*, Cass. 1e civ. (finding that institutions' obligations consist of providing efficient and effective arbitrations, adequately overseeing proceedings, and properly screening arbitrators). *See also* Gaillard, *supra* n.85 (noting that essential functions of institutions consist of providing efficient and effective arbitration, overseeing process, and screening arbitrators). *See generally* Franck, *supra* n.88, at 45 (noting that institutions undertake obligation to perform contractual duties when sponsoring arbitrations); FOUCHARD, *supra* n.85, at 594 (noting that institution's would likely be liable in France for failure to meet contractual duties). Even though the French position clearly states that an institution may be liable contractually, a court has yet to find one liable. *Id.* (stating that French courts have yet to find institutions liable).

sition in *Austern v. Chicago Board Options Exchange*.²³⁷ These cases introduce the question of how to properly view the relationship between the parties and the arbitral institution.²³⁸ The next section will discuss the main theories as to how this relationship should be characterized and how these theories affect whether to grant arbitrators and arbitral institutions immunity or hold them liable.

B. *What is the Nature of the Relationship?*

1. Arbitrators and Parties

Underlying the relative immunity or liability of arbitrators is a theory of the relationship between the arbitrator and the parties.²³⁹ Commentators agree that there is tension is between the contractual nature of the relationship and the jurisdictional nature of the relationship, or the relationship forming out of the arbitrator's "status" as an adjudicator.²⁴⁰ Commentators further note that along this same continuum a tension exists between granting immunity to arbitrators for their status as adjudicators, and holding them liable for their contractual duties; the more strictly contractual the relationship, the closer to complete liability and the more strictly jurisdictional the relationship, the closer to complete immunity.²⁴¹

237. See *Austern* 898 F.2d 882 (holding institution enjoys same immunity as arbitrators). See also Gaillard, *supra* n.85 (noting that *Cubic* decision stands in contrast to *Austern* case and most courts' general blanket of immunity).

238. See FOUCHARD, *supra* n.85, at 600-04 (discussing two characterizations of relationship between either arbitrators and parties or institutions and parties as being either contractual or one of status). See also Yu, *supra* n.87, at 114-21 (discussing in detail characterizations of nature of relationship between arbitrators and parties and institutions and parties); Critchlow, *supra* n.87 (noting both contractual and status characteristics of relationship).

239. See FOUCHARD, *supra* n.85, at 600-04 (noting that relationship between either arbitrators and parties or institutions and parties could be based on contract or based on status). See also Yu, *supra* n.87, at 114-121 (noting that contractual relationship between arbitrators and parties or institutions and parties comes from appointment of arbitrator or institution by parties and status relationship comes from position of arbitrators and institutions).

240. See FOUCHARD, *supra* n.85, at 600 n.198 (noting characterization of relationship changes result in granting immunity versus qualified immunity versus liability). See also Yu, *supra* n.87, at 117 (discussing differing views on nature of relationship and impact view has on immunity).

241. See Yu, *supra* n.87, at 115-119 (noting that viewing the relationship between arbitrator and parties to dispute as contractual leads to view of complete liability and as jurisdictional, or one of status, leads to view of absolute immunity). See also

Most scholars agree that there is a contractual nature to the relationship between the arbitrators and the parties to a dispute.²⁴² However, arbitrators do have status as "private judges."²⁴³ In order for courts to recognize them as possessing judicial power and thus enforcing their decisions, arbitrators must have this "status."²⁴⁴ This does not exclude the contractual nature of the relationship.²⁴⁵ First, the arbitrator is able to hear the claims of the parties only because the parties themselves have empowered him to do so.²⁴⁶ They may have done so by directly appointing the arbitrator, or by some other method, nevertheless intending to resolve their dispute through an arbitrator.²⁴⁷ Second, the arbitrator voluntarily consents to being an

FOUCHARD, *supra* n.85, at 600-04 (noting that absolute liability comes out of status view of relationship and liability comes out of contractual view of relationship).

242. See FOUCHARD, *supra* n.85, at 600 (noting that most commentators support contractual nature of relationship). See generally ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 1991) (noting contractual nature of relationship between arbitrators and disputing parties in England); Murray L. Smith, *Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment*, 8 ARB. INT'L 17 (1992) (discussing contractual obligations arbitrators owe to disputing parties in England). Bernd von Hoffmann, *Die internationale Schiedsrichtervertrag – eine kollisionsrechtliche Skizze*, in *Festschrift Für Ottoarndt Glossner Zum 70 GEBURSTAG* 143 (1993) (noting contractual nature of relationship between arbitrators and parties in Germany). Giuseppe Mirabelli, *Contratti nell'arbitrato* (con l'arbitrato; con l'instituzione arbitrale), 30 RASS. DELL'ARB. 3 (1990), and the references cited therein (noting contractual relationship exists between arbitrators and disputing parties and institutions and disputing parties). MARCEL HUYS, GUY KEUTGEN, L'ARBITRAGE EN DROIT BELGE ET INTERNATIONAL, para. 174 (1981) (noting that arbitrators and arbitral institutions owe contractual duties to disputing parties in Belgium). RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 292 *et seq.* (1985) (discussing in comparative law that there is contractual relationship between arbitrator and disputing parties and between arbitral institutions and disputing parties).

243. See FOUCHARD, *supra* n.85, at 600 (explaining notion that arbitrators have status as private judges). See also Yu, *supra* n.87, at 117 (discussing arbitrators roles and commentators who characterize the relationship as stemming from status as adjudicators).

244. See FOUCHARD, *supra* n.85, at 600 (noting that arbitrators decisions are recognized by courts due to their status as private judges). See also Yu, *supra* n.87, at 117 (indicating that in order for arbitrators decisions to be recognized they must have status as decision-makers).

245. See FOUCHARD, *supra* n.85, at 601 (noting that contractual relationship can coexist with status). See generally Yu, *supra* n.87, at 115-117 (discussing both contractual theory of relationship and jurisdictional theory of relationship, or status).

246. See FOUCHARD, *supra* n.85, at 601 (noting that arbitrator's authority to hear case stems from contract, not status as adjudicator). See also Yu, *supra* n.87, at 115 (noting that relationship between arbitrator and parties originates in arbitration agreement).

247. See FOUCHARD, *supra* n.85, at 601 (noting that parties have choice in selecting

arbitrator.²⁴⁸ This consent concludes the contract, creating rights and obligations for both the arbitrator and the parties.²⁴⁹

2. Arbitral Institutions and Parties

Arbitral institutions do not act as arbitrators and, therefore, the relationship between institutions and the parties is somewhat different than that between the arbitrator and the parties.²⁵⁰ The institution puts out a permanent offer to contract by drafting and publishing its rules and providing fixed conditions for acceptance.²⁵¹ The parties accept the offer when they agree to resolve potential disputes through a particular institution in their contract with each other.²⁵² The contract is not perfected, however, until the parties request arbitration, thus notifying the institution of their acceptance.²⁵³

In general, arbitral institutions simply police or administer

arbitration as method of dispute resolution, and either directly or indirectly select arbitrator to resolve dispute). See also LOOKOFKY, *supra* n.17, at 559 (discussing contractual nature of arbitration); Fischer, *supra* n.17, at 30-33 (noting that parties are free to choose to arbitrate and contract away right to access court).

248. See FOUCHARD, *supra* n.85, at 601-02 (noting that no one is ever obligated to assume role of arbitrator). See generally Franck, *supra* n.88, at 5-6 (noting that arbitrators can create their own express rights in terms of their appointment agreement with parties).

249. See FOUCHARD, *supra* n.85, at 602 (noting that contract between arbitrator and parties is concluded when arbitrator accepts appointment). Broadly speaking, the duties of arbitrators fall into four categories: the duty to act equitably and impartially, complete functions within contractual deadlines, pursue functions until the final award is made, and maintain confidentiality. See *id.* at 609-23 (discussing rights and obligations of arbitrator in general).

250. See FOUCHARD, *supra* n.85, at 602-03 (noting that arbitral institutions do not act as arbitrators and that when parties agree to arbitrate with institution and institution receives request for arbitration, contract forms between them). See also Franck, *supra* n.88, at 7-8 (noting that when parties agreed to submit their decision to arbitral institution, contract is formed between institution and parties).

251. See FOUCHARD, *supra* n.85, at 602 (noting that institution puts out offer to contract by publishing rules aimed at undetermined individuals but with fixed conditions). See also Franck, *supra* n.88, at 7-8 (noting that when parties agreed to submit their decision to arbitral institution, contract is formed between institution and parties).

252. See FOUCHARD, *supra* n.85, at 602 (noting that parties accept offer by including clause to resolve potential disputes through arbitral institution in contract). See also Franck, *supra* n.88, at 7-8 (noting that parties, by agreeing to resolve dispute through arbitral institution, form contract between institution and parties).

253. See FOUCHARD, *supra* n.85, at 602-03 (noting that contract is not perfected until institution receives notice through receipt of request for arbitration by parties). See also Franck, *supra* n.88, at 7-8 (noting that contract forms between institutions and parties when parties agreed to submit their decision to institution).

the proceedings.²⁵⁴ One commentator suggests that this relationship is similar to a contract of agency, where the institution performs various acts on behalf of the parties.²⁵⁵ However, the same commentator also notes that the relationship is also comparable to a contract for the provision of services, where the institution provides certain services for the parties.²⁵⁶ Whatever the characterization of the relationship, the question that emerges is whether an institution, as an administrator of the proceedings, should benefit from the immunity afforded to arbitrators for their judicial function.²⁵⁷

C. *Criticism of Absolute Immunity of Institutions*

Some criticism of absolute immunity for institutions has emerged.²⁵⁸ Commentators assert that absolute immunity will discourage arbitration as a means of dispute resolution.²⁵⁹ Furthermore, scholars note that institutional rules play a role in the parties' choice of an institution;²⁶⁰ therefore, in allowing the institution to disregard its own rules, the choice of the parties is

254. FOUCHARD, *supra* n.85, at 603 (noting that arbitral institutions role is one of oversight and administration). See also Allen, *supra* n.24, at 59 (discussing that one role of arbitral institutions is administrating proceedings). See generally GARNETT, *supra* n.24, at 33-34 (discussing institutionally administered arbitrations).

255. FOUCHARD, *supra* n.85, at 603 (noting that under French law, relationship between parties and institution is like that of contract of agency, due to the institutions duty to perform tasks on behalf of parties).

256. *Id.* at 603 (noting similarity of relationship between institution and parties to contract for provision of services, where institution agrees to perform tasks necessary to provide parties with arbitration). See also Allen, *supra* n.24, at 59 (discussing tasks arbitral institutions undertake in administering arbitration). See generally GARNETT, *supra* n.24, at 33-34 (discussing arbitrations administered through institutions).

257. See FOUCHARD, *supra* n.85, at 604 (questioning whether institution, as service provider, should be granted immunity likened to that of arbitrators). See also Franck, *supra* n.88, at 28 (noting that institutions should not be free to disregard their own rules).

258. See Franck, *supra* n.88, at 28 (indicating that arbitration should balance concerns of protecting judicial function with honoring parties choices in contracting with arbitral institution). See also Sponseller, *supra* n.88, at 439 (arguing that arbitration organizations should be held liable for damages caused by improper administrative tasks).

259. See Franck, *supra* n.88, at 27-28, 58-59 (arguing that absolute immunity will discourage arbitration whereas qualified immunity will serve to foster arbitration). See also Sponseller, *supra* n.88, at 439 (arguing public policy justifies holding arbitration associations liable for breakdowns in arbitration process).

260. See Franck, *supra* n.88, at 27 (noting that rules likely play role in parties' choice of institution). See also Harrison, *supra* n.69, at 94-95 (noting that institutional rules indicate type of arbitration proceeding to potential parties).

frustrated.²⁶¹ Critics argue that absolute immunity works to discourage arbitration, whereas qualified immunity will work to improve and foster arbitration.²⁶²

Notably, commentators have opposed some of the various justifications that courts offer in support of absolute immunity.²⁶³ Institutions do not need absolute immunity in order to protect arbitrators and judicial independence.²⁶⁴ If institutions were immune from the actions of the arbitrator, but liable for their administrative function, the arbitrator's independence would not be threatened.²⁶⁵ One commentator further notes that public policy supports holding institutions liable because institutions are in the best position to insure against liability.²⁶⁶

Commentators note that even if national courts allowed for the complete liability of arbitral institutions, a party would still have to move beyond the exclusion of liability clauses in institutional rules in order to successfully sue an institution.²⁶⁷ However, the validity of these rules is untested.²⁶⁸ Scholars suggest,

261. See Franck, *supra* n.88, at 28 (concluding that institutions should not be permitted to disregard their own rules and parties' agreement). See also Harrison, *supra* n.69, at 94-95 (noting that institutional rules enable parties to anticipate type of arbitration).

262. See Franck, *supra* n.88, at 30 (discussing policy arguments against immunity, noting immunity frustrates parties decisions). See also Sponseller, *supra* n.88, at 439 (arguing that qualified immunity is better for arbitration).

263. See Franck, *supra* n.88, at 30 (noting that immunity encourages carelessness). See also Sponseller, *supra* n.88, at 439 (arguing public policy reasons for holding institutions liable for failure to provide proper arbitral process).

264. See Sponseller, *supra* n.88, at 439 (discussing liability of institutions for own faults as opposed to arbitrators' failures, and noting that this would still protect judicial independence). See also Franck, *supra* n.88, at 30 (noting that institutional immunity is not necessary as means of protecting arbitrators' judicial independence).

265. See Sponseller, *supra* n.88, at 439 (noting that judicial acts limitation on immunity would serve same function as liability for institutions for own faults in administering proceedings). See also Franck, *supra* n.88, at 30 (noting that immunity encourages carelessness by removing incentives to be cautious and that institutional immunity is not necessary as means of protecting arbitrators' judicial independence).

266. See Sponseller, *supra* n.88, at 439 (noting that institutions can best spread risk and insure against liability).

267. See FOUCHARD, *supra* n.85, at 603-04 (discussing institutional rules excluding liability, and questioning their enforceability). See also Gaillard, *supra* n.85 (noting that validity of institutional rules excluding liability is of great importance where state laws may allow for liability of institutions).

268. See FOUCHARD, *supra* n.85, at 623 (asserting that it is unlikely that exclusion of liability clauses have power to exclude liability where national laws deny arbitral immunity). See also Gaillard, *supra* n.85 (noting that enforceability of exclusion of liability clauses is questionable).

along with a French court, that these rules are likely to be found invalid, as against public policy.²⁶⁹

III. *PULLING BACK: HOLDING INSTITUTIONS LIABLE FOR ESSENTIAL CONTRACTUAL DUTIES*

Part I discussed the general background underlying arbitration law and institutions. Part II discussed three nations' approaches to immunity in arbitration. Part II then discussed several characterizations of the relationship both between the disputing parties and the arbitrator, and between the parties and the arbitral institution. Part III will argue institutions provide a different function than arbitrators and therefore should not be afforded immunity on the same basis. Part III will also argue that arbitral institutions should be liable as the Cour de Cassation held. Furthermore Part III will discuss the impact this position will have on both the clients of institutions and the institutions themselves.

A. *Must the Institution be Immune?*

The arbitral institution has been extended the same immunity as an arbitrator in the United States.²⁷⁰ The courts deemed this extension as necessary, otherwise the immunity granted arbitrators would be illusory.²⁷¹ This conclusion does not follow.²⁷²

1. Protecting the Arbitrator's Decision – Avoiding Unduly Influencing His Decision

An institution can be liable for its own actions in a manner

269. See Gaillard *supra* n.85 (noting that issue is untested, however noting that French Cour d'Appel questioned validity of such provisions in *Cubic* case, although not addressing issue in reaching holding). See also *Cubic*, Cass. 1e civ. (questioning validity of institutions' rules excluding liability); FOUCHARD, *supra* n.85, at 623 (noting that no legal system allows unlimited exclusion clauses, further noting public policy against such provision in contracts of adhesion and noting that most jurisdictions will be unwilling to enforce exclusion clauses imposed upon parties rather than negotiated).

270. See *supra* nn.110-43 and accompanying text (discussing United States' position on immunity of arbitrators and arbitral institutions).

271. See *supra* nn.127-40 and accompanying text (mentioning two cases that rely on principle that arbitral immunity must be extended to institutions or else, immunity extended to arbitrators is illusory).

272. See *supra* nn.263-65 and accompanying text (arguing that granting immunity to institutions is unnecessary to protect arbitrators' "judicial acts").

in which the arbitrator will not be affected.²⁷³ This is not an unlimited liability, but a contractually liability where the contractual duties are to provide an efficient and effective proceeding, not a perfect arbitration.²⁷⁴ The challenge will logically come from the party who lost the arbitration, because the winning party has benefited from the wrongful action of the institution.²⁷⁵ But an arbitrator's decision should not be influenced by the possibility of a suit against the institution, based solely on the fault of the institution itself.²⁷⁶ Perhaps courts have been afraid to open the door of liability, eventually engulfing all aspects of arbitration. This also does not follow. The liability to institutions can be limited expressly in a statute as in England,²⁷⁷ or in application as in France.²⁷⁸

2. Supporting Arbitration

A second faulty reason was that the court must support arbitration and, in order to do so, must insulate institutions from liability.²⁷⁹ If courts allow institutions to fail to fulfill their contractual obligations, leaving the injured party without a remedy, they will discourage arbitration's growth.²⁸⁰ Making the institutions liable for their own faults will only ensure that the arbitration process is attractive.²⁸¹

273. See *supra* n.196 and accompanying text (discussing U.K. Act excluding institutional liability for acts or omissions of arbitrators).

274. See *supra* nn.228-35 and accompanying text (discussing French position on institutional liability).

275. See *supra* nn.105, 114, 116, 151 and accompanying text (mentioning policy of insulating judges from liability to protect integrity of their decisions).

276. See *supra* nn.263-65 and accompanying text (noting arbitrator's decision will not be threatened by possibility of institutional liability where institution itself is at fault).

277. See *supra* nn.190-201 and accompanying text (discussing qualified immunity under U.K. Act).

278. See *supra* nn.225-36 and accompanying text (discussing French position on liability of arbitral institutions and discussing *Cubic* case).

279. See *supra* nn.1-16 and accompanying text (discussing *Austern* case and U.S. Act's policy of promoting arbitration and holding that making institutions liable discourages arbitration).

280. See *supra* nn.258-62 and accompanying text (arguing absolute immunity will discourage arbitration, whereas qualified immunity will serve to foster arbitration).

281. See *supra* nn.258-62 and accompanying text (noting that absolute immunity will discourage parties from choosing arbitration, whereas qualified immunity will encourage arbitration).

3. Ensuring that Institutions Are Willing to Provide Arbitrations

Another potential argument against liability is that the institutions will not want to sponsor arbitrations if they are held liable.²⁸² This too is faulty. Doctors do not discontinue their profession because they may be liable for mistakes in performing their profession. Engineers do not cease to build structures because they would be held responsible for injuries resulting from their own fault. Institutions provide a service at a price, and will continue to do so, so long as it is profitable.²⁸³

4. The Effects of Liability

If liability increases the costs of institutions these costs may be passed on to the users.²⁸⁴ On the other hand, the institutions will be more careful in carrying out their duties. If institutions are held to fulfill the essence of their contract, an effective and efficient process, then the standard is low enough for institutions to easily avoid liability.²⁸⁵ Furthermore, institutions are in a better position to insure against the risk of liability, thus spreading and reducing their costs, as opposed to individuals who could not realistically insure against potential negligence on the part of institutions.²⁸⁶

B. A Legally Sound Approach

This Note argues for an approach similar to the approach shown in the *Cubic* case.²⁸⁷ This view is supported by (1) the contractual relationship between the parties and the institution, (2) ensuring the independence of the decision from liability by making the institution liable only for its non-judicial activities, and (3) the policy of bettering arbitration as a service for its clients.

282. See *supra* nn.118-21 and accompanying text (noting other professions where liability does not prevent the profession from continuing to prosper).

283. See *supra* nn.119, 121 and accompanying text (discussing profitability among other professions that are subject to liability).

284. See *supra* n.121 (noting minimal costs if any will be passed on to the users).

285. See *supra* nn.231-36 and accompanying text (discussing standard for liability under French law where institutions are held to fulfill the essence of their contract).

286. See *supra* n.266 and accompanying text (noting that institutions can better insure against liability).

287. See *supra* nn.225-36 and accompanying text (discussing *Cubic* case).

1. Contractual Obligations

Under this approach, the contract between the parties and the institution is given effect.²⁸⁸ They are assured that the institution will provide the services for which they pay.²⁸⁹ An institution has yet to have been held liable in France.²⁹⁰ The standard, low as it may be, presumably would have held the CBOE liable in *Austern* for invalidly impaneling a tribunal.²⁹¹ But this may have created fault even in England, arguably under the bad faith provision.²⁹² The CBOE must have been aware of its own rule with regard to the composition of the arbitral panel. Therefore, their decision to select all five arbitrators from the securities industry could be argued as having been a bad faith decision, thus incurring liability under the U.K. Act.²⁹³

2. Judicial Function

Do arbitral institutions serve solely a judicial function? Even the broadest construction of the phrase judicial function would leave some of their duties outside this interpretation.²⁹⁴ The courts should exclude from liability only the actions of arbitral institutions that directly touch an arbitrator's decision. And the institution should be responsible to provide the necessary means to achieve an effective and efficient arbitration.²⁹⁵

3. A Service for the Users

This Note began by discussing the decision between arbitra-

288. See *supra* nn.236-57 and accompanying text (discussing contractual nature of relationship).

289. See *supra* nn.51-66 and accompanying text (discussing varying reasons for choosing an institution). If a party chose an institution because of its particular rules and then the institution can disregard its own rules without incurring liability, the party's decision is being nullified. See *supra* nn.258-62 and accompanying text (arguing parties' decision is frustrated where institutions are allowed to ignore their own rules).

290. See *supra* n.236 (stating that institutions have yet to be found liable).

291. See *supra* nn.1-16 and accompanying text (discussing rules of the CBOE and their disregard of said rules).

292. See *supra* nn.191-201 and accompanying text (discussing bad faith provisions in U.K. Act).

293. See *supra* nn.191-201 and accompanying text (noting that bad faith acts under U.K. Act create liability).

294. See *supra* nn.250-57 and accompanying text (discussing relationship between the parties and the institution).

295. See *supra* nn.225-36 and accompanying text (discussing standard in *Cubic* case).

tion and traditional litigation.²⁹⁶ The arbitration process is designed as an alternate to traditional litigation and exists for the clients themselves.²⁹⁷ Institutions should be held liable in the interest of the users. Arbitration institutions will only continue to exist so long as the law retains sufficient hold over them to prevent any injustice.²⁹⁸ Granting arbitrators immunity is necessary to protect their impartiality in making their decision.²⁹⁹ Since the institution does not make the award, the same policy consideration does not exist, except where the institutions' actions are closely related to the decision. As previously argued, this liability will only act to bolster the growing reputation of arbitration as a reliable and just alternative to traditional litigation.³⁰⁰

C. *What about the Institutional Rules Excluding Liability?*

The rules of institutions excluding their own liability have yet to be tested by a court.³⁰¹ Each decision granting immunity was based on the national laws and not on the institutional rules.³⁰² Under a contractual approach it would seem appropriate to allow the parties to decide. Yet it is far from certain whether these clauses would be valid.³⁰³

CONCLUSION

Arbitration institutions should not be granted absolute immunity. They operate in a non-judicial manner and do not enjoy the "status" of an arbitrator. The contractual nature of the relationship between the parties and the arbitral institution

296. *See supra* nn.20-57 and accompanying text (discussing businesses' decisions in arbitrating versus litigating).

297. *See supra* nn.20-29 and accompanying text (noting arbitration as alternative to traditional litigation).

298. *See supra* n.23 and accompanying text (indicating necessity of maintaining control over arbitration to ensure its continued popularity).

299. *See supra* nn.103-05, 114-16, 142, 149-51 and accompanying text (discussing need for judicial independence from liability).

300. *See supra* nn.276-79 and accompanying text (discussing the effects of liability on institutions).

301. *See supra* n.267 and accompanying text (noting that no case exists where institution was released from liability due to exclusion clause).

302. *See supra* n.267 and accompanying text (noting that courts based decisions on national laws and not institutional rules).

303. *See supra* nn.267-69 (noting that it is unlikely that institutions could insulate themselves from liability in jurisdictions that held them liable).

should raise contractual duties and obligations. Failure to fulfill those duties and obligations should raise liability. For the benefit of the parties and ultimately the institutions, the institutions should be legally required to deliver reasonable administrative expectations under their agreement, in providing an effective and efficient arbitration process according to the applicable rules.

