AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

WHAT AN ARBITRATOR SHOULD KNOW

About Sanctions, Immunity and Malpractice Insurance

Recorded Webinar

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PRESENTATION TOPICS

- Sanctions -- Can arbitrators award punitive sanctions?
- Arbitral Immunity
- Arbitrator Malpractice Insurance

Sanctions

ARBITRATOR POWER

- Arbitrators have the power to sanction counsel and/or the parties for procedural abuse.
- It is an extraordinary remedy which should only be used in the most egregious of circumstances.
- Power to sanction is not automatic. It must arise from the parties' agreement, applicable statutes or any incorporated arbitration rules.

AAA Commercial Rule 23 which gives the Arbitrator complete power to control the proceeding states:

- “Arbitrator shall have the authority to issue any orders necessary to ... achieve a fair, efficient and economical resolution of the case, including, without limitation:

- ... (e) issuing any enforcement orders which the arbitrator is empowered to issue under applicable laws.”

ARBITRATOR POWER

- Sanctions can include, e g., dismissal of case for discovery abuse, excluding evidence or other submissions, drawing negative inference, imposing cost award (AAA Commercial Rule 23)(c-d), and, in many jurisdictions, punitive aspects.

- A recent case upholding punitive sanctions imposed by an arbitrator, *Seagate Technology, LLC v. Western Digital Corp.*, 854 NW2d 750 (Minn. Sup. Ct., Oct. 8. 2014). This case traveled from the arbitration to the trial court, to the appellate court, and finally to the highest court of that state.

SOFT DRINK EXAMPLE

- Claimant and Respondent enter into an agreement for production of a new soft drink in which Respondent agreed to exclusively produce and sell to Claimant.

- Claimant files a breach of contract claim and demands lost profits for sales it says it lost due to the Respondent's selling and use of the new soft drink formula or at least a reasonable royalty on sales.

- Claimant also demands all information about all the sales made based on the claimed soft drink. Specifically, Claimant demands "any and all documents, in any form existing, relating to, referring to, or concerning in any way all sales of soft drink Ola or similar products."

SOFT DRINK EXAMPLE

- The arbitration provision of the parties' agreement provides:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

SOFT DRINK EXAMPLE

- The arbitrator ordered that the documents must be submitted in four weeks but six weeks later, Respondent had not forwarded the requested documents.
- Counsel for Respondent stated his client has not provided the documents, but he would check with his client again.
- The arbitrator ordered that the documents must be submitted within two weeks but three weeks later, Respondent again did not forward the requested documents.
- At the next conference, Respondent's counsel reiterated that his client's earlier opposition to providing the documents and that his client will never provide them.

What can the arbitrator do?

SEAGATE TECHNOLOGY V. WESTERN DIGITAL, 854 NW2D 750 (MINN. SUP. CT., OCT. 8. 2014)

- Returning to *Seagate Technology, LLC v. Western Digital Corp.*, 854 NW2d 750 (Minn. Sup. Ct., Oct. 8. 2014).

- This case traveled from the arbitration to the trial court, to the appellate court, and finally to the highest court of that state.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL, 854 NW2D 750 (MINN. SUP. CT., OCT. 8. 2014)

- The case arose out of an employment contract between Dr. Sining Mao and his former employer, Seagate Technology. Seagate designs and manufactures hard drives for computers.

- In his role as senior director, Dr. Mao worked on technology involving tunneling magnetoresistance. If successful, his efforts would permit vastly increased storage capacity on a hard drive.

- While working for Seagate, Dr. Mao signed an employment agreement stating, among other requirements, that if he left Seagate, he would preserve the confidentiality of all trade secrets, return all company documents and not solicit any current Seagate employees for other employment using unfair or deceptive means.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – BACKGROUND

- The employment agreement contained an AAA arbitration provision giving broad authority to the arbitrator to "grant injunctions or other relief in such dispute or controversy".

- In 2006, Dr. Mao left Seagate and joined Seagate's competitor, Western Digital Corporation.

- Seagate filed an action against Western Digital and Dr. Mao seeking injunctive relief to prevent disclosure of its trade secrets and later amended its claim to allege actual misappropriation of trade secrets.

- Western Digital invoked the arbitration provision in Dr. Mao's employment agreement with Seagate. The district court stayed the lawsuit pending arbitration.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – PRE-HEARING

- Before the arbitration hearing, Seagate filed a motion for sanctions against Western and Dr. Mao alleging that they fabricated evidence.

- The alleged fabrication related to documents submitted by Western and Dr. Mao that they intended to use to prove that three of Seagate's claimed trade secrets were publicly disclosed before Mao left Seagate.

- Seagate sought an order barring Western Digital and Dr. Mao from presenting any defense to the trade secret claims.

- Both sides requested the arbitrator to defer considering the motion until after the hearing. The arbitrator granted the request.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – HEARING

- The arbitrator found in favor of Dr. Mao and Western Digital with respect to six of the nine trade secret claims, concluding that Seagate had failed to prove that the information reflected in these claims met the definition of a trade secret.

- Regarding the remaining three claims, the arbitrator concluded that Dr. Mao fabricated the evidence for purposes of the litigation while working at Western. The arbitrator concluded the actions of Mao and Western were an egregious form of litigation misconduct and warranted severe sanctions. The arbitrator, thus:

  (a) Barred Dr. Mao and Western Digital from presenting any defense or evidence disputing the validity or misappropriation of these trade secrets or that Western Digital is using these trade secrets in manufacturing its read head; and
  (b) Awarded Seagate compensatory damages of $525 million – essentially an award directly resulting from sanctions against Western Digital, along with prejudgment interest of nearly $96 million, and post-judgment interest with both Dr. Mao and Western Digital being jointly and severally liable for these amounts.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – MOTION TO VACATE

- Western Digital moved to vacate the award concerning the trade secrets clams relating to fabrication; while Seagate moved to confirm the entire award.

- The trial court issued an order confirming the award in part, vacating the award in part, and ordering a rehearing before a new arbitrator. *Seagate Tech., LLC v. W. Digital Corp.,* 834 N.W.2d 555, 567 (Minn. App. 2013).

- The court determined that:
  - the arbitrator's authority to impose sanctions was determined by the Mao–Seagate arbitration agreement and,
  - the agreement did not contain provisions that could be interpreted as authorizing sanctions beyond attorney fees.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – TRIAL COURT DECISION

- The trial court determined that even if sanctions had been permitted, the arbitrator misapplied sanctions law by not allowing Western Digital and Dr. Mao to rebut the presumption created by the fabricated evidence that their defense was without substantial foundation.

- Thus, the court concluded that the arbitrator exceeded his authority by issuing punitive sanctions against Western Digital and Dr. Mao, and so vacatur of the portion of the award impacted by the sanctions was appropriate under Minnesota law.

- Therefore, the trial court vacated the portion of the award regarding trade secrets 4-6, confirmed the award regarding the other claims, and ordered that the matter be reheard before a new arbitrator.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – 1ST APPEAL

- Seagate appealed, arguing that the trial court erred by:
  1) determining that the arbitrator had exceeded his authority by issuing sanctions and concluding that Western Digital and Mao had not waived their right to challenge the sanctions;
  2) reviewing the merits of the arbitrator's decision to impose sanctions;
  3) granting vacatur based on public policy; and
  4) ordering a rehearing before a new arbitrator.

- The Minnesota Court of Appeals reversed and reinstated the portions of the award that were vacated. Seagate Tech., LLC v. W. Digital Corp., 834 N.W.2d 555 (Minn. App. 2013).

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – 1ST APPEAL

- The court of appeals applied a method of waiver analysis from the Eighth Circuit which holds that there is a waiver if the party did not object during the arbitration and that party asked the arbitrator to use a power like the power they now challenge.

- Using this Eighth Circuit method, the court of appeals concluded that Western Digital and Dr. Mao had waived their right to challenge the arbitrator's ability to issue punitive sanctions.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – 1ST APPEAL

The court of appeals concluded:

1) that a broadly worded arbitration agreement confers inherent authority on the arbitrator to impose punitive sanctions;
2) the arbitrator's possible misapplication of sanctions law did not compel vacatur;
3) the arbitration award did not violate public policy; and
4) the trial court abused its discretion by directing a rehearing before a new arbitrator.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – APPEAL

- Differing law exists amongst various jurisdictions as to whether arbitrators have power to impose punitive sanctions as a matter of public policy:
  - New York – yes
  - Florida – yes
  - California – only if specific language exists in the arbitration agreement providing authority to do so.
  - Connecticut - yes

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – 2ND APPEAL

- Western Digital and Mao appealed to the state's highest court, the Minnesota Supreme Court. *Seagate Tech., LLC v. W. Digital Corp.*, 854 N.W.2d 750 (2014).

- The Court addressed whether:
  a) Western Digital and Mao waived their right to request vacatur, and
  b) whether the arbitrator imposed permissible sanctions on Western Digital and Mao.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – 2ND APPEAL

Rejecting the court of appeals' use of the Eighth Circuit method of waiver analysis, the Court held that Western Digital and Dr. Mao did not waive their right to challenge the arbitration award under Minnesota law.

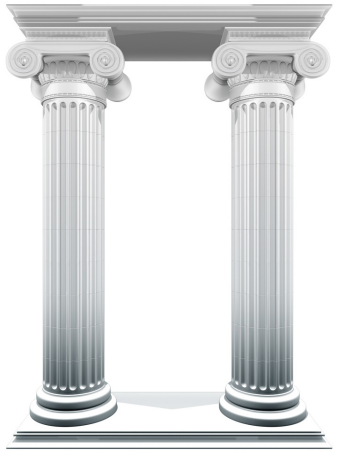
- Arbitrator’s ability to issue punitive sanctions is controlled by the arbitration agreement”. Parties are able to include or exclude use of punitive sanctions either through express provision or through incorporation of particular set of arbitration rules.
- While courts possess inherent judicial powers that enable them to impose punitive sanctions, arbitrators have no correlating inherent authority and receive their powers from either the arbitration agreement or the Legislature.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – 2ND APPEAL

- The arbitration agreement here gave the arbitrator the right to "grant injunctions or other relief in such dispute or controversy" and that the arbitration would be conducted in accordance with the rules then in effect of the AAA.

- While the AAA Rules do not specifically address punitive sanctions, they do authorize the arbitrators to "grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorneys' fees and costs (citing to 2009 AAA Employment Rule 39(d)).

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – COURT OPINION



- The Court held that “power to grant injunctions or other relief” or “any remedy or relief that would have been available to the parties had the matter been heard in court” includes the power to impose punitive sanctions as such sanctions are a form of “relief” or a “remedy” depending on the circumstances involved.

- Preclusion of evidence or any defense on an issue is a sanction used by the courts and has been applied to fabricated evidence. Arbitrators also have broad power to fashion appropriate remedies within the scope of the language of the arbitration agreement.

SEAGATE TECHNOLOGY V. WESTERN DIGITAL – COURT OPINION

Concluding that the arbitrator did not exceed his authority or refuse to hear material evidence, the Court affirmed the appellate court's ruling confirming the award.

The $525 million sanctions award stood.

Whenever you think sanctions are warranted, think it through very carefully before proceeding. Sometimes, you have no choice but to impose a sanction to deal with misconduct. Just be very careful in doing so and follow all applicable laws and institutional rules.

RETURN TO SOFT DRINK EXAMPLE - RECAP

- The arbitrator ordered that the documents must be submitted in four weeks but six weeks later, Respondent had not forwarded the requested documents.
- Counsel for Respondent stated his client has not provided the documents, but he would check with his client again.
- The arbitrator ordered that the documents must be submitted within two weeks but three weeks later, Respondent again did not forward the requested documents.
- At the next conference, Respondent's counsel reiterated that his client's earlier opposition to providing the documents and that his client will never provide them.

So, what can the Arbitrator do?

1) enter a default against the Respondent for the whole claim.

2) give the Respondent one last chance to respond and then enter default for the whole claim.

3) hold the Respondent in contempt and impose a daily fine until Respondent produces the documents.

ANSWER TO SOFT DRINK EXAMPLE

- Under the AAA Commercial Rules, arbitrators do not enter defaults “An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.” Rule 31.

- Unlike courts, arbitrators do not have contempt powers.

- Pursuant to AAA Commercial Rule 23, an arbitrator may draw adverse inferences, exclude evidence and other submissions, and/or make special allocations of costs or an interim award of costs arising from non-compliance of any order issued by the arbitrator. The arbitrator may also issue any other enforcement orders which the arbitrator is empowered to issue under applicable law.

Finally, the arbitrator should remind the parties that AAA Rule 58 provides:

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event, that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

ICDR ARBITRATOR SANCTIONS

ICDR – Article 21.7 (effective June 1, 2014) does not contain a sanctions provision like its AAA counterpart. However, Article 21.7 does give the arbitration tribunal some leeway to address inappropriate conduct. It provides:

- The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, make adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.

ICC Article 22 entitled “Conduct of the Arbitration” does not address sanctions but contains goals:

- The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

- In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, if they are not contrary to any agreement of the parties.

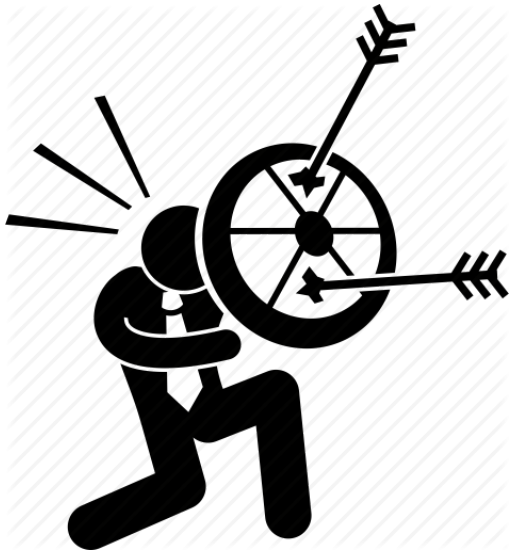
ICC Article 22 entitled "Conduct of the Arbitration" goals further adds:

- Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
- In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
- The parties undertake to comply with any order made by the arbitral tribunal.

IMPLICIT IN THESE RULES IS THE POWER OF THE TRIBUNAL TO SANCTION

Immunity

In order to protect the integrity of the arbitration process, arbitrators are generally found immune from civil liability arising from their role in an arbitration.



Many institutional arbitration rules provide for a limitation of an arbitrator's liability.

- Article 41, of the ICC Arbitration Rules provides that arbitrators shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent that such limitation of liability is prohibited by applicable law.

Courts have routinely held that arbitrators are immune from legal action with respect to acts performed by them in the exercise of their functions.

LANDMARK VENTURES INC. V COHEN AND INT'L CHAMBER OF COMMERCE, 63 F. SUPP.3D 343 (USDC SDNY, NOV. 26, 2014)

- A dispute arose when GE Healthcare invested $25 million in InSightec.
- Landmark entered into an agreement with InSightec to provide strategic banking and financial services. Landmark asserted that InSightec owed it a "minimum strategic partnership" fee of $450,000 and InSightec breached the agreement by refusing to pay the fee.
- The dispute turned on the proper interpretation of the agreement.

LANDMARK VENTURES INC. V COHEN AND INT'L CHAMBER OF COMMERCE – BACKGROUND

- In accordance with the arbitration provision in the agreement, Landmark submitted a demand for arbitration with the ICC.
- After the parties could not agree on who to nominate as the arbitrator, the ICC chose the arbitrator.
- The Arbitrator and the parties agreed on the terms of reference which, among other aspects, specified New York law as governing.

LANDMARK VENTURES INC. V COHEN AND INT'L CHAMBER OF COMMERCE – BACKGROUND

- Landmark lost the arbitration.
- The arbitrator issued an award of costs against Landmark for more than $200,000.

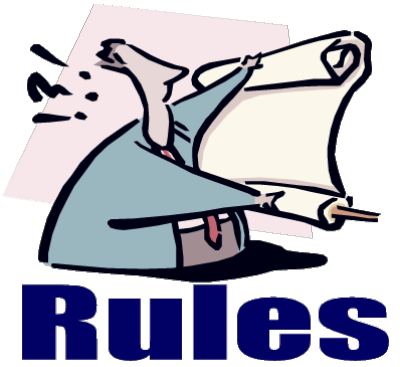
LANDMARK VENTURES INC. V COHEN AND INT'L CHAMBER OF COMMERCE – BACKGROUND

- In response, Landmark filed suit against the Arbitrator and the ICC alleging that the Arbitrator made procedural decisions that were unfair to Landmark particularly by limiting discovery requests, by failing to grant Landmark an extension of time to locate an expert witness while allowing InSightec to call an expert witness, and by allegedly considering an unauthorized brief by InSightec.

- Landmark also challenged the Arbitrator's decision to assess attorney's fees and costs against Landmark and asserted a cause of action against the ICC for "refusing to correct the Award and for assessing additional legal fees and costs against Landmark."

- Though the suit was filed in New York State Court, the defendants had it removed to Federal Court.

- The Court found that Landmark's claims against the Arbitrator were barred by Article 40 of the ICC Rules (which waived liability to the tribunal and the ICC), to which the parties agreed by adopting the ICC Rules.



Article 40: Waiver

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

LANDMARK VENTURES INC. V COHEN AND INT'L CHAMBER OF COMMERCE – COURT DECISION

- The Court noted that all the acts Landmark alleged were done in connection with the arbitration.
- Further, the Court noted that the ICC Rules granted the Arbitrator broad authority to make discovery rulings, manage case deadlines, award attorney's fees and interpret the contract at issue, and granted the ICC itself the authority to review and approve draft arbitration awards.
- The Court also cited to the doctrine of Common Law Immunity which barred Landmark's claim against the ICC: "under well-established law."

LANDMARK VENTURES INC. V COHEN AND INT'L CHAMBER OF COMMERCE – COURT DECISION

- The Court also cited to the doctrine of Common Law Immunity which barred Landmark's claim against the ICC: "under well-established Federal common law, arbitrators and sponsoring arbitration organizations have **absolute immunity for conduct in connection with an arbitration**."

- The Court noted that absolute immunity is the "uniform rule adopted by every Courts of appeals to have considered the issue, including the Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth US Circuit Courts of Appeal."

- The Court stated: "[s]uch absolute immunity for actions done in connection with arbitration is essential to protect the decision-maker from undue influence and [to] protect the decision-making process from reprisals by dissatisfied litigants."

LANDMARK VENTURES INC. V COHEN AND INT'L CHAMBER OF COMMERCE – COURT DECISION

- The Court found that Landmarks' suit against the Arbitrator and the ICC is a clear attempt to circumvent the exclusive means to challenge an arbitration award and precisely the type of action arbitral immunity was created to prevent.

- Because the **Court viewed Landmark's claim as frivolous**, **the Court imposed a $20,000 sanction against its attorney** to deter such conduct.

- The moral here: **US Courts will not tolerate lawsuits against arbitrators and institutions based on conduct in connection with an arbitration – conduct as to which arbitrators are absolutely immune – and will sanction counsel for prosecuting such cases**. (*CPR Alternatives*, Oct. 2015)

OWENS V. AMERICAN ARBITRATION ASSOCIATION, INC., 2016 WL 6818858 (8TH CIR. NOV. 18, 2016)

- A terminated CEO filed for arbitration against his former company.
- The AAA administrated the arbitration and a three-member panel was chosen.
- One of the arbitrators disclosed that he had been consulted in a different matter handled by the same firms that were representing the CEO and the company.
- No party objected to that arbitrator's continued involvement or asked follow-up questions.

OWENS V. AMERICAN ARBITRATION ASSOCIATION, INC., 2016 WL 6818858 (8TH CIR. NOV. 18, 2016)

- The panel issued an initial award of over $3 million to the former CEO.
- The company moved to remove the arbitrator who had made the disclosure, alleging the disclosure was incomplete.
- The AAA allowed the CEO to respond but did not inform any of the arbitrators that a motion had been made or allow the arbitrator whose disclosure was at issue to respond.
- The AAA eventually removed the arbitrator who made the disclosure, and the remaining two arbitrators issued a final award in favor of the CEO.

OWENS V. AMERICAN ARBITRATION ASSOCIATION, INC., 2016 WL 6818858 (8TH CIR. NOV. 18, 2016)

- The company moved to vacate the award in state court.
- A state court trial judge granted the motion.
- The CEO sued the AAA in Minnesota state court for “breach of contract, unjust enrichment, [and] tortious interference with contract.”
- The AAA removed the case to federal court, and the federal district court dismissed the claims based on arbitral immunity.

OWENS V. AMERICAN ARBITRATION ASSOCIATION, INC., 2016 WL 6818858 (8TH CIR. NOV. 18, 2016)

On appeal, the 8th Circuit held:

1) First, immunity can extend to "organizations that sponsor arbitrations" and all of the acts within the arbitral process.
2) Second, it cited a previous case in which the 8th Circuit concluded that "arbitral immunity bars claims against a sponsoring organization based on the appointment of a biased arbitrator."
3) Third, it extended that rule, concluding that the removal of arbitrators is also protected by arbitral immunity.

Many institutional arbitration rules provide for a limitation of an arbitrator's liability.

Austria

Austrian Supreme Court determined that, pursuant to Austrian law, an arbitrator can only be held liable for damages to one of the parties if the arbitrator's decision is overturned by a court and the party demonstrates that the arbitrator was grossly negligent.

Canada

Other countries, like Canada, have taken an even more expansive view of the immunity that arbitrators possess. Borrowing predominantly from English cases, Canadian courts have adopted the position that absent proof of bad faith or fraud, an arbitrator enjoys immunity from civil liability similar to that of a judge.

This immunity applies to contractual liability that may arise out of the arbitration agreement and to tort liability that may arise from the arbitrator's acts or omissions.

Canada (example)

An arbitration agreement required the arbitrator to provide his award no later than 60 days after the receipt of written submissions.

The arbitrator took nearly three years to submit the award.

One of the parties to the arbitration sought to overturn the award and a new hearing was ordered before a different arbitrator. The other party subsequently sued the first arbitrator for breach of the arbitration agreement.

The arbitrator claimed immunity from the lawsuit.

Canada

The Canadian Court held because an arbitrator is immune from both contractual and tort liability absent fraud or bad faith; and neither was established here, the claims against the arbitrator were dismissed.

INTERNATIONAL ARBITRATOR IMMUNITY – COMMON LAW VS. CIVIL LAW

Courts in common law countries feel exposing the arbitrator to liability is damaging and would undermine their impartiality and independence in decision–making which is essential for the rendering of an unbiased award.

In most common law countries, arbitrators are not liable for negligence if they are acting in their judicial capacities, i.e., Canada, New Zealand, Australia.

England does not impose liability on arbitrators for negligence or error of law unless they act in bad faith.

In contrast, civil law jurisdictions have adopted the contractual analysis that interprets the arbitrator's power to render an award is derived from the arbitration agreement.

Under the contractual analysis, arbitrators are not seen as the functional equivalent of judges, but they are treated as professionals subjected to professional liability similar to other professionals.

In France, arbitrators are fully liable based on their contractual relationship with the parties.

In Germany, arbitrators are liable for negligence and willful conduct. A similar approach is found in Austria, Finland and Chile.

INTERNATIONAL ARBITRATOR IMMUNITY – INSTITUTIONS

There is no uniform rule adopted by arbitration institutions regarding the liability of arbitrators.

- UNCITRAL (United Nation Commission on International Trade Law) has remained silent in the area of arbitral immunity.
- ICC – under Article 41 of the ICC Arbitration Rules, arbitrators are completely exempted from liability (except to the extent such limitation is prohibited by applicable law).
- LCIA – Article 3.1 of the London Court of International Arbitration exempts itself and its arbitrators from liability except in cases of deliberate wrongdoing.
- AAA/ICDR – Article 35 makes arbitrators absolutely immune from liability with the exception of deliberate wrongdoing.

INTERNATIONAL ARBITRATOR IMMUNITY– JUST WHEN YOU THOUGHT YOU WERE SAFE

Criminal exposure (threat of imprisonment in the Middle East is nothing new)

Qatar:

- A panel of 3 well-known international arbitrators active in the Middle East transferred a construction dispute from the Qatar International Centre for Conciliation and Arbitration to ad hoc proceeding in Tunisia. Ultimately, the panel rendered an award of Qatari Rial 93 Million (approx. US $ 25M) against a relative of the Qatari royal family.
- On Oct 31, 2018, the Lower Criminal court in Doha sentenced the arbitrators in absentia to 3 years imprisonment. A civil action is pending in Qatar seeking $ 250 Million in damages from the arbitrators.
  (A copy of the criminal court ruling in Arabic and English translation and 2 supporting articles appears in the webinar reference materials).

United Arab Emirates:

- In late 2016, an amendment was made to the UAE Federal Penal Code imposing criminal liability of arbitrators who displayed a lack of integrity and impartiality when issuing an award.
- This led prominent arbitrators to reject/resign from assignments in the region.
- After much lobbying by the international arbitral community, the amendment was very recently repealed.

In certain developing/third-world countries, if you anger the sovereign, it may bite back!

Malpractice Insurance

NEUTRAL MALPRACTICE INSURANCE

- In many jurisdictions, mediators cannot completely rely on immunity defenses and may need to look to other safeguards to protect their business assets -- liability insurance.

- By contrast, arbitrators (as are arbitral institutions) are statutorily immune from liability, often to the same extent judges are, but “nuisance” costs of suit (occurring within deductibles) can arise.

NEUTRAL MALPRACTICE INSURANCE

- Most ADR institutions do not have insurance coverage to address potential claims related to arbitrator liability or simply do not extend coverage to their neutrals.

- Some ADR institutions, such as British Columbia International Commercial Arbitration Center, require neutrals to carry malpractice insurance (with at least US $1 million in coverage). AAA-ICDR, ICC, CPR, WIPO, SIAC, HKIAC and others do not.

NEUTRAL MALPRACTICE INSURANCE

Regardless, it is up to individual arbitrators to determine whether they need coverage (whether they can assume any risk) and, if so, to obtain their own professional liability insurance policies for any liability resulting from their conduct as arbitrators.

NEUTRAL MALPRACTICE INSURANCE

- In Canada, the mandatory professional liability policies for legal professionals in Ontario and British Columbia specifically include additional coverage for individuals who act as either an arbitrator or a mediator.

- Individuals who carry a professional designation from one of the various provincial arbitration institutes are also required to carry professional liability insurance.

NEUTRAL MALPRACTICE INSURANCE

- Attorney malpractice policies will generally cover work as neutrals at no extra cost.
- Affordable coverage for neutrals exists through insurance offered by ABA DR Section and various carriers (e.g. Complete Equity Markets, Inc. in Lake Zurich, IL which also provides ABA DR coverage.)

Attorneys who act as arbitrators:

- Ultimate immunity from liability does not necessarily guarantee immunity from lawsuits which can be time-consuming and expensive to defend.
  - Immunity is limited to the claims arising out of decisional acts.

- As a result, legal professionals who act as arbitrators may want to review their professional liability insurance policies to ensure that they have appropriate coverage. The mandatory professional liability policies for legal professionals in Ontario and British Columbia specifically include additional coverage for individuals who act as either an arbitrator or a mediator.

A FEW ILLUSTRATIVE WAYS NEUTRALS COULD GET SUED

- Fail to Disclose a Conflict of Interest
- Breach a Specific Contractual Promise Regarding Procedural Structure or Outcome
- Engage in the Practice of Law
- Breach Confidentiality
- Advertise Falsely
- Commit Fraud

Ultimately, a party that just doesn't like an award may attempt to use litigation to vacate that award so that party gets "another shot" – while displeasure is clearly not a legitimate basis for vacature, it's the reality we face!

QUESTIONS

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AMERICAN ARBITRATION ASSOCIATION®

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®