Worshipful Company of Arbitrators Lecture

The proper limits of arbitrators' immunity

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The concept of arbitrators' immunity is widely accepted in both civil and common law jurisdictions, although jurisdictions differ as to the precise extent of the immunity. In common law jurisdictions at least, arbitrators' immunity has been said to derive from the immunity accorded to judges. In *Bremer Schiffban v South Indian Shipping Corp Ltd* [1981] AC 999, Donaldson J said: "courts and arbitrators are in the same business, namely the administration of justice". He added: "the only difference is that the courts are in the public and arbitrators are in the private sector of the industry".

Judicial immunity in common law jurisdictions dates back to at least to two early 17th English cases, *Flood v Barker* 77 Eng Rep 1305 (1607) and *The Marshalsea* 77 Eng Rep 1027 (1612) in which Lord Coke announced the rule of judicial immunity, stated its purposes and set out its limitations.

The UN Basic Principles on the Independence of the Judiciary 1985 state that judges should enjoy personal immunity from civil suits for damages for improper acts or omissions in the exercise of their judicial functions. The rationale for this was explained by Lord Bridge in *McC v Mullan* [1984] 3 All ER 908. 916D. He said: "If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that 999 honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction".

In other words, it is in the public interest that judges should be able to go about their business free from the risk of harassment. Litigation often brings the worst out in people. Those who lose their cases may be tempted to find a scapegoat. An obvious potential target may be the judge who rejected their

case. A judge is expected to be true to his or her oath of deciding disputes fearlessly and without fear of being sued by the losing party. The judicial oath in our country requires the judge to act "without fear or favour, affection or ill-will". The independence of the judiciary is one of the pillars on which the Rule of Law rests. Nothing should be done to place that independence in jeopardy. Hence judicial immunity.

So far as I am aware, judges enjoy absolute immunity for any acts or omissions in the exercise of their judicial functions however egregious they may be. Thus, even if a judge acts in bad faith or grossly negligently or unfairly, he cannot be sued regardless of how much financial or other loss he may have caused. The State may choose to compensate the victim of such behaviour in certain circumstances, but the individual judge is never called upon to do so. That is certainly the position in our country. People who litigate in our courts take their chance on the competence and integrity of the judge who is to determine their dispute. They have no say in the choice of the individual judge. That judge can cause one or both of the litigants considerable damage. But the risk of that happening is a price that is thought to be worth paying in most if not all democratic societies. There is no pressure in this country to deprive judges of their immunity. As a matter of policy, it is thought that it is sufficient to deal with bad decisions by having a suitable system for appeals and by the State taking disciplinary measures reprimanding or even dismissing the occasional bad judge. On the whole, the system is believed to work well.

But should arbitrators be treated by the law in the same way as judges? This is a question that has been considered from time to time in different jurisdictions and on which there are divergences of view and practice.

The issue of arbitrators' immunity was considered by the DAC Committee chaired initially by Lord Saville. In its February 1996 report, the committee said that, although the general view seemed to be that arbitrators have some immunity under the present law, this was not entirely free from doubt. So far as I am aware, there is no decision of our courts which has decided this issue. But the committee was firmly of the view that arbitrators should have a degree of immunity (note, not immunity in all circumstances), and that most (though not all) of the responses to the committee expressed the same view. At para 132 of the report, the committee stated:

> " The reasons for providing immunity are the same as those that apply to judges in our courts. Arbitration and litigation share this in common, that both provide a means of dispute resolution which depends upon a binding decision by an impartial third party. It is generally considered that an immunity is necessary to enable that third party properly to perform an impartial decision-making function. Furthermore, we feel strongly that unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined. The prospect of a losing party attempting to re-arbitrate the issues on the basis that a competent arbitrator would have decided them in favour of that party is one that we would view with dismay. The Bill provides in our view adequate safeguards to deal with cases where the arbitral process has gone wrong."

So two main reasons were advanced for maintaining the immunity. First, immunity is necessary to secure the independence and impartiality of arbitrators. Secondly, it is necessary in order to achieve finality. In this lecture, I propose to question both of these reasons. That may be a brave thing to do before an audience of arbitrators. Let's see how I get on.

As we have already seen, Donaldson J had earlier rather played down the differences between judges and arbitrators saying that they were both in the business of the administration of justice and that the only difference was that judges operate in the public sector and arbitrators operate in the private sector. On an important point of detail, it is worth pointing out that some arbitrations are concerned with disputes in which there is a real public interest. I have in mind the many arbitrations that now deal with disputes to which at least one party is a public body and which concern a matter of public interest. There is a real sense in which arbitrators in such cases can be said to be operating in the public sector. In this respect, the world has changed considerably since Donaldson J made his remarks.

But more fundamentally, there surely are real differences between the position of an arbitrator and that of a judge. First, the power of a judge is derived from his appointment by the State to a public office which he or she discharges in seeking to uphold the Rule of Law for the benefit of the State. The Rule of Law is one of the hallmarks of a democratic society. If members of society do not

have confidence that their disputes will be resolved fairly and impartially by independent judges, there is a danger that they will take the law into their own hands. The judge is accountable to the State and not to the parties whose dispute he or she is determining. By contrast, the authority of an arbitrator is derived from the agreement of the parties. Arbitrators are accountable to the parties and, where applicable, to arbitral institutions. They are not accountable to the State. This distinction is of crucial importance. I am therefore unable to agree with Donaldson J that it can be brushed aside on the basis that both judges and arbitrators are concerned with the administration of justice. Arbitrators are chosen by the parties or, in default of agreement, by the institutions that the parties have chosen to make the appointment. Although the parties may choose the court in which to issue their proceedings, they have no say in the choice of the judge to try their case. They also pay for the services of the arbitrator. The State pays the judge. This fundamental difference is of sufficient importance for us to view with caution the argument that the existence of judicial immunity of itself justifies immunity for arbitrators.

There is another important difference between the status and position of judges and arbitrators. In most jurisdictions, an arbitrator's decision cannot be the subject of an appeal or the scope for appeal is very limited. On the other hand, in most jurisdictions there is a right of appeal against a decision of a judge. England and Wales is unusual in requiring a party who wishes to appeal against a judicial decision to obtain permission to appeal in most cases and in making it a condition of permission being granted that the party shows that the appeal has real prospects of success. But even here, it is far easier to appeal the decision of a judge than the decision of an arbitrator. The result of this is that the consequences of a bad decision by an arbitrator may well be more serious for the losing party than the consequences of a bad decision by a judge. For this reason alone, it may be said that the case for conferring immunity on an arbitrator is less compelling than it is for conferring such immunity on a judge.

Redfern and *Hunter* in their seminal book on *International Arbitration* (6th ed) p 324 advance further arguments in favour of according immunity to arbitrators, namely that: (i) immunity helps to ensure the finality of an award; (ii) fewer skilled persons would be willing to act if they were to run the risk of incurring liability; (iii) arbitrators have no interest in the outcome of the dispute and should not be compelled to become parties to it; and (iv) it ensures the

protection of the public in those cases in which judicial functions are truly exercised: see *Redfern and Hunter on International Arbitration* (6th ed) p 324.

I suggest that these arguments are less compelling than they might appear at first sight to be. As regards the finality point, it is difficult to see how according immunity to an arbitrator can have any effect on the finality of an award. An award is final unless it is successfully appealed for error or set aside for some other reason. The fact that an arbitrator may be liable for negligence in relation to an award cannot of itself be a ground for setting it aside. It cannot, therefore, affect the finality of the award. The award would stand even if a court were subsequently to hold that the arbitrator acted negligently in the conduct of the arbitral proceedings and was liable to pay damages. This does not, therefore, seem to be a good reason for according immunity to an arbitrator. I accept, of course, that in our jurisdiction, if the putative negligence amounted to serious irregularity within the meaning of section 68 of the 1996 Act, there would be grounds for setting aside the award. But even in such a case, the award would be set aside on grounds of serious irregularity, not because the arbitrator would or might be liable in negligence.

Perhaps the real point is not that immunity helps to ensure the finality of an award, but that it may enable the parties to draw a line under their dispute and get on with their lives. If the losing party is permitted to bring proceedings against the arbitrator, clearly the dispute is not over for that party. Nor is it over for the arbitrator. It may be necessary to examine the way in which the arbitrator conducted the arbitration. It may also be necessary for the losing party to prove what the outcome of the arbitration would have been if the arbitrator had conducted it properly. This may involve lengthy and costly proceedings. Finality would be sacrificed by the losing party if he chose to make a claim against the arbitrator. But it may be said that this would be his choice.

What about the position of the successful party? If the arbitrator does not enjoy immunity from suit, the successful party will not be at risk of litigating or arbitrating the dispute for a second time, since he will not be party to any proceedings against the arbitrator. I do, however, accept that he may be at risk of having to give evidence in proceedings brought by the losing party against the arbitrator. But is that risk so damaging of an arbitral system to require

arbitrators to be given immunity? Opinions will differ. At the very least, surely that is open to question.

As regards the second point made by Redfern and Hunter, I am very sceptical about the argument that the possibility of being sued would deter potential arbitrators from accepting appointments. Similar arguments have been advanced in other contexts. Expert witnesses are a good example. In *Jones v Kaney* [2011] 2 AC 298, the Supreme Court was asked to decide whether to abolish the rule that a person engaged by a client to act as an expert witness was immune from liability to the client for the negligent performance of his contractual duties. One of the arguments advanced in favour of retaining the immunity was that professional persons would be deterred from acting as expert witnesses if they knew that they were at risk of being sued for negligence by a dissatisfied client. The court was unimpressed with this argument. It was based on a rather pessimistic view about the professionalism of experts.

The court said that it was unrealistic to look for hard evidence in this area. Whether professional persons are willing to give expert evidence depends on many factors. The court was not persuaded that the possibility of being sued for negligence was likely to be a significant factor in many cases. Negligence was not easy to prove against an expert witness. Professional persons engage in many activities where there is likely to be a more realistic possibility of being sued than in the giving of expert evidence. The position of obstetricians comes to mind. In the US, it is notorious that obstetricians are vulnerable to law suits for births that go wrong. But that fact does not deter young doctors from becoming obstetricians. They want to practise in that field because they find it interesting and rewarding and that is what they want to do. They take out professional indemnity insurance. I think the same may be said about arbitrators. It would not be easy to prove negligence against an arbitrator. It is probably far easier to prove negligence against other professional persons. A person contemplating accepting an appointment as arbitrator who was weighing up the risk of being sued would (or should) know this. But I do not believe that professional persons think in this way. It is far more likely that, even if there was no immunity, a would-be arbitrator would not be deterred from taking an appointment for that reason. He or she would know that the work is (usually) interesting; and it is well paid.

Nor am I impressed by the third argument, namely that, if arbitrators could be sued, they would have an interest in the outcome of the dispute. It is true that arbitrators have no interest in the outcome of the dispute which they have been appointed to determine. But I do not understand in what sense they would have an interest in the outcome of the arbitration or be compelled to become parties

to the dispute if they were at risk of being sued. Experts usually have no interest in the outcome of the dispute on which they are advising their clients, but that does not mean that they enjoy immunity from liability if their performance falls short of the standard of care reasonably to be expected of them. Perhaps a better way of putting the point is to say that the independence and impartiality of arbitrators may be put at risk if they know that they may be sued by the unsuccessful party. But it is difficult to see how this argument would work in practice because in most cases the arbitrator has to come down in favour of one party. There is usually likely to be a losing party. So how could the fact that an arbitrator was potentially liable in negligence influence his or her decision? Anyway, this argument sets little store by the professionalism and integrity of arbitrators. It is reminiscent of the "divided loyalty" argument that was deployed in the case of *Hall (Arthur JS) & Co Ltd v Simons* [2002] 1 AC 615 in an unsuccessful attempt to resist the imposition of liability for negligence on advocates. The argument was that it was unreasonable to impose such liability because advocates owed an overriding duty not to mislead the court. It was said that a duty to the client would conflict with the duty to the court. This argument was firmly rejected by the House of Lords.

This leaves the fourth argument, which if I understand it correctly, is no more than an assertion of the equivalence of the position of arbitrators and judges.

So I come back to where I started. The traditional justification of the immunity of arbitrators in England and Wales has been that an arbitrator fulfils a judicial or at least a quasi-judicial function and should for that reason be protected in more or less the same way as a judge. It is worth looking at what was said by the House of Lords in two important cases decided in the 1970s. In *Sutcliffe v Thakrah* [1974] AC 727, the issue was whether an architect could be held liable in negligence for the issue of interim certificates under a building contract. The House of Lords held that, in issuing an interim certificate, an architect did not act in an arbitral capacity. He was under a duty to act fairly in making his valuation and was liable in negligence at the suit of the building owner.

Lord Reid referred to what he described as the "undoubted" rule based on public policy that a judge is not liable in damages for negligence in performing his judicial duties. He also referred to the fact that this "firmly established" rule had been applied to arbitrators for a very long time and could not now be questioned. He thought that the rule was "right", but it could hardly be said to be "self-evident". The reason for it derived in part from the peculiar nature of

duties of a judicial character. He said that a wrong but honest decision on material submitted for adjudication was rarely due to negligence. In most cases, it was due to an error of judgment. The losing party may often think that the decision had been given negligently. The immunity of arbitrators must be based on the belief that, without such immunity, arbitrators would be harassed by actions which would have little chance of success. He added that the immunity may also be based on the thought that the arbitrator is more likely to be sued if the decision goes one way rather than the other. So Lord Reid did not give arbitral immunity a ringing endorsement. I suggest that the fact that negligence claims would be unlikely to succeed on the merits in most cases is not a good reason for saying that there should be immunity even for gross negligence. The real justification given was the familiar wish to protect arbitrators from harassment and interference with their independence.

Lord Salmon said that the immunity of judges, arbitrators, barristers, solicitors, witnesses and jurors was based on the public interest that they should all perform their functions free from fear that losing parties might subsequently harass them with litigation. This immunity was vital for the efficient and speedy administration of justice. He added that, since arbitrators are in much the same position as judges, the law had for generations recognised that they too should be accorded the same immunity. Well, the position of barristers and solicitors in this country has changed fundamentally since then.

In *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, the House of Lords had to consider whether auditors who had been instructed to value shares "as experts and not as arbitrators" and whose valuation was to be final and binding on the parties were immune from liability for negligence in respect of their valuation. The House held that they were not immune from liability. They said that the immunity of judges and arbitrators was exceptional to the general rule of liability for negligence and that there was no reason of public policy making it necessary to treat a "mutual valuer" as an exception to that rule.

Their lordships had some interesting things to say about the position of arbitrators. In relation to the long-established immunity given to arbitrators, it was said that "where a third party undertakes the role of deciding as between two other parties a question, the determination of which requires the third party to hold the scales fairly between the opposing interests of the two parties, the

third party is immune from an action in negligence in respect of anything done in that role".

The House had no difficulty in deciding that the functions performed by the auditors were distinguishable from those performed by a judge or arbitrator and that they were in principle liable like any other professional person.

Lord Kilbrandon agreed with the result. He alone questioned the justification for arbitrators' immunity. He pointed out that an arbitrator is a person selected by the parties for his expertise, whether technical or intellectual, and that he pledges his skill in its exercise. He did not think that, if it were established by law that an arbitrator did not enjoy immunity from suit, "the consequences would be dramatic or even noticeable". And arbitrators could always seek the *agreement* of the parties that they be given immunity. He said that he found it difficult to discern any sensible reason, on the grounds of public policy or otherwise, why an arbitrator should enjoy a judicial immunity. But it was unnecessary to decide the point.

My own view is that the differences between judges and arbitrators are sufficiently significant to enable one to say that one cannot justify according immunity to arbitrators simply because judges enjoy immunity. The immunity of arbitrators requires independent justification. The fact that the analogy between judges and arbitrators is far from exact was recognised by Parliament when enacting the Arbitration Act 1996. Section 29(1) provides that an arbitrator is not liable for anything done or omitted to be done as arbitrator "unless the act or omission is shown to have been in bad faith". By contrast, a judge is immune from suit even if he or she acts in bad faith.

In drawing the line here in section 29(1), Parliament accepted the recommendation of the DAC report. At paragraph 134 of the report, the committee said: "The immunity does not, of course, extend to cases where it is shown that the arbitrator has acted in bad faith". The committee did not explain why this was "of course" so obviously the correct place to draw the line. The only clues to its thinking lie in the statement that (i) the future section 29(1) would provide adequate safeguards to deal with cases where the arbitral process had gone wrong (paragraph 132); and (ii) our law was well acquainted with the

expression "bad faith" and it was a test that would be unlikely to be difficult to apply (paragraph 134). But in my view, neither of these factors justified the solution proposed in the report and adopted by Parliament in section 29(1) of the Act. The fact that the Act would provide adequate safeguards to deal with cases where the arbitral process had gone wrong would surely be a good reason for affording to arbitrators the same blanket immunity as that enjoyed by judges. It does not explain why arbitrators should not enjoy such immunity in cases of bad faith. As for the second point, even if the concept of "bad faith" is well understood and is easy to apply, that can hardly be a sufficient rationale for a delineation of the scope of the immunity.

It is, therefore, difficult to see why the DAC committee and Parliament decided to draw the line where it did. It looks very much like a compromise between on the one hand treating arbitrators like judges and according them total immunity and on the other hand denying them immunity altogether. In other words, there are similarities between arbitrators and judges, but there are differences too. If some mid-point had to be found between the two extremes of absolute immunity and no immunity whatsoever, then "bad faith" had the attraction that it was a compromise solution and it was a concept that was well understood and thought to be easy to apply. There is force in saying that bad faith is categorically different from and worse than negligence, even gross negligence. It has connotations of immorality rather than incompetence. Most of us would agree that bad faith is more reprehensible than incompetence, even gross incompetence. But the party who has suffered harm as a result of the act or omission of the arbitrator might not be too impressed by this distinction. And surely recklessness or gross negligence are more reprehensible than mere negligence. The importance of that distinction is well understood in our criminal law where recklessness is a relevant mental element or *mens rea* for criminal liability and gross negligence manslaughter is a common law criminal offence; but (with one or two exceptions) mere negligence is not sufficient to found criminal liability.

I recognise that to question the immunity of arbitrators is hardly a way to win friends in an audience of arbitrators. It might be said to be playing with fire for me to do so when I am seeking to make friends and build up an arbitration practice! But I think it is worth reconsidering the issue. In this country there has been a tendency to reject immunities in our judge-made common law. The principle that the law should deliver a remedy for a wrong has been said by

some to be question-begging. But I think we all know what it means. If one person causes loss to another by acts or omissions which fall short of the standard to be expected of a person performing the function in question, there surely needs to a compelling justification for saying that the victim of the wrongdoing should not be compensated for the loss he or she has suffered. Take the history of the rise and fall of the immunity of advocates. For many years, advocates enjoyed blanket immunity for everything they did in connection with litigation. This was based on the public policy ground that the administration of justice required that an advocate should be able to carry out the duty he owed to the court fearlessly and independently, and that actions for negligence against advocates would make retrying the original actions inevitable and so prolong litigation, contrary to the public interest. This absolute immunity was re-asserted by the House of Lords in the late 1960s in *Rondel v Worsley* [1969] 1 AC 191. In justifying the retention of the immunity, their lordships placed much emphasis on the importance of achieving finality in litigation. They said that, if advocates could be sued for negligence by a dissatisfied client, the issues would have to be relitigated and that was a very bad thing. The twin reasons of the danger of undermining the independence of the advocate and the risk of jeopardising finality carried the day. It is remarkable how striking the resemblance is between these reasons and the principal reasons given in the DAC report for recommending that the immunity of arbitrators should be substantially retained.

But in *Saif Ali v Sydney Mitchell* [1980] AC 198, the immunity was limited (again on grounds of public policy) to what advocates did in court and to work which could fairly be said to affect the way the case would be conducted if it came to a hearing. The immunity was finally swept away altogether in *Hall v Simons.* The House of Lords decided that the policy grounds previously relied on were no longer sufficient to justify a departure from the general rule that, where there was a wrong, there should be a remedy.

I mention the advocate immunity saga because it shows how attitudes to the same issue can change over time. Nothing had really changed between the date when *Rondel v Worsley* had been decided and the date of the decision in *Hall v Simons.* It was not as if there was available to the later constitution of the Appellate Committee of the House of Lords evidence or other material that had not been available to the earlier constitution. It was simply that the later constitution was willing to be bolder than its predecessor and considered that the balance between the competing pubic interests fell to be struck differently.

I sense that in our jurisdiction blanket immunities are viewed less favourably than they once were. That is certainly the position in the European Court of Human Rights.

The immunity enjoyed by arbitrators is statutory and, so far as I am aware, there is no pressure for it to be abrogated. But if it were left to our judges to decide as a matter of common law whether to retain the immunity (which was originally a creature of the common law), I think it is not inconceivable that they would decide to get rid of it. For the reasons I have already given, the argument based on the analogy between judges and arbitrators is not convincing. It seems that Parliament accepted that the analogy was not exact when enacting section 29(1).

It is worth considering the position in other jurisdictions. I leave aside those cases where the issue of the arbitrator's immunity is provided for by the terms of the appointment. If they wish to do so, the parties can of course agree that their arbitrators will enjoy absolute immunity. In some jurisdictions, arbitrators are accorded absolute immunity equivalent to that enjoyed by judges. In others, arbitrators are given various forms of qualified immunity. It seems that the extent of the potential liability of an arbitrator in civil law jurisdictions is wider than it is in common law jurisdictions. In common law countries, the major exception is immunity for bad faith and for losses caused by the resignation of the arbitrator. The scope of liability in civil law countries is wider. In some civil law jurisdictions, an arbitrator may be liable for failure to act with diligence, erroneous application of the law, gross negligence, wilful misconduct and denial of justice.

It is noteworthy that the UNCITRAL Model Law on International Commercial Arbitration is silent on the question of immunity of an arbitrator. The UNCITRAL Working Group agreed that the question of the liability of an arbitrator could not appropriately be dealt with in a model law on international commercial arbitration nor was it desirable to attempt the preparation of a code of ethics for arbitrators. The UNCITRAL Arbitration rules 1976 contain no provisions on the immunity of an arbitrator. However, during the process of revising those rules, it was generally agreed that any provision that might be introduced to exonerate arbitrators from liability should be aimed at reinforcing the independence of arbitrators. It was recognised that arbitrators should be protected from the threats of potentially large claims from dissatisfied parties.

However, such protective provision should not result or appear to result in total impunity for the consequences of any personal wrongdoing on the part of arbitrators.

Thus, the UNCITRAL Arbitration Rules 2010 provide:

"Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration."

It is not obvious why the line is drawn differently in different jurisdictions. The fact that there are different responses to the issue in different jurisdictions suggests that (unlike the question of judicial immunity which seems to be relatively uncontroversial), the question of arbitrators' immunity is controversial and regarded as difficult. I have endeavoured to show that there is no single compelling rationale for according immunity to arbitrators; and that the reasons advanced by those for whom the case for immunity is clear are far from self-evidently correct. That was certainly the view expressed by that great judge and master of the common law, Lord Reid, in *Sutcliffe v Thakrah.*

It may be that jurisdictions which are keen to build up international commercial centres see the according of absolute or near absolute immunity to arbitrators as a means of attracting arbitrators to work there. But of greater importance is what the users want. That is probably difficult to determine. I suspect that many users want to have their disputes resolved by apparently competent independent arbitrators and then to move on. But not at any price. So at the end of the day, although for the reasons I have given, it is not difficult to criticise the arguments advanced in support of according arbitrators a degree of immunity, I think that there is much to be said for a compromise between absolute immunity and no immunity at all. Quite where the compromise is or should be struck is not susceptible of elaborate argument. It is a striking feature of the world of international arbitration that it has been struck so differently in so many different jurisdictions.

There seems to be no pressure for changing the situation in this country at the present time. Since Parliamentary time is at a premium, there is no realistic possibility that section 29(1) of the Act will be changed in the foreseeable

future. The main thrust of what I have tried to say is that the issue of arbitrators' immunity is a difficult one. I believe that it is worth asking from time to time whether the balance between absolute immunity and no immunity whatsoever it has been struck in the right place.