

CHAPTER 3

ARBITRATORS' IMMUNITY FROM DAMAGE  
CLAIMS

ALVIN B. RUBIN\*

Arbitrators all will be pleased with the results of my research.  
It can be summed up quickly:

Arbitrators may act with impunity  
For theirs is a favored community  
Though losers may whine  
And even malign  
Judges will guard your immunity.

Now let me tell you why you can be so confident of your  
imperviousness.

A little over a century ago, a lawyer named Joseph H. Bradley represented one John H. Surratt, who was tried for the murder of President Lincoln. The trial was heated, and the jury was unable to reach a verdict. After the jury had been discharged Bradley reproached the judge, George Fisher, for what he considered the judge's insults to him during the trial. Judge Fisher disclaimed any intention of insult and assured Bradley of his respect. To quote the Court, "Mr. Bradley, so far from accepting this explanation or disclaimer, threatened the judge with personal chastisement." Judge Fisher thereafter issued an order striking Bradley's name from the roll of attorneys admitted to practice. Bradley promptly sued the judge for damages. The Supreme Court held in *Bradley v. Fisher* that judges are absolutely immune to such damage actions. Judges, the Court stated, "are not liable to civil damages for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to

---

\*Circuit Judge, United States Court of Appeals for the Fifth Circuit, Baton Rouge, Louisiana.

have been done maliciously and corruptly.”<sup>1</sup> This pronouncement, we can rest assured, was not based on solicitude for the judicial fraternity but on concern for the public weal: a judicial officer must be “free to act upon his own convictions, without apprehension of personal consequences to himself.”<sup>2</sup>

In a subsequent Supreme Court case,<sup>3</sup> a person who had been convicted by a police justice for violating a statute later held unconstitutional invoked the Civil Rights Act, Section 1983, in seeking damages from the justice. The Court held the police justice absolutely immune, explaining:

It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feeling in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.<sup>4</sup>

Accordingly, a judge is entitled to immunity even when he is accused of acting maliciously or corruptly, and this immunity shields all of his acts except those performed in “the clear absence of all jurisdiction over the subject matter.”<sup>5</sup>

The courts have created a similar kind of immunity, called quasi-immunity, to protect various other public officials for acts performed in their official capacities. In *Butz v. Economou*,<sup>6</sup> a damage suit against a federal official for alleged wrongful enforcement of the Commodities Exchange Act, the Supreme Court distinguished other public officials from judges and held them entitled only to qualified immunity.<sup>7</sup> It also stated, however, that those officials whose powers and purpose are “functionally comparable” to a judge's have absolute immunity.<sup>8</sup>

We come now to arbitrators. They are literally birds of a different feather, for, though they decide, they do not wear robes or nest in courtrooms. They are neither public officials nor judges but, because they perform a quasi-judicial function, they

---

<sup>1</sup>*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

<sup>2</sup>*Id.* at 347.

<sup>3</sup>*Pierson v. Ray*, 386 U.S. 547, (1967).

<sup>4</sup>*Id.* at 554.

<sup>5</sup>*Bradley v. Fisher*, *supra* note 1 at 351; *Jones v. Brown*, 54 Iowa 74, 78, 6 N.W. 140, 142-143 (1880); see also *Automobile Workers v. Greyhound Lines, Inc.*, 701 F.2d 1181 (6th Cir. 1983).

<sup>6</sup>438 U.S. 478 (1978).

<sup>7</sup>*Id.* at 511-512.

<sup>8</sup>*Id.* at 513, 515.

have been held to be "clothed with an immunity [that is] analogous to judicial immunity."<sup>9</sup> Although the cloak is called "arbitral" rather than "judicial," its protection is equally enveloping. An arbitrator may not be brought to trial, let alone cast in judgment, on a claim for damages, even when the charge is fraud, collusion with the parties, error of law—or plain stupidity.

Unlike many judicial doctrines, arbitral immunity did not require much time to evolve. Adopting the rule of judicial immunity, and relying on a few state court decisions, federal courts began to protect arbitrators as soon as disgruntled parties began to sue. In 1962, the Ninth Circuit considered a damage suit against architects who, in accordance with a practice common in the construction industry, had not only designed the building but were named in the contract between the owner and the builder as arbitrators of disputes that might arise between them.<sup>10</sup> The owner, acting on advice of the architects, terminated the builder's contract and refused to pay him what he claimed was due. The builder sued the owner and joined a claim against the architects for "willfully and maliciously interfering with his performance of the contracts."<sup>11</sup> He also alleged that the architects had defamed him because they had told the owner that he had failed to substantially perform his contract. The court found that, under the contract, the architects were quasi-arbitrators and, insofar as they were acting in that capacity, they were immune to suit whether their actions were intentional, negligent, or merely erroneous. It explained:

If [the arbitrator's] decisions can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions will be governed more by the fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide. It is for this reason that architects, acting as quasi-arbitrators, have been held immune from suit."<sup>12</sup>

The Ninth Circuit further said, in dicta, that it would not extend the architects' immunity to fraudulent acts or acts done with willful or malicious intent. It reasoned that the "dual posi-

---

<sup>9</sup>*Cahn v. Garment Workers*, 311 F.2d 113, 114–115, 51 LRRM 2186 (3d Cir. 1962).

<sup>10</sup>*Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962).

<sup>11</sup>*Id.* at 108.

<sup>12</sup>*Id.* at 117 (citing *Wilder v. Crook*, 250 Ala. 424, 34 So.2d 832, 834 (1948); *Bever v. Brown*, 56 Iowa 565, 9 N.W. 911 (1881); *Jones v. Brown*, 54 Iowa 74, 6 N.W. 140 (1880); *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 50 Am. Rep. 323 (1884)).

tion of the architect, as agent of the owner and quasi-arbitrator, is an anomalous one. It differentiates him, we think, from the judge or other public official who acts judicially or quasi-judicially, and from the ordinary impartial arbitrator."<sup>13</sup> Arbitrators who, like most of you, are distinguished because you are "ordinary" are better protected.

The same year, in *Cahn v. Garment Workers*, the Third Circuit accorded immunity from antitrust claims to an arbitrator.<sup>14</sup> And immunity has since been routinely granted to arbitrators of labor-management disputes.<sup>15</sup> Arbitrators have also been held immune to claims arising under the Civil Rights Act,<sup>16</sup> when acting to resolve claims made under the Employee Retirement Income Security Act of 1974 (ERISA),<sup>17</sup> and when acting pursuant to the rules and regulations regarding the National Association of Securities Dealers.<sup>18</sup>

The Supreme Court held just this term that whether a dispute is arbitrable is a judicial decision, not one to be left to the arbitrator, unless that question is itself made subject to arbitration.<sup>19</sup> But that decision should not alter the Seventh Circuit ruling in *Tamari v. Conrad*,<sup>20</sup> which held that arbitrators are immune from suit with respect to questions involving their authority to resolve a dispute.

Indeed, the immunity of arbitrators has been held to extend to those for whom they are agents. In *Corey v. New York Stock Exchange*,<sup>21</sup> the Sixth Circuit held that the Stock Exchange, which was accused of wrongful conduct in acting through its arbitrators, was itself immune from civil liability for the acts of the arbitrators arising out of contractually agreed upon arbitration proceedings.

<sup>13</sup>*Lundgren*, 307 F.2d at 118. (Emphasis added.) For a fuller discussion of the liability of the architect as arbitrator, see *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1032-1034 (5th Cir. 1977), cert. denied, 434 U.S. 1067 (1978).

<sup>14</sup>311 F.2d 113, 51 LRRM 2186 (3rd Cir. 1962).

<sup>15</sup>See, e.g., *Calzarano v. Liebowitz*, 550 F. Supp. 1389 (S.D.N.Y. 1982); *Hill v. Aro Corp.*, 263 F. Supp. 324, 64 LRRM 2315 (N.D. Ohio 1967); *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221, 26 LA 121 (N.Y. Sup. Ct. 1956), aff'd, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957); see also *Larry v. Penn Truck Aids, Inc.*, 567 F. Supp. 1410, 1415-1417, 114 LRRM 3623 (E.D. Pa. 1983); *Krecun v. Teamsters Local 734*, 586 F. Supp. 545, 550 (N.D. Ill. 1984).

<sup>16</sup>42 U.S.C. §§1983, 1985; *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522 (E.D. Pa. 1978).

<sup>17</sup>*Automobile Workers*, supra note 5.

<sup>18</sup>See *Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 691 (5th Cir. 1985).

<sup>19</sup>*AT&T Technologies, Inc. v. Communications Workers*, 54 USLW 4339, 4341, 121 LRRM 3329, 3332 (1986).

<sup>20</sup>552 F.2d 778, 780 (7th Cir. 1977).

<sup>21</sup>691 F.2d 1205, 1208-1209 (6th Cir. 1982).

Arbitrators also have a speedy remedy if a trial court denies their claim to immunity. Such a decision is not a final decision on the merits and would ordinarily, therefore, not be appealable, but a decision denying arbitral immunity, unlike most other interlocutory decisions in the federal courts, is immediately appealable.<sup>22</sup>

In addition, while judges may be subject to claims for attorney's fees for acts performed in a nonjudicial capacity or when successfully sued under the Civil Rights Act for declaratory and injunctive relief,<sup>23</sup> there appears to be little likelihood that similar claims can be made against arbitrators. *Pulliam v. Allen*, the case holding judges liable for such fees, is based on an interpretation of the Civil Rights Attorney's Fees Awards Act,<sup>24</sup> which is triggered only by a suit to enforce the federal Civil Rights Act, 42 U.S.C. Section 1983, or other civil rights statutes. It is difficult to conceive of a situation in which both requisites would be present: (1) an arbitrator's actions would be the kind of state action that would violate Section 1983; and (2) suit lies for injunctive and declaratory relief.

Thus arbitrators have been well protected. Other courts have shared the sentiment expressed by Federal District Judge Don Young in *Hill v. Aro Corp.*<sup>25</sup> In that case, Judge Young delivered a rhetorical salute to arbitration that should be dear to all who make it their profession:

If national policy encourages arbitration and if arbitrators are indispensable agencies in the furtherance of that policy, then it follows that the common law rule protecting arbitrators from suit ought not only to be affirmed, but, if need be, expanded. The immunity rule was sound when announced by two state supreme courts over eighty years ago; it is still sound today.<sup>26</sup>

This is not to say that participants in arbitration proceedings are without some protection from defects in the process. If the proceeding arises from a "contract evidencing a transaction involving [interstate] commerce," the Federal Arbitration Act<sup>27</sup> makes the proceeding subject to limited judicial review, and most states have similar laws applicable to proceedings not

---

<sup>22</sup>See *Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc.*, *supra* note 18 at 685.

<sup>23</sup>See *Pulliam v. Allen*, 466 U.S. 522, 544, (1984); *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 730 (1980).

<sup>24</sup>42 U.S.C. §1988.

<sup>25</sup>*Supra* note 15.

<sup>26</sup>*Id.* at 326.

<sup>27</sup>9 U.S.C. §2.

involving interstate commerce.<sup>28</sup> An award may be vacated if tainted by an arbitrator's misconduct, for example if the arbitrator refused to hear pertinent evidence; if the award was procured by fraud, corruption, or undue means; if the arbitrator manifested "evident partiality"; or, if the arbitrator acted in excess of his granted power.<sup>29</sup> But the therapeutic of personal responsibility of the arbitrator is not available. As the Sixth Circuit said in *Corey v. New York Stock Exchange*,<sup>30</sup> "[T]he risk of a wrongful act by the arbitrators is outweighed by the need for preserving the independence of their decision-making," for "arbitral immunity is essential to protect the . . . decision-making process from reprisals by dissatisfied litigants."

One new virus may avoid the arbitrator's immunological system. Suppose the arbitrator is sued not for the decision he renders but for failure to decide? In a California case, *Baar v. Tigerman*<sup>31</sup> an arbitrator proceeding conducted under AAA rules took 43 days, spread over a four-year period, followed by 10 days of oral argument. The award was due 30 days after briefs were filed, but the arbitrator, Tigerman, could not meet that deadline. So the AAA requested and the parties granted a three and one-half month extension. No other extension was sought. So, three and a half months after the extension expired, seven months after the original due date, both parties to the arbitration filed written objections to the arbitrator making an award. As a result, under California law,<sup>32</sup> the arbitrator lost jurisdiction. Both parties then sued the arbitrator and the AAA for breach of contract and negligence. The California Court of Appeal, reversing the trial court, held that a claim against the arbitrator had been stated. The California Supreme Court denied a petition to hear the case, with three of the seven justices dissenting.

Insofar as the complaint alleges breach of contract, the judicial analogy is inapt because a judge enters into no contract. Insofar as the complaint alleges negligence, however, it is typical of the contention that might be made against a dilatory judge. The California Court of Appeal, however, considered "judicial and arbitral roles" to be so different in many fundamental respects

---

<sup>28</sup>See, e.g., *Yates v. Yellow Freight Sys.*, 501 F. Supp. 101 (S.D. Ohio 1980).

<sup>29</sup>U.S.C. §10.

<sup>30</sup>*Supra* note 21, at 1210-1211.

<sup>31</sup>140 Cal. App.3d 379, 189 Cal. Repr. 834 (App. Ct., 1983).

<sup>32</sup>California Code of Civil Procedure, §§1282-1284.2.

that it refused to find immunity. I am informed that a bill has been introduced in the California legislature to overturn the result.

The opinion did not expressly allow a claim to be made against the arbitrator for negligence in deciding or in failing to decide. The court said that it was simply reversing the trial court's action in sustaining a demurrer and that it was not deciding whether a cause of action was stated "in any of the several legal theories put forth." If an arbitrator does make a contract, perhaps he should not be immune to a suit for its breach. Discussing the case in *The Chronicle*, Reginald Alleyne says:

If fear of suits may encourage arbitrators to make decisions on grounds other than those warranted by the merits of an arbitrated dispute, a similar fear of suit may encourage arbitrators to make their decisions more swiftly than correctly.<sup>33</sup>

Arbitrators can, however, protect themselves fully against being forced to decide by refusing to accept appointment under conditions that create such a danger. Arbitrators may decline to take a case if they are too busy to handle it promptly. Courts on the other hand may not close their doors when they have more filings than they can expeditiously handle. The California decision is in accord with a decision in my own circuit, the Fifth. In *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*,<sup>34</sup> dealing with an architect as arbitrator of disputes arising under a construction contract, the court held that the architect-arbitrator would be liable for damages caused by failing to make decisions and for undue delay in doing so.

Does all of this mean that arbitrators need have no concern whatever? Not quite. Even if ultimately immune, an arbitrator may be sued and, even if the claim against him is summarily dismissed, he will incur the expense of attorney's fees, unless, of course, the court holds the claim frivolous and taxes fees to the plaintiff. Even if such a judgment is secured, it may be uncollectible. Therefore, although I am at least as fully immune to damage claims as are arbitrators, I carry an insurance policy that affords me protection for such defense costs. But that exposure and therefore that expense is minimal.

---

<sup>33</sup>May 1985 at 3.

<sup>34</sup>551 F.2d 1026, 1033 (5th Cir. 1977), *reh'g denied in part*, 559 F.2d 268 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978).

So, at least with regard to damage claims, arbitrators and judges alike need not, in the words of Gilbert & Sullivan:

Sit in solemn silence in a dull dark dock  
Awaiting the sensation of a short sharp shock  
From a cheap and chippy chopper  
On a big black block.<sup>35</sup>

---