Journal of Dispute Resolution

Volume 2009 | Issue 1 Article 10

2009

Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The

Jenny Brown

The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion?

Malik v. Ruttenberg[1]

I. INTRODUCTION

With the increased use of arbitration in recent years, the concept of judicial immunity has expanded its scope to include arbitrators. As a result, states are currently enacting their own legislation regarding arbitrator immunity and are looking for guidance in how to do so. In response, the National Conference of Commissioners on State Laws has drafted two model acts, referred to as the Uniform Arbitration Act and the Revised Uniform Arbitration Act for states to utilize in formulating their own arbitration laws.[2] Currently the Uniform Arbitration Act has been adopted in thirteen states and is being considered in four other states.[3] Additionally, the New Jersey Arbitration Act ("the Act"), the legislation at issue here, was adopted from the Uniform Arbitration Act.[4] While portions of the Act have already come under judicial review, *Malik v. Ruttenberg* presented state courts with the first opportunity to interpret the Act's immunity provision.[5] In *Malik*, the Appellate Division of the New Jersey Superior Court upheld the extension of absolute immunity to arbitrators without considering the adoption of qualified immunity.[6] Regrettably, that decision may have negative repercussions for the field of arbitration. By reinforcing the status quo, the court essentially gave its support and approval to policies that have eroded accountability and integrity in the arbitration process. Furthermore, because state courts may now look to *Malik* for guidance in interpreting cases, it will be more difficult to implement a new standard of qualified immunity for arbitrators in the future.

1. Malik v. Ruttenberg, 942 A.2d 136 (N.J. Super. Ct. App. Div. 2008).

2. *See* Charles Toutant, *Arbitrator Is Not Liable for Attorney's Alleged Assault of Party, Court Says*, N.J. L.J. (Mar. 2008), *available at* http://www.law.com/jsp/article.jsp?id=1204544935082 (last visited Apr. 14, 2009).

3. *Id.* States that have adopted the Uniform Arbitration Act include Alaska, Colorado, District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregan, Utah, and Washington. *See* Uniform Law Commissioners, Section on Uniform Arbitration Act, *Legislative Fact Sheet*, *available at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited Apr. 14, 2009).

4. *Id.*

5. *Id.*

6. *Malik*, 942 A.2d at 141-42.

II. FACTS AND HOLDING

In 2003, Plaintiff Ric Malik entered into a home renovation contract in Moorestown.[7] During the renovation process, a "serious dispute" arose between Malik and the homeowners.[8] The contract between the parties stated that disputes would be submitted to arbitration pursuant to the rules established by the American Arbitration Association ("AAA").[9] As such, the dispute was submitted to arbitration proceedings, and Peter Liloia, III was appointed as the arbitrator.[10]

During the arbitration proceeding on Nov. 17, 2005, Malik's attorney objected to the conduct of one of the homeowner's attorneys.[11] In his objection, Malik's attorney urged Liloia to remove the homeowner's attorney from the proceedings.[12] Liloia denied the removal request and thereafter called a brief recess.[13] During this recess, the homeowner's attorney allegedly assaulted Malik in the lobby.[14] Because the altercation did not occur in the room where the arbitration proceedings were taking place, Liloia did not personally observe it. In response to this alleged assault, Malik filed a complaint asserting that defendants AAA and Liloia knew of the "dangerous propensities of the homeowner's attorney but failed to exercise reasonable care to control these tendencies."[15] In his complaint, Malik characterized Liloia's failure to control the homeowner's attorney as an "abdication of his judicial or quasi-judicial authority."[16] Following the court's denial of defendants' initial motion to dismiss, Liloia and AAA filed an answer to Malik's complaint.[17] In the answer, defendants asserted that New Jersey Statute Section 2A:23B-14 immunized them from liability.[18] On June 5, 2007, defendants renewed their motion to dismiss with the superior court, but dismissal was denied.[19] Thereafter, the defendants appealed.[20] On appeal, the New Jersey Superior Court held that arbitrators and arbitration associations are judicially im-

7. *Id.* at 138.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* According to the Court's record, the arbitration was "protracted and contentious." *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* The complaint was filed with the Superior Court, Law Division, Camden County.
16. *Id.* at 141.
17. *Id.* at 138.
18. *Id.* This statute states that:
a. An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.
b. The immunity afforded by this section supplements any immunity pursuant to other law.
c. The failure of an arbitrator to make a disclosure required by section 12 of this act does not cause any loss of immunity pursuant to this section.
N.J. STAT. ANN. § 2A:23B-14 (2003).
19. *Malik*, 942 A.2d at 138. The motion judge referred to the affidavit of merit filed by plaintiffs, which stated that defendants had a duty to control the proceedings and failure to do so "falls outside of the scope of arbitral immunity," in finding that the plaintiffs had plead a "viable cause in tort against defendants." *Id.*
20. *Id.*

mune from liability for injuries sustained during the course of arbitration proceedings.[21]

III. LEGAL BACKGROUND

A. Laying the Foundation: The Doctrine of Judicial Immunity

Dating back to medieval times, the doctrine of judicial immunity, which affords protection to federal and state judges acting in their judicial capacity, has served an essential function in the judicial system.[22] Derived from English common law, the fundamental doctrine of judicial immunity emerged alongside the development of the appellate system.[23] As the appellate system evolved, appellate procedures became the standard for correcting judicial error.[24]

In the United States, courts have long recognized the importance of the doctrine of judicial immunity. In *Stump v. Sparkman*, the United States Supreme Court recognized the doctrine as a "general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."[25] In *Forrester v. White*, the Court revisited the question of judicial immunity and again affirmed the doctrine by noting the numerous policy considerations in its support.[26] These considerations include protecting the finality of judgments, discouraging inappropriate collateral attacks, and protecting the judicial independence of judges from "vexatious actions prosecuted by disgruntled litigants."[27]

Beyond these general policy considerations, courts have also stressed the absolute nature of judicial immunity.[28] In supporting such a sweeping form of immunity, courts have greeted challenges to absolute immunity with hostility.[29] For example, in *Mireles v. Waco,* the Supreme Court reversed a judgment from the Ninth Circuit Court of Appeals and stressed that "judicial immunity is an immunity from suit, not just from ultimate assessment of damages."[30] Additionally, the Court asserted that immunity is "not overcome by allegations of bad faith or malice."[31] In fact, the Court found that "immunity applies even when the judge is

21. *Id.* at 142.
22. Forrester v. White, 484 U.S. 219, 225-26 (1988).
23. *Id.* at 225.
24. *See generally* Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 476 (2004).
25. 435 U.S. 349, 355 (1978).
26. *Id.* at 225 (citing Bradley v. Fisher, 80 U.S. 335, 348 (1872)).
27. *Forrester*, 484 U.S. at 225 (citing *Bradley*, 80 U.S. at 347).
28. *Id.* at 226. The Court emphasized, "Freeing the judicial process of harassment or intimidation [] has been thought to require absolute immunity." *Id.*
29. *Id.* at 225-26.
30. 502 U.S. 9, 11 (1991). In *Mireles v. Waco,* the Court granted a motion to dismiss the claim against a judge who had instructed police officers to forcibly and with excessive force seize and bring the plaintiff to the courtroom. *Id.* at 12. There, the Court found that the judge was acting within his judicial capacity when he ordered the police officer to use even excessive force. *Id.* at 13. Thus, the judge's actions were protected under the cloak of judicial immunity. *Id.*
31. *Id.* at 11 (discussing Pierson v. Ray, 386 U.S. 547 (1967)).

accused of acting maliciously and corruptly."[32] Courts have also held that judicial immunity is applicable to judicial acts that are wrong or beyond the judge's authority.[33] For instance, in *Stump v. Sparkman*, the Supreme Court concluded that "a judge is absolutely immune for liability from his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."[34]

B. Extensions and Limitations on the Doctrine

After the Court's early decisions cemented the doctrine's place in the judicial process, judicial immunity eventually expanded to several other official entities.[35] This extension was largely due to the Court's reasoning that absolute immunity is "justified and defined by the *functions* it protects and serves, not by the person to whom it attaches."[36] In *Butz v. Economou,* the Court granted judicial immunity to Executive Branch officials who perform quasi-judicial functions.[37] Similarly, *Imbler v. Pachtman* extended immunity to officials who performed prosecutorial functions that are "intimately associated with the judicial phase of the criminal process."[38] In *Briscoe v. LaHue*, immunity was even extended to advocates and witnesses, further underscoring the deference given to the doctrine.[39]

Clearly, courts have treated the doctrine of judicial immunity with high regard; however, the doctrine is not limitless.[40] Courts have traditionally held that judicial immunity is not applicable in two specific circumstances. First, immunity is not extended to judges acting in a non-judicial capacity—in other words, courts have made a distinction between judicial and administrative acts.[41] Second, actions taken in the complete absence of jurisdiction (i.e., outside of the scope of the arbitrator's role) are not immune.[42] The question of whether arbitrators act in a purely judicial capacity, and thus whether a similar type of absolute immunity should be extended to those individuals, is considered below.

C. Arbitrator Immunity: Absolute or Qualified?

With the increased acceptance of alternative dispute resolution procedures in recent years, arbitration has gained support among the federal government and the

32. *Pierson*, 386 U.S. at 554.
33. K.D. v. Bozarth, 713 A.2d 546, 549 (N.J. Super. Ct. App. Div 1998).
34. Stump v. Sparkman, 435 U.S. 349 (1978). Similarly, in *Bradley v. Fischer*, the Court applied the judicial immunity doctrine to a trial court judge's decision to disbar an attorney for personal insults because the power to disbar was within the court's jurisdiction. 80 U.S. 335. 347-50 (1871). Later, the Supreme Court discussed *Bradley* and reiterated," a judge will not be deprived of immunity because the action he took was in error, done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Sparkman*, 435 U.S. at 356-357 (citing *Bradley*, 80 U.S. at 348).
35. Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 885 (2d Cir. 1990). *See, e.g.,* Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926); Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987).
36. Forrester v. White, 484 U.S. 219, 227 (1988).
37. 438 U.S. 478, 512-514 (1978).
38. 424 U.S. 409, 430 (1976).
39. 460 U.S. 325, 335 (1983).
40. Weston, *supra* note 24, at 449, 475-95.
41. Mireles v. Waco, 502 U.S. 9, 11 (1991).
42. *Id.* at 12.

courts. The Federal Arbitration Act ("FAA") serves as a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.[43] Since the FAA's passage, the National Conference of Commissioners on State Laws has proffered model codes (referred to as the Uniform Arbitration Act and Revised Uniform Arbitration Act) which states have followed in enacting their own arbitration guidelines.[44] With the onset of this alternate dispute resolution forum, the concept of applying judicial immunity to arbitrators has also gained support.[45]

To better understand why arbitral immunity has found such support in the United States, it is helpful to briefly discuss various justifications for the doctrine. Throughout history, several jurisprudential theories have influenced how arbitral immunity is viewed in different jurisdictions.

The contractual theory originated in the nineteenth century and is followed by some civil law European countries.[46] The contractual theory focuses on the arbitration agreement itself—meaning that "it is the agreement to arbitrate that alone gives the arbitrators the authority to make the award." The arbitrators then serve only as the agents of the parties in resolving the dispute.[47] In countries that follow the contractual theory, arbitrators and judges are not viewed as equivalents.[48] Rather, arbitrators are viewed as professionals and therefore subject to civil liability like all other professionals.[49] Judges, on the other hand, are accountable to the State alone and, as such, are immune from any sort of civil liability.[50]

In contrast, the jurisdictional theory stands for the proposition that the roles judges and arbitrators play are analogous.[51] This theory has shaped attitudes toward arbitration in the United States and finds support in other jurisdictions that subscribe to absolute arbitral immunity.[52] This theory is justified largely on the grounds that it encourages the use of arbitration as an alternative dispute resolution forum.[53]

The last relevant theory, and the theory which supports qualified immunity, is the hybrid theory.[54] Supporters of this theory "believe that the reality lies somewhere in the middle of the contractual and jurisdictional theory, namely, that neither the arbitrator performs a legal function nor that the award is a contract ... The

43. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). *See also* 9 U.S.C. § 2 (2000) (stating that arbitration agreements "shall be valid, irrevocable, and enforceable").

44. *See* Toutant, *supra* note 2. *See also*, EDWARD J. BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT, 56 (Cambridge U. Press 2006).

45. *See*, Feichtinger v. Conant, 893 P.2d 1266, 1267 (Alaska 1995); Calzarano v. Liebowitz, 550 F. Supp 1389, 1391 (S.D.N.Y. 1982); Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 885-87 (2d Cir. 1990); Corey v. N.Y. Stock Exch., 691 F.2d 1205, 1209-10 (6th Cir 1982); Blue Cross Blue Shield of Tex. v. Juneau, 114 S.W.3d 126, 130-34 (Tex. App. 2003).

46. Anastasia Tsakatoura, *Arbitration: The Immunity of Arbitrators*, LEX E-SCRIPTA ONLINE LEGAL J. (June 20, 2002), *available at* http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm (last visited Apr. 14, 2009).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

arbitrator's duty is to judge but the power to do so is conferred to him by the agreement of the parties."[55]

Because the United States has embraced the jurisdictional theory, the judicial immunity doctrine's scope has further expanded.[56] Arbitrators are now considered the "functional equivalent" of judges when acting within their quasi-judicial duties, and therefore, courts have found that the judicial immunity doctrine should apply to arbitrators.[57] In reaching this conclusion, courts have largely relied upon the rationales of former decisions regarding *judicial* immunity.[58] Such reasoning stresses that "arbitral immunity is essential to protect decision-makers from undue influence and [to] protect the decision-making process from reprisals by dissatisfied litigants."[59]

In addition, most federal Courts of Appeals have recognized the doctrine, holding that judicial and quasi judicial immunity extends to both arbitrators and organizations that sponsor arbitrations (e.g., the American Arbitration Association).[60] Thus, like courts of law, sponsors are immune from liability for actions taken in connection with administering arbitrations.[61] As the Sixth Circuit concluded:

> The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits. [Arbitral] immunity furthers this need . . . [and] is essential to protect the decision maker . . . .[62]

Therefore, extending the doctrine beyond arbitrators to also include sponsors is "a natural and necessary product of the policies underlying arbitral immunity."[63] The Second, Sixth, and Eighth Circuits all agree that arbitrators' immunity would be illusory without this extension.[64]

Furthermore, in *Butz v. Economou*, the Supreme Court implied that it might approve of absolute arbitral immunity; though the Court did not define the specific acts that would fall under the doctrine of judicial immunity, it held that there are certain persons "whose special functions require a full exemption from liability."[65] Still, recent federal Courts of Appeals decisions, such as *Pfannenstiel v. Merrill Lynch* and *Caudle v. American Arbitration Ass'n*, take a narrower approach to the

55. *Id.*
56. *Id.*
57. Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155, 1158–59 (10th Cir. 2007) ("Every . . . circuit that has considered the issue of arbitral immunity recognizes the doctrine").
58. *Id.*
59. New England Cleaning Servs. v. Am. Arbitration Ass'n, 199 F.3d 542, 545 (1st Cir. 1999).
60. Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir, 1990)
61. *Pfannenstiel,* 477 F.3d at 1158 (listing high courts that had considered and recognized the doctrine as of 2007).
62. 898 F.2d 882, 886 (2d Cir. 1990) (quoting Corey v. N.Y. Stock Exch., Inc., 691 F.2d 1205, 1211 (6th Cir. 1982)).
63. *Id.* (quoting *Corey*, 691 F.2d at 1211).
64. *Id.*
65. *Id.*

doctrine.[66] These decisions opine that the doctrine of arbitral immunity does not necessarily protect arbitrators or organizations *absolutely*.[67] Rather, for immunity to apply, the claim at issue must arise out of a decisional act and not one that is merely administrative.[68] Whether more courts will follow the this approach is yet to be seen, but in any event, the doctrine of absolute immunity continues to enjoy broad application in the United States.

Given the longstanding tradition of judicial immunity, it is not surprising that immunity has gradually extended to arbitrators acting in a judicial capacity. Under the current scheme, courts have restricted their analysis to two choices—that of complete immunity or complete liability. Largely left out of the discussion is the option of qualified immunity—a hybrid that pulls from both the contractual and judicial theories. Qualified immunity protects parties from the arbitrator's acts of bad faith (e.g., gross negligence and fraud), while still extending immunity where such conditions were not present. Even England, which has fairly broad immunity for arbitrators, does not allow immunity in all circumstances.[69] Rather, arbitrators are held liable for acts of bad faith.[70] Despite the United States' tradition of complete arbitral immunity, the question of how far this immunity should extend is still up for debate as states enact their own laws governing arbitration. The New Jersey Superior Court recently had an opportunity to define the proper role of arbitral immunity in *Malik v. Ruttenberg*.[71]

IV. INSTANT DECISION

In *Malik*, the court considered the scope of an arbitrator's immunity from civil liability as a matter of law.[72] To begin, the court cited several provisions of the New Jersey Arbitration Act ("the Act") supporting the proposition that New Jersey law had long embraced arbitration as a "speedy and efficient approach to dispute resolution."[73] Applying the facts of the case to the Act's definitions, the court concluded that Liloia and AAA qualified as an arbitrator and an arbitration association, respectively.[74] Having reached this conclusion, the discussion then turned toward the issue of immunity.[75] Given that the Act's arbitration immunity

66. *Pfannenstiel*, 477 F.3d at 1159; Caudle v. Am. Arbitration Ass'n, 230 F.3d 920, 922 (7th Cir. 2000) (suggesting that arbitration association would not be immune from a claim for a refund due to its failure to provide promised arbitration services).

67. *Pfannenstiel*, 477 F.3d at 1159.

68. *Id.*

69. *See* Tsakatoura, *supra* note 46.

70. *Id.*

71. 942 A.2d 136 (N.J. Super. Ct. App. Div. 2008).

72. *Id.* at 139.

73. *Id.* (citing various sections of the New Jersey Arbitration Act). "Arbitrator" is defined in the Act as: "'Arbitrator' means an individual appointed either as a neutral arbitrator or as a party arbitrator to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate." N.J. STAT. ANN. § 2A:23B-1. "Arbitration organization" is defined by the Act as: "'Arbitration organization' means an association, agency, board, commission or other entity that is neutral and initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an arbitrator." *Id.*

74. *Malik*, 942 A.2d at 139.

75. *Id.*

provision "supplements any immunity pursuant to other law," the court's immunity analysis involved an examination of both state and federal law.[76]

The court began its examination of the common law by retracing the historical origins of judicial immunity.[77] Here, the court cited numerous cases in support of the doctrine's rationale that "the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability."[78] Finding the doctrine of judicial immunity well established as an absolute immunity at common law, the court went on to discuss the doctrine's extension to the work of quasi-judicial figures like arbitrators.[79]

The court stressed that immunity for judicial or quasi-judicial officials is not unlimited.[80] Citing previous cases, the court asserted that immunity only includes "judicial acts performed within the individual's subject matter jurisdiction."[81] Further, the court noted that the Supreme Court has "never undertaken to articulate a precise and general definition of the class of acts entitled to immunity."[82] In its reasoning, the court relied on the Supreme Court's view that "[w]hether the act done by [a judge] was judicial or not is to be determined by its character, and not by the character of the agent."[83] To make this determination, it is important to look toward the nature of the act and the expectations of the parties to decide "whether it is a function normally performed by a judge...[and] whether [the parties] dealt with the judge in his judicial capacity."[84]

In this case, the court found unpersuasive the plaintiff's assertion that the failure of Liloia (the arbitrator) to exercise control over the homeowner's attorney violated his judicial or quasi-judicial authority.[85] In reaching this conclusion, the court noted that the New Jersey Court Rules provide judges considerable authority to conduct proceedings.[86] This authority allows judges wide discretion in managing the judicial process, including imposing sanctions on an attorney or expelling a spectator; the court found this same authority applicable to arbitration proceedings.[87] The court also noted that the common law has recognized immunity from civil liability in civil proceedings, and other circuits considering the issue have uniformly upheld the validity of arbitral immunity for both arbitrators and arbitrator organizations.[88] Thus, it was clear to the court "that an arbitration association, like AAA, 'enjoys arbitral immunity from civil liability for the acts of its arbitra-

76. *Id.* (citing N.J. STAT. ANN. § 2A:23B-14b (West Supp. 2008)).
77. *Id.* at 139–40.
78. *Id.* at 140 (quoting Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435 (1993)).
79. *Id.* at 140.
80. *Id.* at 140-41.
81. *Id.*
82. *Id.* (quoting Forrester v. White, 484 U.S. 219, 227 (1998)).
83. *Id.* (quoting *Forrester*, 484 U.S. at 228).
84. *Id.* (quoting Stump v. Sparkman, 435 U.S. 349, 362 (1978)).
85. *Id.* at 141.
86. *Id.*
87. *Id.*
88. *Id.* at 141–42 (quoting *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158–59 (10th Cir. 2007), for the proposition that "[e]very other circuit that has considered the issue of arbitral immunity [had] recognize[d] the doctrine").

tors in the course of conducting contractually agreed-upon arbitration proceedings.'"[89]

In applying this theoretical basis to the facts of the case, the court found that the act of calling a recess and denying an application to remove an attorney from an arbitration proceeding falls directly within the adjudicative functions of the arbitrator.[90] Ruling that arbitral immunity applied to the cause of action, the court had no choice but to dismiss the complaint.[91] Importantly, the court also noted that it was of no importance that the arbitrator might have exercised his authority differently.[92] Rather, it only mattered that the action was one of a judicial rather than administrative nature and thus fell under the doctrine of arbitral immunity.[93] As such, the court reversed the July 18, 2007, order that denied AAA's and Liloia's motion to dismiss the complaint.[94]

V. COMMENT

Throughout the years, the extension of judicial immunity to arbitrators has been justified on a variety of grounds. However, with the onset of modern arbitration, it is important to reexamine the merit of these rationales in order to truly evaluate how far arbitral immunity should extend. As will soon become evident, several of the traditional rationales and justifications for extending absolute immunity to arbitrators no longer have merit. While some of these rationales are more persuasive than others, none can justify the broad extension of *absolute* immunity to arbitrators. Therefore, a more balanced and appropriate standard of qualified immunity should be implemented.

The principal rationale underlying the extension of arbitral immunity is premised on the notion that arbitrators serve a role that is "functionally equivalent" to the role of judges.[95] Because of this so-called functional equivalence, most Circuit Courts that considered the issue have held that private arbitration proceedings and public adjudication proceedings deserve the same type of immunity.[96] If arbitrators *are* functionally equivalent to judges, then it is necessary, the argument goes, to extend immunity to arbitrators so that they too will be able to exercise independent judgment.[97] Proponents stress that independent judgment is vital to the arbitration process because, by shielding arbitrators from the suits of dissatisfied parties, it ensures the credibility and finality of arbitration decisions.[98]

89. *Id.* at 142 (quoting Hawkins v. Nat'l Ass'n of Sec. Dealers, Inc., 149 F.3d 330, 332 (5th Cir. 1998).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *See* Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990) (collecting federal appellate decisions); Levine v. Wiss & Co., 478 A.2d 397, 407 (N.J. 1984).
96. *See Austern*, 898 F.2d at 886.
97. Weston, *supra* note 24, at 484.
98. *Id.* Proponents argue that subjecting arbitrators to litigation would reduce the number of persons willing to serve as arbitrators, decrease the confidence parties have in the arbitration process, and discourage the use of arbitration in general. *See generally,* Weston, *supra* note 24 (arguing that these concerns are mostly unfounded).

But are these assertions true? Are the roles of arbitrators and judges as similar as these proponents maintain? A decision by the California Supreme Court is telling. In *Broughton v. Cigna Healthplans of California*, the California Supreme Court noted several significant differences between judges and arbitrators regarding the roles and accountability of each.[99] For instance, the court stated that judges are often locally elected and subject to public approval.[100] In contrast, arbitrators are not elected to their positions.[101] Rather, individuals may become arbitrators by fulfilling certain qualifications.[102] Often these qualifications only include completing a specified number of training and observation hours before being able to arbitrate disputes.[103] Because arbitrators are not elected to their positions, they do not need to be as concerned with the public's perception or approval of the job that they do. Their retention does not depend on public support, and thus makes them less accountable to the public. Added to that is the fact that most states have not established professional standards or licensing requirements for arbitrators that exist in other professions.[104] Taking these differences into consideration, absolute immunity fails to adequately protect an individual's rights.

Arbitrators also face less accountability than judges in terms of oversight and evaluation. While it could be argued that parties inject accountability into the system by choosing arbitrators based on their reputation, that alone is not always enough to protect the party's interest. Moreover, even though arbitrators are regulated under the FAA and various state statutes, this does not mean that their performance is evaluated in the same manner as a judge's performance. Judges are subject to discipline by their state's Commission on Judicial Performance, but similar review boards are not in place for arbitration proceedings.[105] The implementation of review boards in states would probably go a long way to alleviate concerns over an arbitrator's abuse of discretion in arbitration proceedings, under either a qualified or absolute immunity system.

An additional difference between judges and arbitrators is the standard of review applicable to their decisions. While judges' decisions are subject to appellate review, the FAA allows parties to appeal arbitration decisions only in limited circumstances.[106] Furthermore, the ways in which a party may file a motion to

99. Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 77-78 (Cal. 1999).
100. *Id.* at 78.
101. *Id.*
102. *Id.*
103. *Id.*
104. Marcus Nieto & Margaret Hosel, *Arbitration in California Managed Health Care Systems*, (Dec. 2000), *available at* http://www.library.ca.gov/crb/00/09/00-009.pdf (last visited Apr. 15, 2009).
105. *Id.*
106. 9 U.S.C. § 16 (2000). An appeal may be taken from:
1. an order
(a)refusing a stay of any action under section 3 of this title,
(b) denying a petition under section 4 of this title to order arbitration to proceed,
(c) denying an application under section 206 of this title to compel arbitration,
(d) confirming or denying confirmation of an award or partial award, or
(e)modifying, correcting, or vacating an award;
2. an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
3. a final decision with respect to an arbitration that is subject to this title.
Id.

vacate the decision are similarly restrictive under the FAA.[107] Thus, the circumstances under which state or federal courts can grant vacatur motions are very limited.[108] The FAA also imposes a strict time frame to file a motion to vacate: individuals must file the motion within three months of the date the arbitrator filed or delivered the decision.[109] By limiting a party's avenue for appeal or vacatur and by implementing strict regulations regarding the time frame in which motions must be filed, courts have left dissatisfied arbitration participants with few options to combat an unfair arbitration proceeding or incompetent arbitrator.

One final difference is the nature of each proceeding. While judicial proceedings are largely public in nature, arbitration proceedings are characterized by privacy and are closed to the public.[110] This privacy is especially troubling when combined with the fact that arbitration decisions are subjected to minimal appellate review. These two characteristics make it highly unlikely that arbitrators' decisions will be questioned.

The lack of accountability in the arbitration system is a concern because it can have dire consequences for both the profession and the individuals involved. For one thing, when arbitrators have no fear of being reprimanded, they may become careless and more likely to render poor decisions.[111] Additionally, in a system where only limited review of decisions is available, the finality of judgments can trump individuals' rights to a just outcome.[112] Arbitrators are also held less accountable to the public and the profession than judges. Considering these differences, it is clear that arbitrators and judicial officers play different roles and should not receive the same type of immunity. Arbitrators, rather than receiving absolute judicial immunity, should only receive qualified immunity. Otherwise, arbitrators are allowed to have all the perks judges enjoy with less responsibility.

Another critique of extending absolute immunity to arbitrators is that traditional assumptions underlying arbitral immunity are outdated and overbroad. It has long been argued that absolute immunity is necessary to recruit volunteers to serve as arbitrators.[113] In fact, courts have been especially apt to use this justification in extending immunity to quasi-judicial actors (e.g. executive officials, and officials with prosecutorial duties that are "intimately associated with the judicial phase of the criminal process)."[114] While this policy consideration might have

---

107. 9 U.S.C. § 10.

108. *See id.* Under the FAA, grounds for vacature are available in the following circumstances:

(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.

Id.

109. 9 U.S.C. § 12 (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). *Id.*

110. Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 77-78 (Cal. 1999).

111. ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION at 242 (Sweet & Maxwell 2004).

112. *Id.*

113. Weston, *supra* note 24, at 500.

114. Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

been relevant in the past, it is not true today with the proliferation of private arbitration practices.[115] In fact, with the onset of private practices, there has been a renewed wave of criticism calling for arbitrators to be held accountable for their actions in arbitration proceedings.[116]

These critics assert that liability should be extended to private arbitration practices in certain circumstances because it is unfair to allow arbitrators to reap the economic benefits of their practice while avoiding responsibility for their decisions.[117] Some even argue that, like other professionals, arbitrators should be required to carry liability insurance.[118] This interesting proposition has merit. If doctors and lawyers are subject to suit by dissatisfied patients and clients, why should arbitrators be any different? Arbitrators have the authority to make final binding decisions that can be just as life altering as any decision a lawyer might make on behalf of his client. With authority comes responsibility, and arbitrators need to be responsible for their actions and decisions during an arbitration.

For people who worry about the effect of liability insurance policies, proponents of such policies respond that it is unlikely that the "industry will go away" if arbitrators are held responsible for their actions like other professionals.[119] Of course, one potential downfall of requiring arbitrators to carry liability insurance is that such a policy may increase the costs of arbitration because the expense would likely be passed onto the parties in one way or another. Even so, it is likely that arbitration participants would accept slightly increased costs to ensure a fair hearing with a competent arbitrator.

In essence, the current policy of granting absolute immunity to arbitrators is not fair to arbitration participants and should be reexamined. It is irrational for states and organizations to continue to support policies such as arbitral immunity if those policies are not equally concerned with maintaining the integrity of the process. With more and more businesses requiring mandatory commercial arbitration, it is crucial that arbitration is a fair and legitimate process. If individuals have no faith in the integrity of the process, they will likely choose not to pursue arbitration as an alternative means of dispute resolution. Similarly, and perhaps of even greater importance, is the fact that people will not want to use a system that might truly be fair if it appears to be unfair. In other words, sometimes the appearance of integrity is just as crucial as the actual integrity of the process. Arbitration has thrived in recent years, but the success may not continue if arbitrators are given absolute, free reign.

In order to improve the quality of and confidence in arbitration proceedings, courts should strike a balance that addresses the courts' dual concerns: protecting the public from possible arbitrator abuse and providing arbitrators with immunity to ensure independent decision making. This desirable (and much needed) balance may be achieved with qualified, rather than absolute, immunity. Qualified immunity would hold arbitrators accountable when arbitrators make decisional acts that are within their jurisdiction.[120] It would also hold arbitrators liable for

115. Weston, *supra* note 24, at 500.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. Weston, *supra* note 24, at 516.

their actions done in bad faith, such as instances of fraud or gross negligence. It is only common sense that if a person acts in bad faith, he or she should be held liable for his or her actions. In this way, arbitrators would be viewed more as professionals who may incur liability in limited circumstances. In addition to limiting the arbitrator's immunity, qualified immunity would also limit the immunity of providers in that it would not extend immunity to arbitral providers who are "alleged to have violated their own internal rules, failed to fulfill their contractual obligations with the parties, or improperly performed duties with respect to the administration and oversight of the arbitral process . . ."[121] Taking all of this into consideration, qualified immunity provides immunity where necessary to protect arbitrators from trivial lawsuits and to protect the independent decision making of the arbitrators, but not in a way that is so overbroad as to compromise the integrity of the arbitration process.[122]

Malik presented the court with the perfect occasion to reexamine the issue of arbitral immunity in interpreting the model statue's immunity provision. Here, the court correctly concluded the arbitrator was acting within his adjudicative or decision-making authority when he decided not to remove the attorney from the proceedings, but the court fell short in its reasoning. While the court hinted that after *Malik* arbitral immunity would later only apply to "judicial acts," it still failed to sufficiently narrow the doctrine.[123] In its analysis, the court did note that the New Jersey statute equated arbitrator immunity with judicial immunity and thus absolute immunity applied.[124] That said, even if the court stuck to the plain language meaning of the statute, the court could have more thoroughly scrutinized the doctrine of absolute immunity. Rather than merely going along with past decisions extending absolute judicial immunity to arbitral immunity, the court could have (and should have) cautioned of the dangers of such broad immunity and urged the legislature to amend the statute to reflect these concerns. Unfortunately, the court did not do this because it did not even consider the concept of qualified immunity. Thus, this decision is disappointing not because of the outcome, but because the court missed a crucial opportunity to take a stand regarding arbitral immunity. The sort of blind acceptance of absolute arbitral immunity evidenced by this court and other courts is problematic because the justification for absolute immunity is no longer applicable in light of modern arbitration practices. This is an important question and courts, for whatever reason, seem unwilling to even entertain a discussion that does not repeat the status quo.

So what are the likely effects of this decision? By failing to critically analyze the doctrine of arbitral immunity, the court made it that much more difficult to make changes in arbitral immunity policies in the future. This is troubling for the arbitration community. Without accountability within the system, the very integrity and viability of arbitration proceedings is threatened. Individuals are likely to lose faith and confidence in a system that is largely private and unaccountable to the public. A better and more thoughtful approach would have discussed the adoption of qualified immunity. Qualified immunity is the only type of immunity that will strike an appropriate balance that "protects arbitral decision making

121. *Id.* at 509-10.
122. *Id.*
123. Malik v. Ruttenberg, 942 A.2d 136, 139-42 (N.J. Super. Ct. App. Div. 2008).
124. *Id.* at 139.

while not shielding non-decisional acts, administrative acts, failure to follow internal administrative or procedural rules, or egregious misconduct, breach of ethics, fraud, or statutory violations."[125] The *Malik* court could have gone a long way in solidifying the continued use of arbitration by arguing for qualified arbitral immunity, but declined to do so. Regrettably, when other states adopt their own codes based on the Model Act, it is likely that those state courts will look to *Malik* to interpret the immunity provision in a similarly broad fashion.

VI. CONCLUSION

While absolute judicial immunity helps to guarantee independence in the judicial system, that same privilege should not extend to quasi-judicial figures like arbitrators. Arbitrators and judges do not share identical roles or have identical qualifications, so it makes sense to extend different types of immunity to each. Beyond these substantial differences in roles, the lack of arbitrator accountability is probably the most troubling aspect of granting arbitrators absolute immunity. Unlike in the judicial system, there are few safeguards in place if an arbitrator does abuse his discretion. Ensuring judicial independence is vital to maintaining the integrity of the system, but arbitrator accountability should not be sacrificed in the process. In *Malik*, the court had a chance to forge a new direction and move away from the status quo of absolute immunity. The court declined to do so, thus it will likely be more difficult to implement substantive change in the future. The *Malik* decision is disappointing because it is evident that change is necessary. By adopting the more limited approach of qualified immunity, the courts and legislatures would be able to strike a balance that better satisfies the goals of integrity *and* accountability. In doing so, they would finally implement a policy that is truly best for participants, arbitrators, and the ADR community alike.

JENNY BROWN

125. Weston, *supra* note 24, at 517.