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# How Far Is Too Far: Reexamining the Continuing Extension of Arbitral Immunity to Arbitral Organizations

Elizabeth Wilhelmi

# How Far is too Far?: Reexamining the Continuing Extension of Arbitral Immunity to Arbitral Organizations

*Strategic Resources, Co. v. BCS Life Ins., Co.*[1]

## I. INTRODUCTION

The protection of arbitration proceedings from judicial inquiry is restricted not only by the limited grounds for vacatur, but also by the application of arbitral immunity, a protection derived from the judicial immunity applied to judges. This immunity strengthens the finality of arbitration by restricting judicial review of decisions protected by arbitral immunity, but at the same time, it raises the question of whether courts should give arbitration the same broad immunity that protects judges. Despite the differences between arbitration and the judicial system, the courts have applied arbitral immunity to the arbitrator's acts in the same way as they have applied judicial immunity to judges. Though mimicking the boundaries of judicial immunity, arbitral immunity has developed as a separate concept. In fact, courts have extended arbitral immunity to protect arbitral organizations, an entity which has no comparable counterpart in judicial proceedings. In *Strategic Resources, Co. v. BCS Life Ins., Co.*,[2] the South Carolina Supreme Court, with no discussion of the merits of the claim, extended immunity to the arbitral organization involved in the dispute and reversed the trial court's injunction against the American Arbitration Association (AAA).[3] Although immunity of arbitral organizations is warranted in some situations, the broad application of immunity with no consideration of the particular facts of the case could weaken a party's confidence in the arbitration proceeding. In so doing, it would likely affect the attractiveness of arbitration proceedings as an option for dispute resolution.

## II. FACTS AND HOLDING

BCS Life Insurance Company and BCS Insurance Company (BCS) filed a lawsuit in Illinois state court against Strategic Resources, Gerald D. Peterson, Continental Casualty Company, and CNA Group Life Insurance Company (Strategic Resources), after a business dispute arose between the parties.[4] The court ordered the parties to arbitrate pursuant to the terms of their written agreement.[5]

The agreement provided that a panel of three arbitrators would hear all disputes.[6] Under the agreement, the parties would each choose an arbitrator, desig-

1. No. 26022, 2005 WL 1943536 (S.C. Aug. 15, 2005).
2. *Id.*
3. *Id.* at *3.
4. *Id.* at *1.
5. *Id.*
6. *Id.*

nated the "party arbitrators."[7] The party arbitrators would then choose a third arbitrator, the "neutral arbitrator."[8] After each party to the dispute had selected a party arbitrator, the party arbitrators were unable to agree on a neutral arbitrator.[9] To resolve the issue, BCS asked the AAA to assist in the selection of the neutral arbitrator.[10]

When Strategic Resources became aware of the AAA's involvement, it argued that the AAA should select the neutral arbitrator according to the AAA's Commercial Rules.[11] BCS, however, contended that the Supplementary Rules for the Resolution of Intra-Industry United States Reinsurance and Insurance Disputes (Supplementary Rules) should apply.[12] When the AAA selected a list of arbitrators according to the Supplementary Rules,[13] Strategic Resources objected to the selection and filed suit against BCS and the AAA.[14]

The trial court, enjoining the AAA from following the Supplementary Rules, ordered the application of the Commercial Rules to the arbitrator selection.[15] Also, the trial court found that BCS had engaged in wrongful conduct, including "manipulating the AAA, violating rules of the AAA, improperly communicating with the AAA, and making inconsistent statements to the trial court at hearings and in documents filed by the court."[16] BCS and the AAA appealed the trial court injunction.[17] The appeal was certified from the appellate court to the Supreme Court of South Carolina.[18]

The sole issue on appeal was whether the trial court erred in enjoining the AAA.[19] The court held that the doctrine of arbitral immunity extended to arbitral organizations' decisions so long as they were "within the scope of the arbitral process."[20] Accordingly, the court held that since the AAA's decision to select a list of potential arbitrators was within the "scope of the arbitral process," the AAA's decision was immune from the court's review.[21] Thus, the injunction was improper.[22]

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* The trial court found that BCS unilaterally decided that the party arbitrators were unable to make the decision and sought the assistance of the AAA without Strategic Resources' involvement. *Id.* at n.1. It further found that the motivation for BCS to involve the AAA was to obtain an unfair advantage in the selection of the neutral arbitrator. *Id.*
11. *Id.*
12. *Id.* The Supplementary Rules generally apply to insurance claims and coverage and yield a list of arbitrators who have experience as officers of insurance corporations but are not lawyers. *Id.* at n.2. The Commercial Rules yield a list of arbitrators who are lawyers experienced in "complex contract disputes." *Id.*
13. *Id.* at *1.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *3. The court also found that an injunction was an improper remedy because Strategic Resources had an adequate remedy of law, the right to an appeal of the decision. *Id.* at *4.
21. *Id.* at *4.
22. *Id.*

## III. LEGAL BACKGROUND

### *A. Judicial Immunity*

The doctrine of judicial immunity prohibits parties from filing civil actions against judges for decisions made and for other judicial acts performed during the course of trial proceedings.[23] The United States Supreme Court first applied this doctrine in *Bradley v. Fisher*.[24] In analyzing the case, the Court reviewed the development of the doctrine under English common law, where it was determined that judicial immunity was essential for the public benefit.[25] Judicial immunity secures the independence of judges and thus serves as a procedural protection for ensuring a fair trial.[26] The court applied the doctrine of judicial immunity to American courts and first awarded immunity to a judge in a claim for an improper removal order.[27] The court reasoned that judges need this protection in order to maintain an independent and neutral judiciary in controversial cases, and to rule without fear of facing a civil suit brought by a party who believes his or her case was wrongly decided.[28]

Although judicial immunity is an absolute immunity, *Bradley* did enunciate a limitation on judicial immunity.[29] The court stated that a judge is immune from civil liability for acts made in "excess of jurisdiction" but is not immune for acts made with a "clear absence of jurisdiction."[30] The clear absence standard invokes an extreme lack of jurisdiction because "the manner and extent in which jurisdiction shall be exercised are generally as much questions for [the judge's] determination as [are] any other questions involved in the case."[31] For example, an act made with a clear absence of jurisdiction and not protected by judicial immunity would be a probate court, with authority to hear disputes over wills and settlement of estates, ruling on a public offense.[32] In contrast, an example of an act made in excess of jurisdiction and protected by judicial immunity would be a court of general criminal jurisdiction creating a new public offense and convicting someone of the offense or a court of general criminal jurisdiction sentencing a party to a greater punishment than that authorized by law.[33]

Further, the immunity doctrine will not be applied to nonjudicial acts or actions taken when the judge is not acting in his or her judicial capacity.[34] To determine whether an act is judicial or nonjudicial depends on "whether it is a function normally performed by a judge" and on the "expectation of the parties and whether they dealt with the judge in his judicial capacity."[35]

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23. Bradley v. Fisher, 80 U.S. 335, 347 (1871).
24. *Id.*
25. *Id.* at 347-49.
26. *Id.*
27. *Id.* at 356.
28. *Id.* at 348.
29. *Id.* at 351-52.
30. *Id.*
31. *Id.* at 352.
32. *Id.*
33. *Id.*
34. Stump v. Sparkman, 435 U.S. 349, 360 (1978).
35. *Id.* at 362.

Courts construe the limitations narrowly and are reluctant to deny immunity to judges.[36] In *Stump v. Starkman*, the U.S. Supreme Court reversed the appellate court's denial of judicial immunity.[37] In *Stump*, a judge was sued who, on petition from the plaintiff's mother, ordered that plaintiff undergo a sterilization procedure when she was a minor.[38] The appellate court reversed the district court's judgment granting judicial immunity, stating that immunity did not protect against the judge's "failure to comply with elementary principles of due process."[39] The U.S. Supreme Court found the appellate court's view of the scope of judicial immunity "unduly restrictive" and stated that "a judge is completely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."[40]

Similarly, courts have provided broad interpretations when defining what constitutes a judicial act. In *Mireles v. Waco*, the plaintiff's attorney sued the judge after the judge allegedly ordered police officers to bring the plaintiff's attorney using excessive force into the court room.[41] The U.S. Supreme Court focused on the "particular act's relation to a general function normally performed by a judge" and found that the "function of directing police officers to bring counsel in a pending case before a court" was an act performed within judicial capacity and thus, was deserving of protection.[42]

### *B. The Expansion of the Doctrine of Judicial Immunity*

The doctrine of judicial immunity is no longer limited to judges but is extended to non-judicial entities that the courts find worthy of protection. The U.S. Supreme Court recognized an extension of judicial immunity to other public officials in *Butz v. Economu*, in which the Court extended judicial immunity to federal officials in the executive branch performing adjudicatory functions.[43] To justify the expansion of the doctrine, the Court stated that judges had immunity "not because of their particular location within the government but because of the special nature of their responsibilities."[44] In its determination of whether to extend immunity, the Court considered three factors: (1) whether the role of the official was "functionally comparable" to that of a judge, (2) whether immunity was necessary for the official to perform his or her role without harassment and intimidation, and (3) whether there were other existing procedural safeguards, similar to those available in the judicial process, that would protect against abuse of the immunity.[45] Applying this analysis, courts have extended the doctrine to

36. *Id.* at 359.
37. *Id.* at 364.
38. *Id.* at 352-54.
39. *Stump*, 435 U.S. at 355.
40. *Id.* at 359.
41. 502 U.S. 9,10 (1991).
42. *Id.* at 13
43. 438 U.S. 478, 516 (1978).
44. *Id.* at 511.
45. *Id.* at 512.

law clerks, appraisers, guardians ad litem, conservators, and state prosecuting attorneys.[46]

### *C. Arbitral Immunity*

Early state court decisions extended judicial immunity to arbitration, [47] now recognized as the separate doctrine of "arbitral immunity." [48] Several states have also codified arbitral immunity in their state statutes.[49] In addition, the Revised Uniform Arbitration Act (RUAA) codifies arbitral immunity stating as its support that this comprehensive immunity insures the "independence of arbitrators and arbitrator organizations" and "furthers the integrity of the arbitral system."[50]

Because an arbitrator's acts satisfy the three-part analysis articulated in *Butz*,[51] judicial immunity may be extended to arbitrators.[52] First, the arbitrator's role is "functionally comparable" to the role of a judge.[53] The parties' agreement to arbitrate substitutes the arbitrator for the judge as the decision-maker for the dispute and invokes the arbitrator's independent judgment and discretion.[54] This agreement to arbitrate "replaces a statute or court order as the source of the arbitrators' power with regard to the subject matter and procedural rules."[55] Second, immunity is necessary for arbitrators to perform their role without harassment and intimidation. Because arbitrators hear the parties' dispute and then render a final award, they must maintain an independent and neutral position without fear of becoming a party to the dispute.[56] Third, there are procedural safeguards in the arbitration system similar to those in the judicial system that can protect the parties from abuse of arbitral immunity.

The parties have the right to be represented by an attorney. Parties can also seek judicial review of the award and the court can vacate the award under the limited grounds set forth in the FAA.[57] In addition, the voluntary use of arbitration also operates as a procedural safeguard. The parties must decide to arbitrate as a means to resolve the dispute and forego a remedy at law.[58]

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46. Arbitral immunity is also extended to other professions when acting in a quasi-arbitrator capacity, such as architects, accountants and appraisers. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1975) (extending judicial immunity to state prosecuting attorneys in civil suits); Olivia v. Heller, 839 F.2d 37, 40 (2nd Cir. 1988) (extending judicial immunity to law clerks); Cok v. Costentino, 876 F.2d 1, 3 (1st Cir. 1989) (extending judicial immunity to guardians ad litem and conservators).

47. *See* Jones v. Brown, 6 N.W. 140, 142 (Iowa 1880).

48. *See* Lundgren v. Freedman, 307 F.2d 104, 118 (9th Cir. 1962) (extending judicial immunity to architects when acting in a quasi-arbitrator capacity); Wasyl v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987) (extending arbitral immunity to appraisers in their valuation of partnership assets); Asset Management Systems, Inc. v. White, No. B1431680, 2002 WL 724925, *7 (Cal. App. 2002) (extending arbitral immunity to accountants acting as referees).

49. *See, e.g.*, CAL. CIV. PROC. CODE § 1297.119 (West Supp. 2004); FLA. STAT. CH. 44.107 (2003); 7A GA. PROC. CIV. § 7:11 (2001); N.C. GEN. STAT. § 7A-37.1 (2003).

50. *See* RUAA § 14(a)-(b).

51. 438 U.S. 478, 512 (1978).

52. Corey v. New York Stock Exchange, 691 F.2d 1205, 1209-10 (6th Cir. 1982).

53. *Id.* at 1209.

54. *Id.*

55. *Id.*

56. *Id.* at 1211.

57. *Id.* at 1210.

58. *Id.*

In addition to satisfying the *Butz* analysis, arbitral immunity also supports many policy arguments. Most importantly, arbitral immunity furthers the federal policy favoring arbitration.[59] Arbitral immunity ensures that an adequate body of individuals will be willing to serve as arbitrators by greatly reducing the risk that the arbitrator will become a party to the dispute.[60] Arbitral immunity also prevents collateral attacks against arbitrators and their judgments, which, if allowed, would significantly reduce the effectiveness of the limited appeal provisions of the Federal Arbitration Act.[61] Finally, arbitral immunity respects the contractual choice of the parties to arbitrate the dispute by limiting the court's involvement in the dispute and giving more effect to the decisions of the arbitration proceedings, which the parties chose to engage in.[62]

The limitations placed on arbitral immunity mirror those placed on judicial immunity. The arbitrators are not afforded immunity if they lack jurisdiction or if the arbitral act at issue is not within the scope of the arbitral process.[63] Arbitral immunity is similarly applied broadly despite these limitations. Arbitral immunity clearly applies to claims that an arbitrator was improperly selected and thus lacked the authority to resolve the dispute.[64] In *Tamari v. Conrad*, the Seventh Circuit applied the arbitral immunity doctrine and analogized the improper selection claim to an attempt to declare a jury verdict void because the selection of the jury was improper.[65]

Courts apply a more critical analysis of arbitral immunity for claims concerning the arbitrator's failure to act. In *Baar v. Tigerman*, a California court of appeals emphasized the difference between the judicial process (which derives power and duty from the Constitution) and the arbitral process (which derives power and duty from the parties' contract).[66] The court found that the arbitrator's failure to render the arbitration award in a specified time period was a breach of a contractual obligation, which is distinct from acting in quasi-judicial capacity.[67] This distinction of applying contract liability to the arbitrator's failure to act instead of immunity was also applied in *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*.[68] The Fifth Circuit declined to apply immunity to the arbitrator's delay in rendering an award because the delay was a breach of contract rather than a quasi-judicial action.[69] The court stated that the arbitrator lost immunity because he lost his "resemblance to a judge" and had "simply defaulted on a contractual duty to both parties."[70]

59. *See* Cort v. AAA, 795 F. Supp. 970, 973 (N.D. Cal. 1992) (asserting that one goal of arbitral immunity is to "ensure that there are a body of individuals to perform the service").

60. *See* Tamari v. Conrad, 552 F.2d 778, 780-81 (7th Cir. 1977) (stating that the arbitrators cannot be expected to volunteer their time to arbitrate their disputes if they can be at risk for a lawsuit in a dispute in which they have no real interest).

61. *Corey*, 691 F.2d at 1211.

62. *Id.*

63. *Tamari*, 552 F.2d at 780-81.

64. *Id.*

65. *Id.*

66. 140 Cal. App. 3d 979, 984 (Cal Ct. App. 1983).

67. *Id.* at 985.

68. 551 F.2d 1026, 1033 (5th Cir. 1977).

69. *Id.*

70. *Id.*

Although the courts have found enough similarities between arbitrators and judges to justify an extension of judicial immunity to arbitrators, many commentators find that the extension of immunity to arbitrators is not proper. Commentators focus on the differences between arbitrators and judges to stress the flaws in a court's analysis supporting the extension.[71] For example, arbitral appointments differ from judicial assignments.[72] Arbitrators market themselves as "professional neutrals"[73] and are nominated by the parties or an arbitral organization, whereas, judges are randomly assigned.[74] Arbitrators also can decline assignments as well as modify the conditions of the assignments through contract.[75] In addition, arbitrators are awarded fees for their services on the basis of their experience and background, while judges do not receive compensation from the parties for their services.[76]

Although courts state that there are adequate procedural safeguards in the arbitration process to protect against the abuse of arbitral immunity, many commentators argue that the procedural safeguards in the arbitration process are inadequate.[77] For example, although the parties can seek judicial review of the award, they are subject to the remedy of vacatur which the court can only grant in very restricted circumstances as articulated by the FAA. In addition, even if the aggrieved party is able to vacate the award, the party must return to the private arbitration system to settle the initial dispute.[78] Also, arbitrators are not bound by precedent and do not have to follow the same rules of evidence and procedure as the federal courts.[79]

Commentators suggest several alternatives to arbitral immunity. Approaches vary from a market-based approach to a qualified immunity. The market-based approaches emphasize arbitration's reliance on contract and apply a default provision of liability unless the contract states otherwise.[80] The default provision is intended to force the arbitrators to place liability provisions in their contracts rather than relying on the court system.[81] Some qualified immunity approaches advocate for a statute that defines when arbitrators are not entitled to immunity.[82]

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71. *See* Maureen Weston *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449 (2004); Peter Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 156 (2004).

72. Weston, *supra* note 71 at 497; Rutledge, *supra* note 71, at 156.

73. Weston, *supra* note 71 at 497; Rutledge, *supra* note 71, at 156.

74. Rutledge, *supra* note 71, at 168.

75. *Id.*

76. *Id.* at 168-69.

77. Weston, *supra* note 71, at 496.

78. *Id.*

79. Rutledge, *supra* note 71, at 167.

80. *Id.* at 190-200.

81. *See* Rutledge, *supra* note 71, at 156; Matthew Rasmussen, Note, *Overextending Immunity: Arbitral Institutional Liability in the United States, England and France*, 26 FORDHAM INT'L L.J. 1824, 1872-75 (2003).

82. *See* Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 7-8 (2000) (proposes a statute that denies arbitral immunity to organizations for nonfeasance and for intentional acts of misconduct).

### D. Extension of Arbitral Immunity to Arbitral Organizations

Most federal courts extend arbitral immunity to the organizations administering arbitration proceedings and to the private provider organizations, such as the AAA, because these organizations perform tasks that are within the scope of the arbitration process.[83] The extension of arbitral immunity to arbitral organizations also ensures that the organizations will continue to administer arbitrations.[84]

The extension of arbitral immunity to the arbitral organizations is derived from the immunity of the arbitrator, rather than as a separate immunity applied to arbitral organizations. In *Corey v. The New York City Stock Exchange*,[85] the Sixth Circuit reasoned that because the arbitrators had immunity, extending that immunity to encompass boards which sponsor arbitration was a "natural and necessary product of the policies underlying arbitral immunity;" and if not extended, "immunity extended to the arbitrators would be illusionary."[86]

Although immunity is derived from the arbitrator, organizational immunity has not been limited to the organization's acts that arbitrators are capable of performing, but has been applied to all acts within the scope of the arbitral process, including the organizations' own administrative responsibilities.[87] In *Austern v. Chicago Board Options Exchange*,[88] the Second Circuit rejected the argument that immunity only applied to discretionary tasks and did not apply to administrative tasks.[89] The court stated that whether or not the act was within the scope of the arbitral process depended on the "functions it protects and serves."[90] Courts have also applied immunity to the arbitral organization's internal procedural violations. In *Olson v. National Association of Securities Dealers*,[91] the Eighth Circuit applied arbitral immunity to National Association of Securities Dealers' selection of the arbitrator.[92] The court reasoned that this selection was "a necessary part of arbitration" which applied "even when the selection violate[d] the organization's own rules."[93]

As in judicial immunity, the limitations on arbitral immunity such as the "clear absence of jurisdiction" limitation, is narrowly interpreted when applied to arbitral organizations.[94] In *New England Services, Inc. v. American Arbitration Association*,[95] the arbitral organization continued processing the arbitration despite

83. *See* Austern v. Chicago Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990); Corey v. New York Stock Exch., 691 F.2d 1205, 1208-09 (6th Cir. 1982).

84. *See* New England Cleaning Servs., Inc. v. Am. Arbitration Ass'n, 199 F.3d 542, 546 (1st Cir. 1999) (stating that the failure to extend immunity to organizations could discourage it from sponsoring future arbitrations and this reluctance would "impede the implementation of the federal policy favoring arbitration of labor disputes"); *Austern*, 898 F.2d at 886 (stating that reducing immunity to arbitral organizations would "merely serve to discourage its sponsorship of future arbitrators").

85. 691 F.2d 1205 (6th Cir. 1982).

86. *Id.* at 1211.

87. *Austern*, 898 F.2d at 886.

88. *Id.*

89. *Id.*

90. *Id.*

91. 85 F.3d 381, 383 (8th Cir. 1996).

92. *Id.*

93. *Id.*

94. New England Cleaning Servs., Inc. v. Am. Arbitration Ass'n., 199 F.3d 542, 546 (1st Cir. 1999).

95. *Id.*

the fact that one of the parties to the arbitration cancelled the agreement that mandated arbitration.[96] The court held that the AAA was not operating with a "clear absence of jurisdiction" because the "termination of the agreement was not enough to determine that the demand for arbitration was not facially valid."[97]

Following the federal courts' lead, several lower state court decisions have extended arbitral immunity to institutions providing arbitration.[98] In *Boraks v. The American Arbitration Association*,[99] the Michigan Court of Appeals applied arbitral immunity to protect the AAA against a claim that the AAA misrepresented the effectiveness of its arbitration services and breached its duty to provide competent arbitrators.[100] In *Higdon v. Construction Arbitration Association*,[101] the Kentucky Court of Appeals extended arbitral immunity to the Construction Arbitration Association, relying on the federal courts' extension as well as the fact that Kentucky state courts have "recognized the doctrine of quasi-judicial immunity to which arbitral immunity is often compared."[102] Similarly, in *Thiele v. RML Realty Partners*,[103] a California appellate court extended arbitral immunity to the arbitral organization, following the decisions of federal courts and other lower California state courts to extend immunity to arbitral organizations.[104] The first extension of arbitral immunity to arbitral organizations by a state supreme court, however, occurred in *Strategic Resources, Co. v. BCS Life Insurance Co.*,[105] in the South Carolina Supreme Court.

## IV. INSTANT DECISION

In *Strategic Resources, Co. v. BCS Life Ins. Co.*,[106] the South Carolina Supreme Court found that the trial court's decision to enjoin the AAA was an abuse of discretion on two grounds: first, the AAA was protected by arbitral immunity, and second, Strategic Resources had an appropriate remedy at law, the right to an appeal.[107]

After a brief review of federal courts' and other state jurisdictions' application of arbitral immunity, the court conceded that the arbitrator in the instant case

96. *Id.* at 545.
97. *Id.*
98. *See* Stasz v. Schwab, 17 Cal. Rptr. 3d 116 (Cal. Ct. App. 2004) (extended arbitral immunity to the organization because the accusation of bias had an appropriate remedy at law); Theile v. RML Realty Partners, 18 Cal. Rptr. 2d 416 (Cal. Ct. App. 1993) (rejects the claim against the arbitral organization because of the strong public policy favoring arbitration and the liberal construction of the doctrine); Higdon v. Constr. Arbitration Assocs., Ltd., 71 S.W.3d 131 (Ky. Ct. App. 2002) (extended arbitral immunity to the organization because it performs the sort of procedural and factual determinations an arbitrator would also make); Boraks v. AAA, 517 N.W.2d 771, 773 (Mich. Ct. App. 1994) (the Michigan appellate court affirmed the trial court's decision to grant arbitral immunity to the AAA); Blue Cross Blue Shield of Texas v. Juneau, 114 S.W.3d 126 (Tex. Ct. App. 2003) (extended arbitral immunity to the organization relying on the federal courts extension).
99. 517 N.W.2d 771 (Mich. Ct. App. 1994).
100. *Id.* at 772.
101. 71 S.W.3d 131 (Ky. Ct. App. 2002).
102. *Id.* at 132.
103. 18 Cal. Rptr. 2d 416 (Cal. Ct. App. 1993).
104. *Id.* at 417.
105. 2005 WL 1943536 (S.C. Aug. 15, 2005).
106. *Id.*
107. *Id.* at *2-4.

should be afforded arbitral immunity.[108] The court then turned its focus to "whether the decision to select a list of potential arbitrators from the Supplementary Rules falls within the scope of the arbitral process and not within one of the exceptions of judicial immunity."[109]

The court quickly dispensed with the first inquiry, summarily concluding that the decision to select a list of arbitrators from the Supplementary Rules was within the scope of the arbitration process.[110] The next step in the court's analysis was consideration of the applicability of the two exceptions to immunity, as articulated in *Mireles v. Waco*,[111]—whether there was a non-judicial act or a clear absence of jurisdiction.[112] The court found that these two exceptions did not apply, stating that the AAA's decision to select a list of potential arbitrators "was a quasi-judicial action" and that "the parties did not dispute that their arbitration agreement gave the AAA the authority or jurisdiction to administer the selection of the neutral arbitrator upon an impasse."[113]

The defendants cited two cases, *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*[114] and *Baar v. Tigerman*,[115] in which courts had denied immunity for the arbitrator's failure and delay to render an award.[116] The South Carolina Supreme Court distinguished these two cases from the instant case by noting that in the instant case "there was no allegation that the AAA caused any delay."[117] A second distinction the court made was that the relief sought in *E.C. Ernst* and *Baar*[118] was monetary, and in this case, the claim was "for equitable relief of an injunction, which requires a showing of extraordinary circumstances."[119] Thus, the court found *E.C. Ernst* and *Baar* were not controlling in the instant case.[120]

In the final stage of the arbitral immunity analysis, the court found that "sound public policy provides an arbitrator not be forced to defend a claim and, in turn, be forced to step out of an impartial administrative role to assume an adversarial position."[121] The court stated that the AAA was "immune from lawsuits concerning this decision" and held that "the trial court erred in enjoining the AAA."[122] The court also accepted BCS's argument that the trial court erred because there was an adequate remedy at law.[123] The court stated that Strategic Resources did have a right to an appeal and that this right "protect[ed] [Strategic Resources'] rights and [gave it] the opportunity to repair any prejudice caused by the alleged improper selection of the neutral arbitrator."[124]

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108. *Id.*
109. *Id.* at *3.
110. *Id.*
111. 502 U.S. 9, 11-12 (1991).
112. *Strategic Resources*, 2005 WL 1943536, at *3.
113. *Id.*
114. 551 F.2d 1026 (5th Cir. 1977).
115. 140 Cal. App. 3d 979 (Cal. Ct. App. 1983).
116. *E.C. Ernst*, 551 F.2d at 1032; *Baar*, 140 Cal. App. 3d at 984.
117. *Strategic Resources*, 2005 WL 1943536, at *3.
118. *E.C. Ernst*, 551 F.2d at 1028; *Baar*, 140 Cal. App. 3d at 981.
119. *Strategic Resources*, 2005 WL 1943536 at *3.
120. *Id.*
121. *Id.* at *4.
122. *Id.*
123. *Id.*
124. *Id.*

## V. COMMENT

In *Strategic Resources, Co. v. BCS Life Ins. Co.*[125] the South Carolina Supreme Court, following precedent established and adhered to in federal courts, became the first state supreme court to broadly apply the doctrine of arbitral immunity to the AAA.[126] In so holding, the court also adopted the federal courts' limited analysis purportedly justifying the extension of arbitral immunity to arbitral organizations. The South Carolina Supreme Court provided little analysis and reasoning to justify their extension of arbitral immunity to arbitral organizations and failed to consider the analysis articulated in the *Butz*[127] decision, which provided the framework for extending immunity outside of the judicial system. By providing only a limited analysis, the court further distanced arbitral immunity in the state court system from the principle on which it was founded—judicial immunity. This broad application has important ramifications, both because it extends arbitral immunity to arbitral organizations, creating a distinct break from its founding premise, and because it goes against the legal community's call for a narrow application of arbitral immunity.

Application of arbitral immunity to arbitral organizations should not be completely denied, but such an application should be supported by reasoned analysis. Furthermore, the limitations of arbitral immunity applied to arbitral organizations cannot rely solely on the consideration of judicial immunity's limited exceptions. The extension of arbitral immunity must address the concerns of extending the immunity to arbitral organizations on a case-by-case basis.

The *Strategic Resources* decision highlights the concerns of extending arbitral immunity with little analysis from the court. The South Carolina Supreme Court would have better supported its decision if it had applied the *Butz* factors to the particular facts of the instant case. A more detailed approach could address the concerns of extending arbitral immunity to organizations, and at the same time, give arbitral organizations discretion to act within parameters that would keep their actions from being subject to review by a court. When the *Butz* factors are applied to arbitral organizations, compelling arguments exist that such organizations should not be wholly protected by immunity. As a result, the court should consider specific limitations for the extension of arbitral immunity to arbitral organizations in addition to the exceptions of judicial immunity and arbitral immunity.

The first prong of the *Butz* analysis considers whether the role of arbitral organizations is functionally comparable to the role of a judge.[128] Arbitral organizations are not always acting in a "functionally comparable" capacity to that of a judge acting in an adjudicatory capacity. Arbitral organizations derive power and control in the arbitration from the private contract negotiated between the parties and the organization as opposed to a court order, statute, or constitution that gives the parties less choice in their participation in the proceedings.[129] The agreement to use the arbitral organization's services as well as the arbitration proceeding also

125. *Id.*
126. *Strategic Resources*, 2005 WL 1943536, at *3.
127. Butz v. Economu, 438 U.S. 478, 512 (1978).
128. *Id.*
129. Weston, *supra* note 71, at 496-98.

takes place in a private setting, rather than the judicial process' public setting. This increases the chances that parties with unequal bargaining power may be pressured to sign arbitration agreements.[130] The arbitral organizations also receive fees and market their services through reputation and advertising, a dynamic entirely absent in judicial proceedings.[131]

When applying the first prong of the *Butz* analysis to the instant case, the South Carolina Supreme Court would have addressed whether the role of the AAA as the decision-making authority was "functionally comparable" to that of a judge acting in the judicial system. True enough, the authority from the contract is sufficient to establish the authority for the decision-maker.[132] In this case, though, the court would have considered the additional facts that the parties did not originally contract for the AAA's involvement in this phase of the selection process, and that the AAA's involvement in this phase came from BCS's unilateral solicitation of the AAA absent any consultation with Strategic Resources.[133] If arbitral immunity had been extended, the AAA's decision would have barred Strategic Resources from any claim concerning this decision, even though Strategic Resources did not independently decide to involve the AAA.

The second prong of the *Butz* analysis addresses the necessity of arbitral immunity to prevent harassment and intimidation.[134] Arbitral organizations do not need the protection of arbitral immunity to prevent harassment and intimidation unlike individual arbitrators or judges. Because the parties voluntarily agree to use the services of arbitral organizations, the arbitral organization has an incentive to develop a reputation of neutrality and independence in providing its services in order to ensure future demand of its services.[135] Arbitral organizations also have the ability to decline to provide services, which could prevent future administration of disputes involving parties guilty of wrongful conduct or with a reputation of previous wrongful conduct.[136]

The South Carolina Supreme Court's analysis of the second prong of the *Butz* analysis would have then questioned whether arbitral immunity was necessary to protect the AAA from harassment and intimidation. The court would have examined factors such as the procedural history of the case to determine if Strategic Resources had other motivations in bringing this claim. The court would have also considered the neutrality of the AAA in the proceedings and considered more carefully the trial court findings that BCS manipulated the AAA, violated the rules, and improperly communicated with the AAA.[137] If the AAA and BCS were operating together, this relationship could have biased the entire arbitration proceeding to the detriment of Strategic Resources. This type of wrongful conduct gives Strategic Resources little relief but to file a claim contesting the procedure rather than risk becoming bound by the decisions of the AAA under the influence of the opposing party. If the AAA in this instance was susceptible to wrongful

130. *Id.*
131. *Id.*
132. *See* Corey v. New York Stock Exch., 691 F.2d 1205, 1209-10 (6th Cir. 1982).
133. *Strategic Resources*, 2005 WL 1943536, at *1.
134. Butz v. Economu, 438 U.S. 478, 512 (1978).
135. *See* Rutledge, *supra* note 71, at 169.
136. *See* Weston, *supra* note 71, at 496; Rutledge, *supra* note 71, at 166-67.
137. *Id.*

conduct by the other party, the neutrality of the organization would not be strong enough to have entitled it to immunity.

The third prong of the *Butz* analysis addresses the procedural safeguards available to protect against abusive use of the immunity doctrine.[138] An analysis of the procedural safeguards in the extension of immunity to arbitral organizations raises the identical concerns with the adequacy of the procedural safeguards in the extension to arbitrators, stemming from the nature of arbitration itself.[139] The arbitrator's award is final, with judicial review for vacatur permitted only under a few limited grounds, such as where the award was procured by fraud or undue means, where there exists evident partiality of the arbitrators, or where the arbitrator clearly exceeded his or her powers.[140] This limited review of the arbitral organization's decisions will not be reviewable until after the entire process is complete and a final award has been rendered.[141] At the same time, the inadequacy arguments may be more pressing when analyzing the actions and decisions of the arbitral organizations as opposed to the arbitrators. For instance, the fact that the decision will not be reviewable until the final award has been rendered may affect claims against arbitral organizations more than claims against the arbitrators because arbitral organizations' decisions are more commonly made in the beginning of the arbitration, such as selecting an arbitrator or providing a selection list of arbitrators. Therefore, there may be a higher likelihood that the contested decision affected the entire arbitration proceedings.

In analyzing the third prong of the *Butz* analysis, the court would have considered the procedural safeguards available to Strategic Resources, focusing on the timing of the claim in the arbitration proceeding, and the advantages and disadvantages of confronting the issue before or after the final award is rendered, as well as the probability of judicial consideration of the claim in the future. The court's decision to extend immunity to the AAA means that Strategic Resources' claim for equitable relief will not be heard until the arbitration proceeding is completed and the final award is rendered. Thus, Strategic Resources must go through the time and expense of the entire arbitration process before its claim can be heard. In addition, if Strategic Resources' claim meets the high standard of vacatur, all of the parties will suffer the same loss of time and expense to conduct the entire process because it affects the actual selection of the arbitrators.

Policy arguments, such as encouraging arbitration, honoring the parties' contract, and giving effect to the arbitral immunity granted to arbitrators, also challenge the justification for extension of arbitral immunity. Although immunity and its effect of limiting the liability of arbitral organizations may encourage arbitral organizations to provide their services, arbitral immunity may provide hesitation in parties' decisions to contract with an arbitral organization. If parties are not soliciting the organization to administer the arbitration, arbitral immunity's effect of encouraging arbitral organizations to continue to arbitrate is futile. Further, absent the application of immunity, the risk of liability may not discourage the arbitral organizations from continuing to provide their services. The arbitral organizations' prospect of compensation is a strong incentive for organizations to

138. *Butz*, 438 U.S. at 512.
139. *See* Rutledge, *supra* note 71, at 166-67; Weston, *supra* note 71, at 496.
140. *See* 9 U.S.C. § 10(a)(1)-(4) (2000).
141. Rutledge, *supra* note 71, at 179-80.

continue offering arbitration services and may take priority over the possible risk of liability.[142] In addition, arbitral immunity will affect the quality of the arbitrator's decisions as well as the quality of those that choose to be arbitrators. A broad application of arbitral immunity will allow arbitrators to render inferior decisions and services and use arbitral immunity to escape liability.[143] On the other hand, in the absence of arbitral immunity, arbitrators will have a stronger incentive to render higher-quality awards to avoid liability. The risk of liability will also increase the likelihood that only those arbitrators who are qualified and do not need to rely on immunity will accept appointments.[144]

The contention that arbitral immunity gives the parties what they bargained for in their contract fails when the arbitral organization has acted in bad faith or has failed to follow its own rules. Clearly, that is not what the parties contracted for in agreeing to use the organization's services. Finally, the denial of the extension of arbitral immunity to arbitral organizations will not necessarily make arbitral immunity illusory. Arbitral organizations are not a necessary precondition to a properly functioning arbitration system.[145] It is possible that arbitrators themselves could independently administer the arbitration proceedings.[146] In addition, the risk of parties bringing claims against the arbitral organization to circumvent the arbitral immunity that protects arbitrators is limited. Since arbitral organizations usually function in the administration of the arbitration, the range of cases in which an arbitral organization might be liable is much narrower than the claims against an arbitrator.[147]

The South Carolina Supreme Court should have addressed several of these policy arguments in their discussion of the extension of arbitral immunity to the AAA. For example, applying arbitral immunity to the AAA may not further the federal policy toward arbitration. Although awarding immunity to the AAA protects the AAA from becoming a party to the dispute, the grant of immunity will have an effect on Strategic Resources' decision to employ the AAA for any disputes in the future. Further, arbitral immunity would not necessarily give the parties what they bargained for, considering that the involvement of the AAA in this part of the dispute was not specifically in the parties' contract and resulted from BCS's unilateral solicitation of the dispute. An examination of the three factors and policy arguments would have forced the court in *Strategic Resources* to consider the basic justifications of judicial immunity and only then could the court have decided if arbitral immunity was proper in this case. This type of analysis would have satisfied the critics' claims of abuse of the doctrine of judicial immunity, and would best serve arbitration proceedings in the future.

## VI. CONCLUSION

Although extension of judicial immunity to arbitrators is arguably a proper application of the doctrine, when arbitral immunity is extended to arbitral organi-

142. *Id.* at 168-69.
143. *Id.* at 175.
144. *Id.*
145. *Id.* at 178-79.
146. *Id.* at 179-80.
147. *Id.*

zations, the courts can no longer rely on the federal precedent that justifies the extension of immunity to arbitral organizations on the initial extension of judicial immunity to arbitrators. Because this is the first state supreme court case extending immunity to arbitral organizations, the higher state courts need to establish an application of a more specific analysis, absent in the federal system, that reflects the different context in which arbitration takes place as opposed to the context of judicial proceedings. A more careful analysis of the extension of immunity, tailored to the concerns associated with the arbitral organizations, could preserve the functions of arbitral organizations and at the same time protect the parties from abuse and skepticism in arbitration proceedings. The continuing extension of immunity with little analysis in the state courts creates a more pressing concern to reshape the application of arbitral immunity to arbitral organizations in order to preserve the functions and integrity of the organizations.

ELIZABETH WILHELMI