

ARBITRAL IMMUNITY: JUSTIFICATION AND SCOPE IN ARBITRATION INSTITUTIONS**PRATHIMA R. APPAJI*****I. INTRODUCTION**

Arbitration as a form of dispute resolution mechanism has existed from centuries ago and was used extensively in the area of commercial and labour-management sectors.¹ Traditionally, entities with relatively equal bargaining power used arbitration primarily in specialised industries.² Arbitration relationship is hybrid in nature.³ Though it arises from a contract, the parties to the contract waive their right to come before a competent court and bestow the power to resolve the dispute to a neutral third party and agree to abide by decision rendered by the third party(s).⁴ This makes arbitration more than a simple contractual relationship, converting it into a true jurisdictional relationship.⁵ The process of arbitration is relatively faster, simpler and less expensive within a neutral council. Most importantly, arbitration provides for internationally recognized method for enforcing awards, which is the New York Convention.⁶ Hence with the advent of the global economy and the increasing number of international commercial transactions, arbitration has become an important dispute resolution option.⁷ It is being increasingly used as a mechanism of dispute resolution in the form of arbitration contracts between corporate entities and their customers, patients, or employees.⁸

With the rise of the use and demand for arbitration, there rose a corresponding market of professional arbitrators and an industry of private businesses that

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¹ Refer Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N. C. L. REV. 931, 969 (1999). (Describing the genesis of origin of arbitration in Europe and the United States) as cited in Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449 (2003-2004).

² See *Id.*, 449

³ Bernardo M Cremades, *Should arbitrators be immune from liability?* 10 INTL FIN. L. REV. 32 (1991).

⁴ Refer *Id.*,

⁵ *Id.*,

⁶ 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 (2000).

⁷ *Id.*,

⁸ Refer *Id.*,

provide arbitration support and administrative services.⁹ However, because of the perceived misconduct of the arbitrators, the arbitration process has come under increasing attack through civil actions against arbitrators.¹⁰ This has resulted in the questioning of justification and ambit of arbitral immunity. Currently, different countries and arbitration institutions deal with arbitral immunity in their own myriad ways and even the watershed, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration, does not contain any provision in detail regarding the immunity of arbitrators.¹¹ Thus, there is a startling lack of international harmonization regarding the scope of liability for arbitrators.¹²

II. EVOLUTION OF ARBITRAL IMMUNITY AND ITS RELEVANCE TODAY

Arbitral immunity developed from the concept of judicial and quasi-judicial immunity. It was argued that this is so because of the inherent similarities between arbitrators and judges and hence arbitrators must be extended the same privilege. In common law countries the doctrine of judicial immunity can be traced to Lord Coke's 1607 judgement in *Floyd & Barker*,¹³ which held that judges of England's principle common law court, the King's Bench¹⁴, were immune from being sued in competing courts for acts performed in their judicial capacity.¹⁵ This rule of immunity is subject to two important caveats.¹⁶ It was held in the *Marshalsea Case*, when actions are taken in complete absence of jurisdiction the judge can be subject to personal liability.¹⁷ In *Floyd & Barker*, the court came to the conclusion that a judicial immunity is only for "judicial actions" and does not extend to acts which are administrative, legislative or personal.¹⁸ Also, immunity is not extended to protect the judges for their

⁹ Refer *Id.*,

¹⁰ Refer *supra* note 6, at 2

¹¹ See *Model Law of International Commercial Arbitration*, U.N. Commission on International Trade Law, 18th Session, Annex I, U.N. DOC. A/40/17 (1985): see *infra* notes 208-9 and accompanying text (discussing the legislative history of the Model Law and why it avoided addressing the issue) as cited in *supra* note 3

¹² Refer *supra* note 3

¹³ *Floyd & Barker*, 12 Co. Rep. 23, 77. Eng. Rep. 1305 (1607) as cited in Michael D. Moberly, *Immunitizing Arbitrators from Claims for Equitable Relief*, 5 PEPP. DISP. RESOL. L. J. 325, 328 (2005).

¹⁴ See *Pulliam*, 466 U.S. at 546 as cited in *Id.*,

¹⁵ See *Pulliam*, 466 U.S. at 530 (discussing *Floyd & Barker*), as cited in *Id.*,

¹⁶ Dennis R. Nolan & Roger I Abrams, *Arbitral Immunity*, 11 INDUS. REL. L. J. 228, 230 (1996) as cited in *supra* note 6, at 16

¹⁷ The *Marshalsea Case*, 10 Coke's Kings Bench Rep. 68, 77 Eng. Rep. 1027 (K.B.) as cited in *supra* note 6, at 16

¹⁸ *Floyd v. Barker*, 12 Coke's Kings Bench Reports 23, 77 Eng. Rep. 1305 (K.B.) as cited in *supra* note 6, at 16

criminal acts. The principle was subsequently expanded to afford comparable immunity to all judges.¹⁹ The policy justifications underlying the doctrine are to ensure finality of judicial decisions, to preserve judicial independence, and to protect the integrity of the judicial process by preventing interference in judicial decision making that arises from harassment or intimidation by parties.²⁰ Another set of justifications given is the remedies that are available against judicial decisions are impeachment and appeals. In civil law jurisdictions, judges are liable for wrongful acts and parties can recover damages caused from judicial wrongdoing.²¹ Judicial immunity existed not just to protect people holding judicial offices but also to protect litigants and litigation process.²² It is a means to an end and not an end in itself.²³ In line with these principles, the courts have extended judicial immunity to arbitrators due to the functional similarities between the two positions. Arbitrators are neutral parties that are appointed to adjudicate on disputes submitted before them and render binding and final decisions. In this process, arbitrators determine the rights of the parties to the arbitration agreement. Similar to the public policy argument given to justify judicial immunity, the grounds of independence and finality holds true for arbitral immunity. Thus, the courts have justified the granting of judicial immunity to arbitrators.

However the analogy is not perfect and eventually the functional similarity between the two break down.²⁴ An arbitrator derives his powers from private contracts and receives remuneration in return for his professional service; however, a judge is appointed by the State from which they derive their power and remuneration.²⁵ The judiciary is one of the three limbs of the government and is essential for the working of a democracy; the profession of arbitrators is less noble.²⁶ Arbitrators need not follow precedents and do not create it.²⁷ Arbitration proceedings are not public like courts, but are private and confidential.²⁸ Also, unlike court proceedings, arbitration proceedings cannot

¹⁹ See *Pulliam*, 466 U.S. at 531 (discussing *Floyd & Barker*), as cited in *supra* note 13, at 328

²⁰ See *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Bradley*, 80 U.S. at 347-49 ; Also see J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, DUKE L.J. 879, 897-920 (1980) as cited in *supra* note 1, at 477

²¹ *supra* note 6, at 17-18

²² Refer Dennis R. Nolan, & Roger I Abrams, *Arbitral Immunity*, 11 INDUS. REL. L. J. 228, 232 (1989)

²³ *Id.*; *supra* note 6, at 23

²⁴ *supra* note 22, at 234

²⁵ *Arenson v. Casson*, [1975] 3 All. E. R. at 918-19 as cited in *supra* note 6, at 23

²⁶ *Baar*, 140 Cal. App. 3d at 984; Refer Mark A. Sponseller, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, 430 (1993) as cited in *supra* note 6, at 23

²⁷ *Arenson v. Casson*, [1975] 3 All. E.R. at 918 as cited in *supra* note 6, at 24

²⁸ See *Baar*, 140 Cal. App. 3d at 984, as cited in *supra* note 6, at 24

determine the rights and obligations of non-parties to the arbitration contract.²⁹ They lack rigid procedural formality³⁰ and arbitral awards are subject to very limited judicial review.³¹

However, despite all these differences arbitrators are bestowed with blanket immunity, which even judges performing a noble profession are not honoured with. Thus, this near absolute immunity renders them more powerful than judges in specified areas. Also, today, due to great demand for arbitrators, it has developed into a profession like doctors, lawyers, accountants, where they are hired for their professional services.³² There are situations where arbitrators, like other professionals, act negligently or even maliciously.³³ In other professions such misconduct would result in liability.³⁴ Yet the blanket immunity granted to arbitrators' shields them from any accountability for their wrongful conduct and denies the aggrieved parties any remedies for the damage suffered.³⁵ Without any form of substantial liability imposed on them, arbitrators are most likely to commit or fail to commit an increasingly diverse array of acts which will test the limits of parameters arbitral immunity in new ways.³⁶ Hence, there is a need to question not only the ancient justifications but also the relevance of arbitral immunity in light of today's globalised economy where arbitration is an important dispute resolution mechanism in the international scene.

III. SCOPE OF ARBITRAL IMMUNITY UNDER VARIOUS ARBITRATION INSTITUTIONS WITH REFERENCE TO 'SERIOUS MISCONDUCT' AND 'BIASES'

Under most arbitration institutions, neither 'serious misconduct' nor 'bias' is defined. They state that the arbitrator would be merely removed and replaced in case of existence of justifiable doubts of the arbitrator's independence or impartiality. All the institutions impose the duty to disclose on the arbitrator of any circumstances that is likely to result in justifiable doubts. Few of them have

²⁹ See *Baar*, 140 Cal. App. 3d at 984, as cited in *supra* note 6, at 24

³⁰ Refer See Richard J. Mattera, *Has the Expansion of Arbitral Immunity Reached its Limits After United States v. City of Hayward?*, 12 OHIO ST. J. ON DISP. RESOL. 779, 785 (1997) and Mark A. Sponseller, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, 436-37 (1993) as cited in *supra* note 6, at 24

³¹ See *Corey v. New York Stock Exch.*, 691 F. 2d 1205, 1210 (6th Cir. 1982) as cited in *supra* note 6, at 24

³² Refer Peter B. Rutledge, *Toward A Contractual Approach for Arbitral Immunity*, 39. GA. L. REV. 151, 154 (2004-2005).

³³ Refer *Id.*,

³⁴ *Id.*,

³⁵ *Id.*,

³⁶ *supra* note 32, at 156

an exclusion liability clause that affords immunity to the arbitrators. Thus, the extent of this arbitral immunity is different under different institutions.

Under the International Centre for Alternative Dispute Resolution, India (ICARD), the institute is under the duty to obtain a confirmation from the potential arbitrator that under no circumstance would there be justifiable doubts with regard to the arbitrator's independence or impartiality.³⁷ Also he should possess other qualifications as specified in the arbitration agreement.³⁸ Under the rules, it is also given that a challenge to the arbitrator can be made only when the above stated rule is not complied with.³⁹ There is no question of liability of the arbitrator and 'serious misconduct' or 'bias'.

As per the Singapore International Arbitration Centre (SIAC) Rules 2010, challenge to the appointment of the arbitrator can be made only on the ground of justifiable doubt with respect to his impartiality and independence or when the arbitrator does not possess the qualifications that the parties agreed upon.⁴⁰ They also have a blanket immunity clause under Rule 34.1, wherein arbitrators, among officers, employees and directors shall not be held liable for any arbitration proceedings governed under these rules.⁴¹ The SIAC has also adopted the Rules of Ethics for International Arbitrators drafted by the International Bar Association (IBA). Though there is absolute arbitral immunity, in the Rule of Ethics, bias is discussed under Rule 3.⁴² Bias here is considered on the terms of impartiality and independence.⁴³ Partiality occurs when the arbitrator favours one party over the other or when he is prejudiced about the subject matter of dispute, and dependence refers to a close relationship between one of the parties and the arbitrator or with someone close to the parties.⁴⁴ The relationship can be a personal, direct or indirect professional business relationship and past relationships are important only if they are of a high magnitude that could

³⁷ Rule 6 (i) of Appointment of Arbitrators, ICADR, (Feb. 27, 2012); <http://icadr.ap.nic.in/services/services2.html>

³⁸ Rule 6 (ii) of Appointment of Arbitrators, ICADR, (Feb. 27, 2012); <http://icadr.ap.nic.in/services/services2.html>

³⁹ ICADR, (Feb.27, 2012); <http://icadr.ap.nic.in/services/services2.html>

⁴⁰ Rule 11.1 of SIAC Rules 2010 (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130#siac_rule11

⁴¹ Rule 34.1 of SIAC Rules 2010 (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130#siac_rule11

⁴² Rule 3, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

⁴³ Rule 3, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

⁴⁴ Rule 3.1, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

eventually affect arbitrator's judgment.⁴⁵ The arbitrator is under an obligation to disclose all facts and circumstances which might lead to such justifiable doubts.⁴⁶

Under the China International Economic Trade Arbitration Centre (CIETAC), the arbitrator is under a similar duty to disclose in writing any facts or circumstances that are likely to lead to justifiable doubts with regard to his independence and impartiality.⁴⁷ On being successfully challenged before the Chairman, the arbitrator will be withdrawn by the Centre.⁴⁸ There is no rule on 'serious misconduct', 'bias', arbitral immunity or a general exclusion of liability clause.

Pursuant to Article 11 of the Hong Kong International Arbitration Centre, (HKIAC), Arbitration Rules, the arbitrator is under a duty to disclose existence of facts leading to justifiable doubts regarding impartiality or independence.⁴⁹ They also have under Article 40, exclusion of liability, where arbitrators are to be liable for any act or omission in connection with arbitration conducted under these Rules, save where the act was done or omitted to be done dishonestly.⁵⁰ Though this section does not refer to serious misconduct or bias, liability still exists for acts or omissions done dishonestly, hence, there is no blanket arbitral immunity as under other arbitration institutions.

The Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce, 1999, (SCC) states that the arbitrator is under a duty to be independent and impartial and should immediately disclose such circumstances if and when they arise.⁵¹ And on finding the arbitrator disqualified the SCC Institute would only remove him.⁵² The SCC Institute grants itself absolute

⁴⁵ Rule 3.2, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

⁴⁶ Rule 2, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

⁴⁷ Article 26, CIETAC Arbitration Rules, (Feb. 27, 2012); <http://www.cietac.org/index.cms>

⁴⁸ Article 25, CIETAC Arbitration Rules, (Feb. 27, 2012) ; <http://www.cietac.org/index.cms>

⁴⁹ Article 11, HKIAC Arbitration Rules, (Feb. 27, 2012); <http://www.hkiac.org/index.php/en/arbitration-rules-a-guidelines/hkiac-administered-arbitration-rules/45-hong-kong-international-arbitration-centre-administered-arbitration-rules-1#11>

⁵⁰ Article 40, HKIAC Arbitration Rules, (Feb. 27, 2012); <http://www.hkiac.org/index.php/en/arbitration-rules-a-guidelines/hkiac-administered-arbitration-rules/45-hong-kong-international-arbitration-centre-administered-arbitration-rules-1#11>

⁵¹ Article 17, Arbitration Rules, SCC,(Feb. 27, 2012); <http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html>

⁵² Article 18 (4) , Arbitration Rules, SCC, (Feb. 27, 2012); <http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html>

immunity under Article 42 of the Rules.⁵³ However, this absolute immunity is only granted to the Institute itself whereas an arbitrator under the Rules is liable for damages caused due to wilful conduct or gross negligence.⁵⁴

The London Court International Arbitration, (LCIA), Rules 1998, impose a similar duty on the arbitrator to remain independent and impartial at all times.⁵⁵ The arbitrator should not act in the capacity of an advocate to any party and should not advise any party on the merits or outcome of the case, either before or after appointment.⁵⁶ The arbitrator is liable to be removed in the event he acts in deliberate violation of the arbitration agreement or the LCIA Arbitration Rules or acts unfairly or impartially.⁵⁷ A party can also challenge the appointment of arbitrator in an episode of impartiality or independence.⁵⁸ Though there is an exclusion of liability clause in the Rules, it does not endow the arbitrator with blanket immunity.⁵⁹ The arbitrator remains liable, when he acts or omits to act with the intention of conscious or deliberately wrongdoing.⁶⁰

As per Articles 14 and 15 of the International Chamber of Commerce (ICC) Arbitration Rules, 2012, the arbitrator can be challenged and removed on the grounds of lack of impartiality and independence.⁶¹ The allegation has to be made in writing.⁶² Liability of the arbitrator is limited under Article 40.⁶³

⁵³ Article 42, Arbitration Rules, SCC, (Feb. 27, 2012); <http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html>

⁵⁴ Article 42, Arbitration Rules, SCC, (Feb. 27, 2012); <http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html>

⁵⁵ Article 5.2, Arbitration Rules, LCIA, (Feb. 27, 2012); <http://www.lcia.org/Dispute-Resolution-Services/LCIA-Arbitration-Rules.aspx#article32>

⁵⁶ Article 5.2, Arbitration Rules, LCIA, (Feb. 27, 2012); <http://www.lcia.org/Dispute-Resolution-Services/LCIA-Arbitration-Rules.aspx#article32>

⁵⁷ Article 10.2, Arbitration Rules, LCIA, (Feb. 27, 2012); <http://www.lcia.org/Dispute-Resolution-Services/LCIA-Arbitration-Rules.aspx#article32>

⁵⁸ Article 10.3, Arbitration Rules, LCIA, (Feb. 27, 2012); <http://www.lcia.org/Dispute-Resolution-Services/LCIA-Arbitration-Rules.aspx#article32>

⁵⁹ Article 31.1 Arbitration Rules, LCIA, Feb. 27, 2012); <http://www.lcia.org/Dispute-Resolution-Services/LCIA-Arbitration-Rules.aspx#article31>

⁶⁰ Article 31.1 Arbitration Rules, LCIA, (Feb. 27, 2012); <http://www.lcia.org/Dispute-Resolution-Services/LCIA-Arbitration-Rules.aspx#article31>

⁶¹ Articles 14 and 15, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

⁶² Articles 14, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

⁶³ Articles 40, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

However, it is clearly stated in the Article that where limitation of liability is prohibited by law, there the arbitral immunity under Article 40 would not apply.⁶⁴ Hence, it does not provide for blanket immunity to the arbitrator. The Common law approach followed by institutions such as the ICC and the LCIA, have adopted rules seeking to exclude the liability for arbitrators. However, even under them, arbitrators can only be held liable for proved bad faith and not even negligence.⁶⁵

The IBA has also come up with a set of Rules and Rule of Ethics with respect to international arbitration. The elements of 'bias' has already been discussed under SIAC. Similar to the Rules examined above, the Rules also impose a duty on the arbitrator to disclose all facts or circumstances leading to the factors that may give rise to clouding his impartiality or independence.⁶⁶ Along with this, the introductory note to these Rules (1987) provides that international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of wilful or reckless disregard of their legal obligations.⁶⁷ The IBA has also drafted Guidelines in situations where there arise conflicts of interest in international arbitrators. The purpose of these guidelines is to ensure that the arbitrator knows what facts to disclose and the different choices of disclosure that would result in the least conflict of interest.⁶⁸ There was a need felt for these guidelines as there was an increase in challenges by parties to delay arbitration.⁶⁹ Part II of the Guidelines enumerates concrete examples of possible conflicts of interests, which are classified into three lists; Red List which is further divided into waivable and non-waivable, Orange List and Green List.⁷⁰

⁶⁴ Articles 40, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

⁶⁵ NIGEL BLACKABY & CONSTANTINE PARTASIDES With ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 330 (Oxford University Press 5th ed. 2009)

⁶⁶ Rule 4, Rules of Ethics for International Arbitrators, (Feb. 27, 2012); http://www.int-bar.org/images/downloads/pubs/Ethics_arbitrators.pdf

⁶⁷ A/CN.9/WG.II/WP.143/Add.1 para 40 as cited in DR. PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNICITRAL MODEL LAW JURISDICTIONS 11-26, 11-27, 11-28, 522-523 (Sweet and Maxwell, 3rd ed. 2012)

⁶⁸ Introduction, IBA Guidelines on Conflicts of Interest in International Arbitration, (Feb. 27, 2012); <http://www.int-bar.org/images/downloads/guidelines%20text.pdf>

⁶⁹ Introduction, IBA Guidelines on Conflicts of Interest in International Arbitration, (Feb. 27, 2012); <http://www.int-bar.org/images/downloads/guidelines%20text.pdf>

⁷⁰ JEAN-FRANCIS PLOUDRET, SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL LAW 417, 349, (Stephan V Berti & Annelte Ponti trans., Sweet & Maxwell 2nd ed., 2007)

The UNCITRAL also came up with Arbitration Rules popularly known as Model Law in 1976. It was recently revised in 2010. Under the Model Law, the arbitrator's duty to disclose is given under Article 11 and in Article 12, whereby parties can challenge the mandate of the arbitrator on grounds justifiable doubts of partiality or dependence.⁷¹ Though there is a provision for arbitral immunity, it has been limited to the laws applicable and to intentional wrongdoing.⁷² The working group shared the view that a certain degree of immunity or exoneration from liability in favour of arbitrators was advisable to reinforce the independence and impartiality of the arbitrators with a free spirit rather than being concerned about later liability lawsuits.⁷³ These sanctions though act to spurn on the indolent arbitrator, they do nothing to compensate a party who has suffered financial loss as a result of delay in proceeding with the arbitration.⁷⁴

IV. CURRENT SCENARIO IN INDIA

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996.⁷⁵ This Act replaced the existing regime of three legislations, namely the Arbitration and Conciliation Act of 1940, the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937. The Act is based on the UNCITRAL Model Law, 1985.⁷⁶ No provision under the Act of 1996 explicitly defines either 'serious misconduct' or 'biases' though misconduct was the basis for challenge to arbitrators under the Act of 1940. However, its implication can be inferred from a reading of sections 12, 13, 14, 15 and 34 of the Act.

Though there is no direct provision or case law on arbitral immunity in India, a combined reading of these provisions and relevant case law, gives us a clearer picture of the extent of this protection in India. Under these sections suspicion by itself could not be made a ground for conclusion that the arbitrator would not act impartially or fairly.⁷⁷ The court also said that there must be minimum

⁷¹ Articles 11 and 12, UNCITRAL Arbitration Rules (as revised in 2010), (Feb. 27, 2012); <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

⁷² Article 16, UNCITRAL Arbitration Rules (as revised in 2010), (Feb. 27, 2012); <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

⁷³ A/CN. 9/646.para 38 as cited in *supra* note 67

⁷⁴ *supra* note 65, 66, at 334

⁷⁵ Hereafter referred to as the Act

⁷⁶ Hereafter referred to as the Model Law

⁷⁷ V.K. Dewan & Co. v. Delhi Jal Board, (2004) 3 Raj. 32 (Del.). The position would have been different if the offer had been accepted. As cited in K. K. VENUGOPAL, JUSTICE R S BACHAWAT'S LAW OF ARBITRATION & CONCILIATION 622-23 (Wadhwa & Company, 4th ed., Volume 1, 2005)

intervention as per section 5 of the Act and hence must be slow in terminating the mandate of the arbitrator.⁷⁸ Hence, termination of the mandate is not allowed only on the basis of apprehension of bias.⁷⁹ To apply for a termination of a mandate, there must be actual bias.⁸⁰ In *Ranjit Thakur v. Union of India*,⁸¹ this court laid down that “the test of likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias as “likely” and whether the person concerned “was likely to be disposed to decide the matter only in a particular way”.⁸² This test could also apply to an arbitrator.⁸³ But while considering the reasonable ground for apprehension that the arbitrator will be biased, the court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal of the said application.⁸⁴ The same principle was reiterated in *Mabeshwari Eng. & Associates v. Union of India*,⁸⁵ *International Airports Authority of India*⁸⁶ and *Sachinandan Das*.⁸⁷ In the former, the court said that there must be acceptable evidence to substantiate the indictment of bias for it to accept it.⁸⁸ In the latter cases, the court said that “the apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person”.⁸⁹ On this issue, the Supreme Court said with prudence that not every mistrustful thought of a party should be taken into account.⁹⁰

However, the remedies against this misconduct are the removal of the arbitrator, setting aside the arbitral award or the non-payment or partial payment of the arbitrator’s fees. Reasonable apprehension or likelihood of bias of the arbitrator

⁷⁸ *supra* note 77, at 643

⁷⁹ *supra* note 77, at 643

⁸⁰ *supra* note 77, at 643

⁸¹ A.I.R. 1987 S.C. 2386 (India).

⁸² *Ranjit Thakur v. Union of India*, A.I.R. 1987 SC 2386 (India), as cited in *supra* note 77, at 645

⁸³ *Ranjit Thakur v. Union of India*, A.I.R. 1987 SC 2386 (India), as cited in *supra* note 77, at 645

⁸⁴ *Ranjit Thakur v. Union of India*, A.I.R. 1987 SC 2386 (India), as cited in *supra* note 77, at 645

⁸⁵ A.I.R. 2000 A.P. 57 as cited in *supra* note 77, at 561

⁸⁶ *International Airports Authority of India v. K.D. Bali and Anr*, (1988) 2 S.C.C. 260 (India).

⁸⁷ *Refer Sachinandan Das v. State of West Bengal*, A.I.R. 1991 Cal. 224 (India) as cited in *supra* note 77, at 648

⁸⁸ AIR 2000 A .P. 57 as cited in *supra* note 77, at 561

⁸⁹ *International Airports Authority of India v. K.D. Bali and Anr*, (1988) 2 S.C.C. 260 (India); *Refer Sachinandan Das v. State of West Bengal*, A.I.R. 1991 (Cal.) 224 as cited in *supra* note 77, at 648

⁹⁰ *Refer Sachinandan Das v. State of West Bengal*, A.I.R. 1991 (Cal.) 224 as cited in *supra* note 77, at 648

is sufficient ground for the removal of the arbitrator⁹¹ while actual bias must be proved for the setting aside of the award.⁹² The standard of a reasonable and average point of view should be taken into consideration and not the ramblings of a fanciful person.⁹³ If there is reasonable ground for the apprehension of the applicant that the arbitrator will be likely to be biased⁹⁴ or if there is little chance of receiving impartial justice from him⁹⁵ or if there would be failure of justice if the arbitration was allowed to proceed⁹⁶ or if the arbitrator has disclosed actual bias against a party⁹⁷, the mandate of the arbitrator may be terminated. However, relationships to a party are not a disqualification if the arbitrator is not likely to be biased.⁹⁸ Also, there can be no interference if the appointment is made with full knowledge of the relationship.⁹⁹

V. CONCLUSION

In no manner can the position of arbitrators be equated to that of judges. Hence though arbitral immunity has its roots from judicial immunity, it can in no situation supersede judges' immunity. In the process of arbitration, private arbitrators, not necessarily skilled in law, render final and binding determinations as to not only the parties' contractual rights, but also statutory rights and liabilities, including the possibility of collective and class action claims.¹⁰⁰ Where the lapse is serious like that of bias, it seems right that the party who has suffered loss should be entitled to recover that loss from the offending arbitrator, even in countries that traditionally confer immunity from liability of arbitrators.¹⁰¹ On

⁹¹ See s.12(3) of the 1996 Act, which uses the expression "justifiable doubts as to his independence or impartiality" as cited in *supra* note 77, at 643

⁹² State of Orissa Ltd. v. Modern Construction Co., A.I.R. 1972 (Ori.) 219. The case was remanded. The matter was under the cooperative societies act, 1972. R. SangeetaRao v. Krishi Co-Operative Group Housing Society Ltd., (1989) 1 ARB L. REV. 9 (Del). As cited in *supra* note 77, at 643

⁹³ Refer Sachinandan Das v. State of West Bengal, A.I.R. 1991 (Cal.) 224 as cited in *supra* note 77, at 648

⁹⁴ Union of India v. Beant Singh 1998 SLJ 137, when malice was established and the court is satisfied of the apprehension that nominated arbitrator may not do justice; court can use its discretion to ask both parties to submit to a panel of arbitrators. As cited in *supra* note 77, at 646

⁹⁵ Gangaram Gurnah v. Sumangal Bhikaji, A.I.R. 1933 (Sind.) 347 as cited in *supra* note 77, at 646

⁹⁶ Gaya Prasad v. MathulalBudhaLal, A.I.R. 1925 All 202 as cited in *supra* note 77, at 646

⁹⁷ Roshan Lal Sethi v. Chief Secretary, A.I.R. 1971 (J&K.) 91 646

⁹⁸ Nehalchand v. Shantilal, A.I.R. (Oudh.) 349 (relationship to a member of a joint family of which a party is a member) as cited in *supra* note 77, at 616

⁹⁹ *supra* note 77, at 616

¹⁰⁰ See Green Tree Fin. Corp. v. Bazzel, 123 S. Ct. 2402, 2406-07 (2003) as cited in *supra* note 1, at 511

¹⁰¹ *supra* note 65, at 337

the flipside, it is equally important to protect the arbitrators from harassing parties and also to ensure their independence and impartiality in the interests of the public. Such a fine distinction has been drawn in the Indian law where the arbitral immunity though wide is not absolute and there exists recourse against the arbitrator when he is biased under arbitration law and under tort law in all circumstances. Such is the case in most of the arbitration institutions discussed above with the exception of ICADR. Hence, ultimately a balance must be struck between imposing sanctions on arbitrators to deter them from wilfully and recklessly abusing their functions and simultaneously making it possible for them to fulfil their quasi-judicial role without fear of non-meritorious attacks.¹⁰²

¹⁰² *supra* note 6, at 59