Arbitrator Immunity

by James R. Madison

Whether arbitrators should have the same immunity from civil suit as judges or be subject to damage claims has long been a matter of controversy in California. Proponents of immunity argue that one of the most beneficial characteristics of arbitration as an alternative to litigation for the resolution of disputes is the opportunity parties have to participate in selecting their decision maker. If the utility of this opportunity is to be realized, individuals must be encouraged to make themselves available for service as arbitrators so as to maximize the pool from which parties can choose. Exposing potential arbitrators to damage claims will have a contrary effect by discouraging individuals from serving. The consequence of deterring individuals from serving as arbitrators will not only limit the size of the pool from which to choose, but also may well have an adverse effect upon its quality. The more thoughtful individuals also may be the more risk averse. Thus, they may withhold their service and bias from the available pool in favor of those who tend to be more careless and less predictable.

Proponents of immunity for arbitrators also point out that immunity of judges from suit is supported by the need to protect independent decision making. They argue that the same public policy is applicable to arbitrators twice over. For arbitration to be an effective alternative to litigation, arbitral decisions need at least to match the quality of judicial decisions, if not exceed that standard, and freedom from suit is vital to promoting such high quality decisions. The applicable evidence and law may warrant a tough call, but the arbitrator who fears that a tough decision will risk exposure to a lawsuit by whomever is disappointed will tend to "pull his punches," so to speak, and render a safer, but second rate award

. Another argument is that being able to hold arbitrators to account with a claim for damages is unnecessary, because the marketplace will serve as a cure. Arbitrators who do the process a disservice will be vetoed when they offer themselves for additional cases.

Insurance against damage claims is said to be no answer. For one thing, insurance costs money. Creating a need on the part of arbitrators to be insured will, therefore, increase the cost of arbitration and make it a less appealing alternative dispute resolution process. In addition, insurance offers no protection against the personal trauma of being confronted with a claim for

damages or of its likely progeny, a lawsuit. Finally, the thought of arbitrators commonly being covered by insurance might lead to an increase in questionable claims. Opponents of arbitral immunity contend, on the other hand, that arbitrators are not nearly as accountable to the public as judges. They arguably need not abide by the law in deciding cases, their decisions are less subject to review on appeal, and they may not be turned out of office at an election. The most effective means of holding them accountable is to hold them responsible in damages. Most arbitrators are paid for their services. Why shouldn't they be held to respond in damages for misbehavior just like a doctor, lawyer, accountant or any other professional?

Baar v. Tigerman, (1983) 140 Cal. App.3rd 979, gave some comfort to both proponents and opponents of arbitral immunity. It held that arbitrators are entitled to quasi-judicial immunity, but limited their protection to conduct in their arbitral capacity and held that they may be sued for damages for breach of contract.

The facts in B*a*ar tended to invite the conclusion reached by the court. The case arose out of an arbitration administered by the American Arbitration Association. The arbitration apparently involved a difficult dispute. The case led to forty-three days of evidentiary hearings and 10 more days of final argument. In order to assure parties of a prompt decision, the AAA rules provided, as they still do, that an award must be made no later than 30 days from the date of closing the hearings. When the arbitrator was unable to comply with this timeline, the AAA obtained an agreement from the parties to extend the deadline by three and one-half months. When seven months had passed after the hearings were closed and the arbitrator still had not rendered an award, one of the parties objected pursuant to Code of Civil Procedure Section 1283.8 that the power to make an award had been lost. Although Section 1283.8 does not deprive an arbitrator explicitly of the power to make a tardy award, it does so implicitly in providing that a party waives an objection to the timeliness of an award unless the party gives the arbitrator written notice of the objection before service of a signed copy of the award. The opinion in *Baar* does not reveal the sequence of events, but the objection apparently prevented the arbitrator from making an award, and the parties were confronted with further delay and the need to pay for a second arbitration.

The trial court sustained the arbitrator's demurrer to a suit against him seeking damages for his failure to render a timely award. However, on appeal by plaintiffs, the decision was reversed. The *Baar* court noted with approval that American courts had "long recognized immunity to protect arbitrators from civil liability for actions taken in the arbitrator's quasi-judicial capacity." *Baar v. Tigerman*, supra, 140 Cal. App. 3rd at 984. However, the court drew a distinction between the role a of a judge and that of an arbitrator. Whereas "a judge receives power from the Constitution . . . arbitration remains essentially a private contractual arrangement between the parties . . . ." Id. at 984-85. This distinction enabled the court to avoid the precedent of Wyatt v. Arnot, (1907) 7 Cal. App. 220, which had held that, as a governmental figure, a judge was immune from suit even when he had resigned from the bench before deciding a case over which he had presided and, thus, had prevented a case from being decided.

In contrast, according to the *Baar* court in the case of an arbitration, "we must also uphold the contractual obligation of an arbitrator to the parties involved." 140 Cal. App. 3d at 985. The AAA rules amounted to a contract with the parties, and the arbitrator had agreed to arbitrate in accordance with the rules. A complaint of failure to render a timely award stated facts sufficient to constitute a cause of action for breach of contract.

In the wake of *Baar*, the State Bar pushed for and, effective January 1, 1996, obtained passage of Code of Civil Procedure Section 1280.1, which provided that "an arbitrator shall have the immunity of a judicial officer when acting in the capacity of arbitrator . . . ." The inclusion of "sunset" provisions in legislation was in vogue at the time, and language was, accordingly, was included in Section 1280.1, providing for its sun to set initially on December 31, 1990. Although the sunset was extended to December 31, 1995 without difficulty, by the 1995-96 legislative session, the issue of arbitral immunity had become a pawn in the controversy over whether to overturn the limits on judicial review of arbitration awards established in *Moncharsh v.Heily & Blase,* (1992) 3 Cal. 4th 1. Those who wanted to amend Code of Civil Procedure Section 1286.2 to expand the grounds of review had sufficient power to prevent a further extension of arbitrator immunity, except in trade for acceptance of their views. The parties agreed to extend the sunset

one year to allow time to reach a compromise. When negotiations failed, statutory immunity for arbitrators ended at midnight on December 31, 1996.

Section 1280.1 had provided that the immunity it conferred was to "supplement . . . any otherwise available common law immunity . . . ." Thus, the rule laid down in *Baar v. Tigerman,* supra, presumably again became the controlling law on January 1, 1997. The recent case of *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.*, (2006) 140 Cal. App. 4th 795, made it clear that the partial immunity for arbitrators established in Baar is alive and well. As in Baar, this case arose from a judgment of dismissal entered after defendants' demurrer had been sustained. Thus, as in Baar, the appellate court was obliged to take the allegations of the complaint as true. According to the allegations of the complaint in the Morgan Phillips case, the plaintiff was a retailer of specialty bedding products which had a dispute with two suppliers. The parties agreed to mediation of their dispute by John Bates of JAMS. A settlement resulted which provided for submission of ensuing disputes to Bates for "binding resolution." 140 Cal. App. 4th at 798. In due course, a further dispute arose and, pursuant to a "contract . . . that was partly written, oral and implied by law," was submitted to JAMS and Bates for "binding arbitration." Ibid. Bates held one hearing. In setting a second, he told the parties that, if they were unable to settle the matter before the second hearing, they should come prepared with evidence and he would exercise his authority to render a binding decision. Id. at 798-99. In turn, he was told that, unless the matter was decided promptly, there was a "substantial risk" that Morgan Phillips would not be able to continue in business. Id. at 799. After the evidence was presented at the second hearing, Bates continued trying to mediate the dispute. However, at a lunch break, Bates "suddenly announced with no lawful justification" that he was withdrawing as arbitrator, and he refused to issue an award. Ibid. Morgan Phillips filed suit against Bates and JAMS. It sought damages for breach of contract in failing to provide binding arbitration services as agreed. It also complained of JAMS alone for unfair competition and false advertising in violation of Sections 17200 and 17500 of the Business & Professions Code. However, the issues involved in claims against arbitration providers are beyond the scope of this article.

As in *Baar*, the Morgan Phillips court reversed the trial court's judgment of dismissal. It

reasoned that “the purpose of arbitral immunity is to encourage fair and independent decision making by arbitrators . . . .” 140 Cal. App. 4th at 800. The issue is whether the conduct sought to be shielded is “ ‘integrally related to the arbitral process,’ ” Id. at 801, quoting from *Theile v. RML Realty Partners*, (1993) 14 Cal. App 4th 1526, 1530. The court noted that the alleged failure in Baar to make an award was held not protected by immunity because not making an award is “not integral to the arbitration process; it is rather a breakdown of that process.” *Morgan Phillips*, supra, at 801. Similarly, it concluded, “the unprincipled abandonment” of an arbitration “is the antithesis” of the purpose of the process. Id. at 802. The Morgan Phillips court stressed that, in reaching its decision, it was accepting the allegations of the complaint as true. “Certainly,” it said, a showing based on a “full evidentiary picture” of a “decision to withdraw because of substantial doubt of the ability to be fair and impartial, or because of a conflict of interest, is entitled to immunity.” Id. at 803. The Baar and Morgan Phillips cases provide a bright line of sorts with respect to the potential for arbitrators to face lawsuits in that they both involved situations in which the arbitrator did not render an award. What about cases in which an award has been rendered, but vacated? Three cases come to mind. One is *Azteca Construction, Inc. v. ADR Consulting, Inc.*, (2004) 121 Cal. App. 4th 1156, in which an arbitration award was vacated after the losing party had not received a full disclosure of the arbitrator’s involvement with the prevailing party. It made no difference whether the information that was not disclosed would have led a reasonable person to doubt the impartiality of the proposed arbitrator. Code of Civil Procedure Section 1281.91 gives a party the right to disqualify an arbitrator peremptorily. The arbitrator probably would be safe in a case like this in any event, because he had made a complete disclosure to the provider organization, which was the American Arbitration Association. The provider, on the other hand, might have faced suit on the same theory as JAMS in the Morgan Phillips case, because it apparently failed to share with the parties all that it learned from the arbitrator. The second is *IATSE v. Laughon,* (2004) 118 Cal. App. 4th 1380, in which an award was vacated because the arbitrator failed, albeit inadvertently, to comply with disclosure obligations established by the Judicial Council pursuant to Code of Civil Procedure Section 1281.85. The plaintiff who sought to justify a suit against the arbitrator growing out of a case like

this presumably would contend that the arbitrator's omission was antithetical to the arbitral process. The defense presumably would argue that the disclosure obligations were integral to the process. The third case is *O'Flaherty v. Belgum*, (2004) 115 Cal. App. 4th 1044. The arbitrator in this case did his job in that he made an award. However, the arbitration agreement in this case required that the arbitrator abide by the law, and he awarded a remedy that was not authorized by law. Instead of characterizing the decision as involving an error of law and confirming the award in reliance upon *Moncharsh v. Heily & Blase*, supra, the court vacated the award pursuant to Code of Civil Procedure Section 1286.2(a)(4) on the theory the arbitrator had exceeded his power. The successful appellants in O'Flaherty sued the arbitrator and the American Arbitration Association, which had administered the arbitration. They alleged (i) that the defendant arbitrator had omitted information from the biography which had been submitted by the AAA for their consideration in deciding whether to agree to his appointment; (ii) that the matter was omitted in order to induce parties to accept him as arbitrator; and (iii) that the omitted matter would have revealed a potential bias against them, such that they would have disqualified him from service. The trial court overruled the arbitrator's demurrer. The transcript of the oral argument suggests that it was troubled by whether the arbitrator should have immunity for conduct that, as alleged in the complaint, suggested fraud. The arbitrator filed a petition for a writ of -11-mandate. The petition contended that the process whereby an individual who is nominated for service as an arbitrator is obliged to make disclosures before the appointment can be confirmed is integral to the arbitration involved, so that immunity should attach to the arbitrator's compliance. An alternative writ was issued and the matter was fully briefed. However, a confidential settlement was reached in the case before oral argument. An amicus brief in the latter case, of which the present writer was co-author, argued that the disclosure obligations of an individual who is nominated for service as an arbitrator are analogous to Code of Civil Procedure Section 170.1, which a judge must consider before accepting an assignment. Indeed, the information that must be disclosed by a prospective arbitrator pursuant to Code of Civil Procedure Section 1291.9 includes the existence of any ground specified in Section 170.1 for the

disqualification of a judge. If abiding by Section 170.1 is integral to the process of judging, then complying with Section 1281.9 is integral to the arbitral process.

The bottom line, so to speak, is that the scope of arbitral immunity in California remains open to debate. If a litigant that is unhappy with an arbitrator wants to sue, it is possible to draft a complaint that states facts sufficient to constitute a cause of action regardless of whether the arbitration has resulted in an award or not. It would not be surprising if this state of affairs created apprehension among arbitrators. On the other hand, it undoubtedly is much easier to plead a case against an arbitrator than to prove one. Thus, prospective plaintiffs should take care before launching an attack.