

THE U.S. AND ABSOLUTE IMMUNITY FOR
INTERNATIONAL ARBITRATORS: WHAT WENT
ABSOLUTELY WRONG?

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“*Tellers of truth have no friends*”

(*Anonymous proverb attributed to a Zulu Chief*)

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I. INTRODUCTION

The “*what*” and the “*about*” matter. As part of a conversation that started eleven years ago and still continues, *what* I primarily learned from Professor Linda Silberman is that if a principle of law is to find its perfect workings, that precept must be consequential. It must have practical application.

This *what*, however, goes beyond pragmatism. It inevitably invades the space of teleology and paradigms. The *what* is a command to understand the way in which a particular legal proposition can serve as a microcosm that in turn allows for a holistic structural view. The *particular*, according to Professor Silberman’s view (as I likely misunderstand it), needs to serve the higher purpose of forming and transforming the *general*.

The *about* is equally daunting and exacting. Despite the inner and outer fiber of what can only be described as a tireless scholar, Professor Silberman professes that there can be no tolerance, or more didactically, “justification,” for pragmatic systemic failures in the application of private international law. It is in this part of the *about* that the *what* also participates. Accountability must be a *sine quo non* of the legal process.

Part of *what* I have learned from Professor Silberman is that theoretical musings and practical operational functionality must be perfect much in the same way that a Euclidean circle is beyond cognizable flaw. And so too are the parallel lines of Lobachevsky that actually meet. It is for this reason that I have chosen to contribute a paper for this *festschrift* on arbitrator immunity in international arbitration through the prism of the aberrational and quite singular U.S. development and application of this doctrine.

A timeless South African proverb attributed to a Zulu elder teaches that “tellers of truth have no friends.” Consequently, in most of the world, the perfect arbitrator is protected from

those who would find fault with a teller of truth except where the allegations of wrongdoing are intentional in nature.¹

1. The majority of States accord arbitrators partial immunity for non-intentional acts. Seven countries stand out as notable examples of States according arbitrators partial immunity: *see, e.g.*, The Russian Federation, Federal Law on Arbitration (Arbitral Proceedings), arts. 1(2) and 51, Dec. 29, 2015 Federal Law No. 382-FZ (providing that arbitrators in domestic and international commercial arbitrations with Seat in The Russian Federation shall not be liable for any alleged failure to perform or perform improperly the functions of an arbitrator, except where the parties are prejudiced as a consequence of an arbitrator's criminal act); The Republic of Uzbekistan, *see, e.g.*, Law on International Commercial Arbitration, art. 6, No. ZRU-674, February 16, 2021 (asserting that arbitrators are not liable for acts or omissions relating to their undertakings as arbitrators unless such alleged acts or omissions are *intentional*). *But see*, Law on Arbitration Courts of the Republic of Uzbekistan, No. ZRU-64, October 26, 2006 (granting no comparable immunity to arbitrators in domestic arbitration); The French Republic, Code civil [C. civ.] [Civil Code], art.1231-3, Law No. 2018-287, April 20, 2018 (Fr.) and Case No. 09/22701, March 1, 2011 (holding that arbitrators are immune except for fraud, gross negligence, and miscarriage of justice); Federal Republic of Germany, Basic Law for the Federal Republic of Germany, art. 34, Gazette Part III, No. 100-1, as last amended by art. 1 of the Act of 29 September 2020 (Federal Law Gazette I, p. 2048); Civil Code of Germany, § 839 (2), (Federal Law Gazette I, p. 42, 2909, 2003 I p. 738), last amended by art. 4, paragraph 5 of the Act of October 1, 2013 (Federal Law Gazette I, p. 3719) (imposing liability where arbitrators' are criminal in nature); The Kingdom of Spain, The Consolidated Arbitration Law, art. 21, No. 60/2003, Dec. 23, 2003 (offering immunity to arbitrators except for bad faith, reckless or fraudulent acts); The Republic of South Africa, International Arbitration Act of South Africa, art. 9, No. 15 of 2017 (offering immunity to arbitrators except for where *bad faith* can be established); and The Dominion of Canada, *see, e.g.*, *Sport Maska Inc. v. Zitter*, 1 SCR 564 (1988), Case 19660, Supreme Court of Canada, ¶ 16 (providing that arbitrators enjoy immunity in the absence of bad faith or fraud); *see also* Québec, Code of Civil Procedure, updated January 1, 2023, c-25.01, Sec. 621 ("Arbitrators cannot be prosecuted for an act performed in the course of their arbitration mission, unless they acted in bad faith or committed an international or gross fault"); Alberta, Arbitration Act, R.S.A., 2000 c.A-43, Sec. 15(4) ("If the court removes an arbitrator for a corrupt or fraudulent act or for undue delay, it may order that the parties for all or part of the costs, as determined by the court, that they incurred in connection with the arbitration before the arbitrator's removal"); British Columbia, International Arbitration Act, RSBC, 1996, Chapter 233, Sec. 36.02 ("An arbitrator is not liable for anything done or omitted in connection with an arbitration unless the act or omission is in bad faith or the arbitrator has engaged in intentional wrongdoing"); *But see*, Canada, Commercial Arbitration Act, R.S.C., 1985, c.17 (2nd Supp.), June 17, 1986 (provides no provision on arbitrator liability or immunity).

Under this model, an arbitrator is but a provider of services in the marketplace who is accorded an extra layer of protection with respect to mere non-intentional or qualified contractual wrongdoings. There is no pretense concerning the perfect arbitrator's role as a judge or quasi-judicial adjudicator.

Similarly, there is no construction of the perfect arbitrator's arbitral functions as somehow serving as a means for a State's exercise of judicial or quasi-judicial sovereignty.

Pursuant to this immunity model, an arbitrator is sufficiently protected so as to address any chilling effects or concerns that may arise from the natural enemies of tellers of truth. Yet, the arbitrator, as is the case with any contractual stakeholder, is held accountable. Professor Silberman's conception of an accountability requirement in private international law here finds ample resonance.

In the United States, the perfect arbitrator finds herself in the singular position of enjoying absolute and unqualified immunity.² Standing distinctly apart from all jurisdictions with

2. *See, e.g.*, *In re Marriage of Assemi v. Assemi*, 7 Cal. 4th 896, 909 (1994) (holding that "arbitrators have been extended the protection of judicial immunity, because they perform 'the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'") (citation omitted); *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 901 (2010) (observing that "[i]n determining whether absolute immunity applies to the conduct of a public or private arbitrator, 'the courts look at the nature of the duty performed [to determine] whether it is a judicial act – not the name or classification of the officer who performs it, and many who are properly classified as executive officers are invested with limited judicial powers.'"); *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.*, 140 Cal. App. 4th 795, 801 (2006) (observing that "[a]s stated by one court, by failing to make a timely decision that arbitrator 'loses his claim to immunity because he loses his resemblance to a judge. He has simply defaulted on a contractual duty to both parties.'") (citing to *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1033, *modified* 559 F.2d 268 (5th Cir. 1977)); *Stasz v. Schwab*, 121 Cal. App. 4th 420, 440 (Cal. Ct. App. 2004) (asserting "we hold that bias in the arbitration process should be remedied by challenging the arbitration award, not by seeking to impose liability on the arbitrator or the sponsoring organization."); *see also* *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126 (Tex. Ct. App. 2003). The court in *Blue Cross* held that arbitrator immunity applied to instances where the arbitrator failed to disclose that he at one point worked at the identical law firm as an attorney serving as counsel to one of the parties to the arbitration, the court observed:

Even if [the arbitrator] is not protected by the doctrine of arbitral immunity, Blue Cross's appeal still fails . . . Blue Cross is attempting to circumvent the [state] arbitration act and indirectly attack the [arbitration] award . . . The Act's provisions afforded Blue Cross a sufficient mechanism to vacate the arbitration award on the theory

that [the arbitrator's] impartiality was compromised. An award under the Act may be vacated if a party establishes 'evident partiality' on the part of an arbitrator . . . Therefore, Blue Cross had an opportunity to contest [the arbitrator's] impartiality through its motion to vacate. When the motion to vacate proved unsuccessful, Blue Cross [could] not otherwise collaterally attack the award . . . A suit against an individual arbitrator is not contemplated by the arbitration act. To permit a cause of action against an arbitrator, in addition to the possibility of vacating the award, would contravene the purpose of arbitration. Speed, cost savings, and a final determination would no longer characterize an arbitration proceeding. Instead, a disgruntled party could circumvent the act and seek relief outside the statutory limitations, rendering meaningless the notion that parties can contract to be bound to an arbitrated judgment. In light of the Texas Arbitration Act's purpose, its procedures to vacate an arbitration award, and the strong deference afforded arbitration judgments, we hold that an application to vacate the award for an arbitration for an arbitrator's alleged misrepresentation or failure to disclose a relationship is the exclusive remedy under the arbitration act.

Id. at 132–36 (citations and footnotes omitted). *See also* *Coopers & Lybrand v. Superior Court*, 212 Cal. App. 3d 524, 534 (1989) (noting that “[c]ourts recognized early on that arbitrators serve in a quasi-judicial capacity”) (citation omitted); *Feichtinger v. Conant*, 893 P.2d 1266, 1267 (Alaska 1995) (holding “that a court-appointed independent custody investigator who performed quasi-judicial functions was protected from suit by the doctrine of quasi-judicial immunity”); *L & H Aircro, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 377 (Minn. 1989) (holding that arbitrator’s failure to disclose information establishing a conflict of interest or bias does not prevent application of the arbitrator immunity protection, but rather supplies the parties with vacatur as a remedy); *Baar v. Tigerman*, 211 Cal. Rptr. 426, 430 (1983) (finding that “[w]hile we must protect an arbitrator acting in a quasi-judicial capacity, we must also uphold the contractual obligations of an arbitrator to the parties involved,” and holding that sponsoring-supervising arbitral institute “did not act in an arbitral capacity and therefore its actions standing alone do not merit immunity.”); *c.f.* *Greenspan v. LADT, LLC*, 111 Cal. Rptr. 3d 468 (2010) (citing to *Baar v. Tigerman* for the very general proposition that “arbitral immunity does not extend to an arbitrator ‘who *never* renders an award.’”) (emphasis in original). The court in *Greenspan v. LADT* did observe that both *Baar v. Tigerman* and *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas* “recognize[d] that ‘immunity does not apply to the arbitrator’s breach of contract by failing to make any decision *at all*.’” (emphasis in original) (citation omitted). No analysis, however, was undertaken concerning the extent to which a contractual and not a judicial or quasi-judicial standard should govern arbitrator conduct generally or with respect to immunity in particular. *See also* *Morgan Phillips, Inc.*, 140 Cal. App. 4th at 801 (citing to *Baar v. Tigerman* for the “narrow exception to arbitral immunity: the immunity does not apply to the arbitrator’s breach of contract by failing to make any decision.”). Significantly, however, the court altogether ignored the contractual paradigm and went on “to explain” *Baar*’s foundational normative configuration as merely

the solitary partial exception of the Republic of Singapore,³ the perfect arbitrator in the United States is unaccountable and impervious to wrongdoing.⁴

Is the aberrant position that the United States has adopted on this issue a consequence of socio-political policies that were intentionally designed? Why is the United States the singular dissonant note when compared to the rest of the world? How did the doctrinal development of arbitrator immunity in the United States unfold such that only the U.S. common law would accord arbitrators absolute immunity from civil prosecution?

Is it a matter of common law *versus* civil law conceptual development? If so, why then is the U.S. position on the subject also at odds with all other common law jurisdictions? To the extent that such a policy is not the consequence of discursive

“supported by a common sense rationale.” *Id.*; and the very Second District Court of Appeal’s opinion in *Coopers & Lybrand v. Superior Court*, 212 Cal. App. 3d at 534–35 itself commented on its own analysis in *Baar v. Tigerman* only to note that “Senate Bill No. 1001 (1985–86 Reg. Sess.) was introduced in direct response to *Baar* . . . and to expand arbitral immunity to conform to judicial immunity when the arbitrator is acting under any statute or contract.” Absent is any reference to the judicial-contractual paradigms and incident competing interests and policies.

3. *See, e.g.*, Republic of Singapore, Arbitration Act of Singapore, art. 59 (Immunity of Arbitral Institutions), No. 37/2001, Mar. 1, 2002 (providing absolute immunity to the arbitral institutions except for some acts or omissions done in bad faith); International Arbitration Act of Singapore, art. 25A (Immunity of Appointing Authority and Arbitral Institutions, Etc.), No. 14/1994, Jan. 27, 1995 (providing immunity to the appointing authority, the arbitral or other institution, or person designated by the parties to nominate an arbitrator, unless the alleged act or omission is premised on *bad faith*). Quite notably, Singapore adopts a uniquely symmetrical “*Judge Model*” of arbitrator immunity that treats arbitrators as “Public Servants” for purposes of criminal liability. Penal Code of Singapore, ch. 9 (offenses by or relating to Public Servants), arts. 161–67, Sept. 16, 1872, with amendments through 2021. In this sense, Singapore’s adherence to the “*Judge Model*” of arbitrator immunity is more consistent than that of the U.S., which for purposes of criminal liability does not treat arbitrators the same as judges or other public servants. The anomaly present in a symmetrical treatment on the part of the U.S. is examined in PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS 69–138 (2nd ed. 2020).

4. *See* RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 3.10 cmt. a (AM. L. INST., Proposed Final Draft 2019) (“Arbitrators, arbitral institutions, and appointing authorities general enjoy absolute immunity from civil liability for claims arising out of an international arbitral proceeding.”).

reasoning, how else could it have developed? Of course, there is no single or simple answer.

Equally notable structural and policy questions abound. For example, does the question of arbitrator immunity expose the profound lack of a conceptual rubric allowing States to understand more fully pursuant to *brightline rules* the classification of *private* versus *public* in the *greater polis*? Have States considered the competing policies of granting immunity to encourage rigorous merits-based adjudication without fear of legal retribution, versus qualified immunity (or no immunity at all) in furtherance of encouraging accountability? This question remains both relevant and daunting.

This modest writing shies from purporting to address all of these inquiries.⁵ Instead, this narrow effort seeks to demonstrate that, in part, the “Judge Model” absolute arbitrator immunity doctrine is based upon a foundational misapprehension of the counterpart judicial immunity doctrine.

Hence, the first part of this analysis will focus on eight very particular premises that gave rise to the judicial immunity doctrine, but that do not, and cannot, apply to arbitrators and arbitration. The absence of these factors, so says the argument here advanced, has not been duly tested in connection with the wholesale importation of judicial immunity into arbitration.

Second, this contribution revisits *Jones v. Brown*,⁶ the first U.S. common law case addressing arbitrator immunity, which has been ignored by academics and practitioners alike. As part of this effort, the conceptual origins of absolute arbitrator immunity shall be discussed by focusing on five foundational flaws underlying the *Jones v. Brown* decision.⁷ It shall be

5. For a more sustained effort that confronts the development of the absolute immunity doctrine in the United States see MARTINEZ-FRAGA, *supra* note 3, at 41–140.

6. *See Jones v. Brown*, 54 Iowa 74 (1880) (arbitrators, when acting within their jurisdiction, cannot be liable in a civil action for his judicial acts).

7. In skeletal format and substance the five deficits pervading *Jones v. Brown* are here very briefly identified as:

- (i) citing inapposite authority,
- (ii) not identifying the issue before it as one of first impression,
- (iii) viscerally treating based upon argument by analogy the application of *judicial immunity* to arbitrators,
- (iv) accepting without ever submitting to discursive reasoning defendant-counter-claimant’s wrongful framing of the issue before it, and

concluded that a better reasoned policy based upon deliberate risk assessment needs to be adopted such that arbitrators may process cases without the chilling effects of vexatious litigation, while being held accountable (i) for non-compliance with contractual obligations, and (ii) intentional wrongdoing.

II. THE TRANSPOSITION OF JUDICIAL IMMUNITY TO ARBITRAL IMMUNITY: THE PARADIGM SHIFT LEADING TO OVERPROTECTION WITHOUT NORMATIVE, HISTORICAL, OR POLICY FOUNDATION

A. *Eight Premises Warranting Consideration*

Practically unqualified absolute judicial immunity has been the subject of untested incorporation into the sphere of international arbitration. This doctrinal development has matured without the benefit of at least eight non-exhaustive propositions that configured and reconfigured the development and expansion of the absolute *judicial* immunity stricture.

This development, in turn, gave rise to a cluster of common law judicial related immunities.⁸ At the very outset, absent from the origins of arbitral immunity is the rich historicity that underlies the formation of the judicial immunity doctrine. Thus, the absolute arbitrator immunity rule lacks two pivotal British and American historical transformational moments: (i) the natural consequences of the doctrine that “the King can do no wrong,”⁹ and (ii) the social-historical vector of a post-civil

(v) identifying the question raised as concerning “the liability of judges for civil action for their judicial acts.”

8. Expansion of judicial immunity to officials, accountant, engineers, among others. *See, e.g.*, *Durham v. Reidsville Eng’g Co.*, 120 S.E.2d 564 (N.C. 1961) (when engineers make decisions under the terms of their contract, they cannot be held liable for damages in the absence of bad faith); *Craviolini v. Scholer & Fuller Associated Architects*, 357 P.2d 611 (Ariz. 1960) (architects enjoy immunity when they are performing those particular functions which require them to act like a judges); *Wilder v. Crook*, 34 So.2d 832 (Ala. 1948) (an engineer, when placed in a position analogous to an arbitrator, cannot be held liable for damages even where his decisions are the result of fraud or corruption).

9. *See* MARTINEZ-FRAGA, *supra* note 3, at 58–62 (providing an overview of “the king can do no wrong” rule as deeply rooted in the English common law tradition).

war reconstruction U.S. Supreme Court that spawned the absolute judicial immunity doctrine.¹⁰

The absolute arbitrator immunity doctrine is not a rightful heir to this historical legacy. Instead, the doctrine was the product of a *tour de force*, having as its cause and first principle an analogy rather than a series of very specific historical moments that focused on the specific workings of judicial tribunals as expressions of institutionalized sovereignty that had to be safeguarded at all costs in the aftermath of a civil war. No comparable claim can be ascribed to the role of an arbitrator in an international arbitration or treaty-based dispute.

Second, the narrow instances giving rise to judicial liability for civil claims based upon an absolute lack of jurisdiction tantamount to “abuse of jurisdiction” are both theoretically and practically absent from arbitration proceedings. No such exception to liability can form part of a framework based on party consent and circumscribed by the doctrines of *arbitrability* and competence-competence.¹¹

Third, the systems of control common to judicial proceedings minimize the need for private civil damages actions as an appropriate check on judicial wrongdoing.¹² Arbitration proceedings lack comparable systems of control and accountability attaching to arbitrator misconduct. Therefore, the use of private causes of action as an appropriate recourse in order to rein in arbitrator misconduct is all the more warranted.

Fourth, judicial immunity and the derivative cluster of immunities attaching to public sector actors whose responsibilities are essential to the judicial process, and equally necessary for purposes the exercising State sovereignty through the judicial and administrative (regulatory) systems, is foreign to international arbitration. They are subject to systemic hierarchical checks and balances within the structure of agencies.

10. See *id.* at 66–69 (contextualizing the absolute judicial immunity doctrine during the Reconstruction period).

11. For a detailed analysis of the competence-competence doctrine see C. Ryan Reetz, *The Limits of the Competence-Competence Doctrine in United States Courts*, 5 DISP. RESOL. INT’L 5 (May 2011) (providing a detailed discussion of how several competence-competence issues are treated by federal courts in the United States).

12. See MARTINEZ-FRAGA, *supra* note 3, at 83–87 (discussing the United States jurisprudence which has defended the lack of need private civil damages stemming from systemic checks).

This entire framework is absent from international arbitration and the role of arbitrators. Further, such officials forming part of the judicial process are under (i) official government scrutiny, and (ii) subject to public record disclosure strictures that render their undertakings susceptible to the public's performance assessments and the consequential effects of such public evaluations.¹³ International commercial arbitration is private and *ad hoc*.¹⁴ Therefore, the need for private rights of action against arbitrators is even more enhanced.

13. *Id.* at 87–89 (discussing the applicable case law and factors that support federal agency officials conducting hearings as having many of the same checks as judges). (Freedom of Information Act (FOIA) Improvement Act of 2016 states that judicial filings and public records are open to the public. California, Colorado, New Jersey, Texas, and Washington, among others, have their own statutes concerning public records).

14. See Tadas Varapnickas, *Issues of Arbitrator's Liability as Regards the Right to Fair Trial: What Way to Choose for Policy-Makers*, 20 V.J. 95, 103 (2016) (observing that “[t]his contractual approach to liability is usually associated with civil law countries, and some Islamic countries. In many civil law jurisdictions, arbitrators are merely professionals whose liability is determined by the general principles of contract liability contained within the civil code.” It follows that if a policy-maker prefers a contractual theory of arbitration, an arbitrator should be held liable for his misconduct because if a party to a contract fails to perform his obligation contractual liability is unavoidable”) (citing Susan D. Franck, *The Liability of International Arbitrator: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT’L & COMP. L. 1, 7–8 (2000) (“In general, however, the contract between the parties and the arbitrator is subject to private law and can be characterized as a mandate with service elements or a quasi-mandate in exchange for the remuneration of the arbitrator.”)). See Franck at 24, n.147 (citing to *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1356 (9th Cir. 1981) for the proposition that in an arbitration arising under the Railway Labor Act a four-member board of the System Board serving as arbitrators was not bound by the precedent of three prior arbitral awards on the identical legal issue). See also Pedro J. Martinez-Fraga, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 NW. J. INT’L L. & BUS. 419 (2012) (exploring how the common law concept of *res judicata* can help supply a uniform doctrine applicable in international commercial arbitrations). An arbitrator empanelled in an investor-State arbitration remains a private actor although the adjudication process may touch and concern matters of public interest and even national and transnational policy. See, e.g., José E. Alvarez, *Is Investor-State Arbitration “Public”?* 18–35 (Inst. for Int’l L. and Just., Glob. Admin. L. Series, Working Paper 2016/6) (discussing the debate surrounding the public and private aspects of Investor-State Dispute Settlement and the concluding that ISDS is a form of dispute settlement that has hybrid public and private aspects); Kyla Tienhaara, *Once BITten, Twice Shy? The Uncertain Future of “Shared Sovereignty” in Investment Treaty Arbitration*, 30 POL’Y & SOC’Y 185, 185–190 (2011) (referencing arbitrators as private actors

Fifth, the contours of the development and expansion of the judicial immunity doctrine, in part, was based on analysis of phases of judicial proceedings (i) that have no analogue in arbitration proceedings, and (ii) typically expose public actors forming part of the judiciary, including judges and magistrates, to an entire universe of non-parties with which arbitrators have no dealings.¹⁵

Sixth, the expansion of the doctrine to non-judges *always* took place within the context of the rubric and incident historicity of the judicial process.¹⁶ Neither the elements of that process nor its historical foundations form part of international arbitration. Thus, the transposition of judicial immunity to arbitrator immunity, on the strength only of a surface analogy concerning seemingly shared aspects of adjudication that in fact cannot resist sustained analysis, is conceptually flawed and leads to adverse practical workings. The ills of overprotection cannot be policed.

Seventh, the practical consequence of engrafting judicial immunity on international arbitrators leads to a systematic disavowance of the most fundamental and sacrosanct principles that arbitration purports, not only to safeguard, but to further: namely, efficiency and expediency.¹⁷ Overprotection arising from absolute immunity causes unforeseen and involuntary cost-shifting.

Eighth and finally, judicial adjudication is carefully constrained.¹⁸ Appellate accountability strictures minimize the need for private civil damages actions as a means to discourage and to control intentional or negligent judicial misconduct.

and arguing that arbitrators have not acquired added authority from states to provide them public powers).

15. See MARTINEZ-FRAGA, *supra* note 3, at 85–86 (claiming incongruity between common law issues giving rise to the judicial immunity doctrine and those of the arbitrator immunity sphere).

16. See *e.g.*, Jones v. Brown, 54 Iowa 74, 78–79 (1880) (explaining arbitrator immunity in reference to judicial history).

17. See Loukas Mistelis, *Efficiency. What Else? Efficiency as the emerging defining value of international arbitration: between systems theories and party autonomy*, 4–5 (Queen Mary Univ. of London, Sch. of L. Legal Studies Research Paper No. 313/2019) (discussing arbitration users' conception of speed and efficiency in dispute resolution).

18. See *id.* at 6–11 (discussing the inceptions and rationale of arbitration as a more flexible and bespoke option compared to judicial adjudication).

To the contrary, arbitrator discretion is both practically and theoretically almost absolute.¹⁹ Further, in addition to the virtually unbridled nature of the inherent power of arbitrator discretion, arbitration lacks interlocutory and final appellate recourse.

These premises, however, have played no role in qualifying or tempering the unrestricted importation of judicial immunity historicity and doctrinal elements into arbitral proceedings. The seductive powers of an ostensibly attractive analogy cannot be underestimated.

The glittering similarity of the adjudicatory role, even within the idiosyncratic framework of an arbitral proceeding, distracts from the more substantive but less obvious differentiators. What subtlety first appeared as “the application of the judicial immunity doctrine to arbitrators,” became the “arbitrator immunity” common law doctrine.²⁰

The first case ever to apply the judicial immunity doctrine to an arbitrator was a state court proceeding that worked its way through to the State of Iowa Supreme Court.²¹ It became the foundational case for the application of the judicial immunity protection as applicable to arbitrators and, therefore, of the adoption of a judicial based standard in contrast with the contract premised case most civil law jurisdictions follow.

The case predated the enactment of the Federal Arbitration Act²² (FAA) by approximately forty-five (45) years, and thus we are able to examine with pristine clarity the extent to which the argument by analogy to a judicial model is relied upon. From linguistic and analytical perspectives this distance in time from the FAA wrests from the Iowa Supreme Court’s analysis the conceptual “impurities” arising from federal policy favoring arbitration.

Free from this conceptual influence, the extent to which surface reliance on an analogy dominated the Court’s

19. See generally Pedro J. Martínez-Fraga, *Developing Equipose Between Party-Autonomy and the Inherent Power of Arbitrator Authority in the Gathering of Evidence in International Arbitration*, in *INHERENT POWERS OF ARBITRATORS* 209–45 (Franco Ferrari & Friedrich Rosenfeld eds., 2018) (analysing the nature of arbitrator discretion, its minimal constraints, and the structural elements that define it).

20. See MARTÍNEZ-FRAGA, *supra* note 3, at 85–86 (tracing the roots and expansion of the judicial immunity doctrine and noting the “importation of the judicial immunity doctrine into the absolute arbitrator immunity sphere”).

21. *Jones v. Brown*, 54 Iowa 74 (1880).

22. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2023).

imagination and reasoning becomes even more stark. The Iowa Supreme Court's analytical methodology, however, has not been questioned. The argument based on analogy has been accepted, adopted, and perpetuated as a visceral self-evident truth. In fact, nothing could be farther from the truth.

B. *Jones v. Brown: The First U.S. Common Law Case Addressing Arbitrator Immunity and the Origins of a Flawed Doctrine that Still Persists*

The conceptual and doctrinal shortcomings of the Supreme Court of Iowa in *Jones v. Brown*,²³ render the case a rich Petri dish for didactic purposes. It is not too delicately laced with false assumptions and untested premises.

Despite its relative brevity, even for that historical period (decided on June 16, 1880), the analysis is abundantly eloquent in demonstrating the troubling premises assumed and the equally blunt analytically discursive reasoning used in addressing the then-novel issue. Moreover, the very peculiar procedural development of the case reveals a complete neglect of conceptual symmetry that further has clouded the manner in which courts subsequently have addressed the absolute arbitrator immunity doctrine for over one hundred and thirty years to follow.

In *Jones v. Brown* the plaintiff was an arbitrator who filed an action to recover arbitral fees allegedly owed. This procedural happenstance shall result in a meaningful conceptual point that will reveal basic asymmetries that still plague the doctrine.²⁴ The defendant party to the underlying arbitration, however, asserted a two-count counterclaim alleging intentional torts. The character of these averments also contribute to the case's didactic value.

The Iowa Supreme Court framed the issue before it as “[c]an the plaintiff be held liable in a civil action for damages

23. *Jones v. Brown*, 54 Iowa 74 (1880).

24. The parties to the arbitration had contracted to pay the arbitrators as compensation for professional services the sum of \$10 per day, “at the conclusion of said arbitration, and when the said arbitrators should be ready to submit their award to said court, ‘or sooner, if through any means said arbitration should be terminated.’” *Id.* at 75.

for an award alleged to have been made by him fraudulently and corruptly”?²⁵ This query was answered in the negative.

Oddly, as a predicate to holding that a corrupt arbitrator cannot be held liable in a civil action for damages arising from an award alleged to have been fraudulently issued by the arbitrator, the Court identified “two considerations”²⁶ that it characterized as being “of *minor* importance.”²⁷ It is precisely the understanding and classification of these critical premises as being “of minor importance” that constitutes a central cause of the wrongful transposition of the judicial immunity doctrine to arbitrators in the field of international arbitration.

The untested assumptions and lack of sensitivity to the relevant symmetries that characterize the Iowa Supreme Court’s analysis in this seminal case command strict and sustained analysis.

The first of the two considerations “of minor importance” concerned the defendant-counter-plaintiff’s assertion that because at the time of the issuance of the award the arbitrators had adjourned, “they [the arbitrators] acted in a mere ministerial capacity, and not as a court, nor as judicial officers.”²⁸

Ironically, it is the defendant-counter-plaintiff who in framing the “ministerial capacity” defense introduces the enthymeme that for purposes of the analysis, and therefore of the corresponding defense, an arbitrator is conceptually tantamount to a judge. The untested and implicit premise is contained in the corollary proposition that, were the arbitrator at issue in making the subject award *not* acting “in a mere ministerial capacity,” it would only follow that he would have been acting, together with his co-arbitrators, “as a court” or “as [a] judicial officer.”²⁹

Put simply, the very defendant-counter-plaintiff seeking affirmative relief against the plaintiff-counter-defendant arbitrator, equates arbitrator with court or judicial officer. This conceptual flaw has proven to be doctrinally determinative in the development of this, and other related, common law immunity.

25. *Id.* at 78.

26. *Id.* at 77.

27. *Id.* (emphasis added).

28. *Id.*

29. *Id.*

The Court disposes of the “ministerial capacity” defense rather handily once it accepted without any quibble the implicit untested assumption that for purposes of immunity from liability as to a civil action for damages, an arbitrator shall be accorded the same status as a judge.

Having accepted this proposition, the Iowa Supreme Court applies a judicial paradigm that views the arbitrator as an adjudicator-judge, *rather than* a private actor in the marketplace whose jurisdiction arises from a private agreement. The Court observes that “[t]he arbitrators, in determining the time and manner of making and filing their award, acted in the same capacity as they did in determining what their award should contain.”³⁰

It went on to reason that “[a]s well might it be claimed that a judge acts in a mere ministerial capacity in reducing an opinion to writing, and thus hold him liable civilly upon the ground that such act was not judicial.”³¹

The second “consideration . . . of minor importance” concerned equating an arbitrator engaged in arbitration to a judge acting in a judicial capacity, and similarly analogizing an arbitral tribunal to a court of law.³² The latter proposition is articulated much as if it were an immutable first principle that is self-evident and for this reason unworthy of being questioned or submitted to discursive reasoning. The Iowa Supreme Court’s reasoning merits reading and re-reading:

*It does not seem to be seriously contended that arbitrators of matters of difference between parties do not act in a judicial capacity. That they are in a certain sense a court, cannot be questioned. They are empowered to determine questions of law and fact; in short, to adjudicate all questions presented to them by the parties, and to determine the rights of the parties. The fact that their award may be subject to review by the court to which it is required to be returned, does not divest them of judicial functions.*³³

The surface analogy of an arbitrator to a judge is deeply rooted in this analysis. Indeed, phrases like “[i]t does not

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (emphasis added).

seem to be seriously contended,” and “cannot be questioned,” emphasize what the Iowa Supreme Court views as an intuitive visceral proposition that is beyond reproach and for this reason *must* be taken as true.

Having concluded that the arbitral tribunal is akin to “in a certain sense a court” and that this proposition “cannot be questioned,” all that remained for the Court to examine was English common law on judicial immunity, without ever questioning whether an arbitrator in fact is sufficiently akin to a judge to compel application of the judicial immunity doctrine.

After reviewing some of the major English cases addressing the scope of the judicial immunity doctrine, and also including *Bradley v. Fisher*,³⁴ the Court held that the plaintiff-counter-defendant arbitrator enjoyed absolute immunity, even where, as in that case, the allegations assert intentional and deliberate wrongdoing.³⁵

34. *Bradley v. Fisher*, 80 U.S. 335 (1871).

35. *Jones v. Brown*, 54 Iowa 74, 78–79 (1880) (citing *Bradley v. Fisher*, 80 U.S. 335 (1871)). Here, the court observed:

In some cases, as in *Bradley v. Fisher* [citation omitted], it is held that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly; and a distinction is made between excess of jurisdiction and a clear absence of jurisdiction over the subject-matter. In other cases it is held that judges of courts of limited jurisdiction are liable to civil actions for their acts done in excess of their jurisdiction.

Even the single qualification that arguably may have given rise to an exception to immunity, always under the working assumption that an arbitrator is functionally a judge or judicial officer, was dispensed:

It is unnecessary, however, that we should discuss these distinctions in considering the first question presented by the first counter claim in the case at bar, because it is apparent that the arbitrators had jurisdiction both of the subject-matter and of the persons of the parties interested, and no act set forth in said counter claim was in excess of their jurisdiction. Jurisdiction is defined to be ‘the authority of law to act officially in the matter then in hand.’ [citation omitted] That the arbitrators in this case had jurisdiction to do all that is alleged they did in the counter claim under consideration is apparent; that is, they had jurisdiction to hear, try and determine, and make an award. That they did not act in excess of their jurisdiction is also apparent. Orders or judgments in excess of jurisdictions are such as the judge has no power to make, as where a judge having jurisdiction of a criminal offence inflicts a penalty in excess of that provided by law, or the like. The arbitrators in this case had power to make an award. The means employed by them, and the

Holding fast to the assumption that for purposes of an immunity analysis an arbitrator is tantamount to a judge or judicial officer, the Court not only ignored the threshold question, namely, are the elements and historicity giving rise to the doctrine of *judicial* immunity applicable to an arbitrator, but it also failed to accord any weight to the inferences arising from the exercise of excessive jurisdiction as a qualification to application of the doctrine of judicial immunity.

The need for private civil damages claims against judges and judicial officers is considerably diminished because courts, having limited jurisdiction, circumscribe judicial misconduct to the exercise of “excessive jurisdiction” pursuant to appellate recourse. An exception to the judicial immunity doctrine has been carved from the exercise of “excessive jurisdiction.” “Excessive jurisdiction”, for purposes of triggering an exception to judicial immunity, concerns exercising jurisdiction structurally beyond the specified subject matter of a court.

This structural rubric is altogether absent from international commercial arbitration, which by nature is both *ad hoc* and non-appealable.³⁶ Indeed, even though the Supreme Court of Iowa analyzed the disparate rulings under the English common law that extract exceptions to judicial immunity depending upon the status of judges as pertaining to courts of superior or limited jurisdiction, the Court was studiously silent on any reading that would invite comparison with the private contractual normative foundation of international arbitration.³⁷

This omission was all the more glaring because of the procedural posture of the case. The procedural configuration gave rise to a conceptual asymmetry that the Court also failed to identify, a failure that mightily has contributed to the development of case law in furtherance of an absolute arbitrator immunity doctrine.

In the factual matrix underlying *Jones v. Brown*, the arbitrator assumed the role of a *plaintiff* in the judicial proceeding and asserted a complaint based upon *breach of contract* against a party to the arbitration. Thus, it is evident that the arbitrator himself

manner in which the proceedings before them were conducted, may have been irregular, but were not in excess of their jurisdiction.

36. See MARTINEZ-FRAGA, *supra* note 3, n. 242 (explaining that “it is hornbook law that arbitral awards are not appealable” and providing examples of limited exceptions under the Federal Arbitration Act).

37. *Jones v. Brown*, 54 Iowa at 78–79.

very clearly understood the private nature of his services as arbitrator as purely contractual in nature with respect to the parties to the arbitral proceeding.

Understandably, he pressed a claim for contractual damages.³⁸ The counterclaim was cloaked in the language of intentional torts but conspicuously sought damages for what would be a breach of contract claim asserting non-performance on the part of the arbitrator.³⁹

The Iowa Supreme Court actually adopted a contractual paradigm for purposes of adjudicating the arbitrator's claims as a plaintiff but inexplicably dispensed with this criterion and embraced a standard based upon an analogy, i.e., arbitrator as judge and, therefore, adjudicator, for purposes of ruling on the viability of the counterclaim. This asymmetrical approach is meaningful beyond its mere aesthetic value, which is considerable enough.

In effect, the historical importance of the asymmetry articulated in *Jones v. Brown* cannot be sufficiently overstated. As of the publication of the opinion in 1880, as a matter of U.S. common law doctrinal development, arbitrators have been understood for purposes of any immunity analysis *primarily* as adjudicators akin to judges. Only *secondarily* have they been viewed as private actors in the marketplace selling their professional skills to consumers of arbitral services at arms-length pursuant to a contractual relationship.

The characterization of arbitrators as judges, based upon untested assumptions and the surface phenomenology of an equally untested analogy, has caused U.S. federal and state courts to embrace a "judge-adjudication" paradigm as applicable to the development of the absolute arbitrator immunity doctrine at the expense of the actual governing dispositive contractual relationship between arbitrator and parties. It also has turned

38. The record provides that:

Plaintiff avers that between the 17th of December 1878 and April 1, 1879, *he rendered services* as such arbitrator for the period of twenty-four days, and in October, 1879, the said arbitrators submitted and filed in the said district court their award in writing, and that defendants are indebted to him in the sum of \$240, *for said services* for which he asks judgment.

Id. at 75 (1880) (emphasis added).

39. *Id.* at 75-76.

a blind eye to multiple policy considerations that warrant qualifying arbitrator immunity.

Consequently, arbitrators, unlike all other professionals, are treated as public officials who undertake professional actions in furtherance of the State's exercise of its Judicial Sovereignty. Yet, they are neither (i) public officials, nor (ii) vehicles through which States exercise sovereignty.

The absence of State-action with respect to the arbitral process, a fact that is essential to the perfect workings of international arbitration, is altogether ignored in furtherance of adherence to the consequences that follow from adopting argument by analogy. While all other professionals are liable in tort or contract for negligence or intentional wrongdoing, no such liability attaches to arbitrators. The analysis in *Jones v. Brown* created the analytical framework for this anomaly that leads to process legitimacy concerns and to the ills of overprotection.

The Iowa Supreme Court in this venerable chestnut could not have adopted a more viscerally-based analysis. It went from identifying the issue, never disclosing the plaintiff as an arbitrator, *directly* to the following reasoning:

Perhaps no branch of the law has undergone more thorough discussion *than the question as to the liability of judges to civil actions for their judicial acts*. The cases which treat of the subject are so numerous, both in England and in this country, that it is impracticable to do more than to refer to them generally. In the case of *Yates v. Lansing*, 5 John. 28, there is an elaborate review of the authorities upon the subject. In a note to *Burland v. Parsons*, 25 Am. Reporter, 694, we have the substance of a large number of cases, English and American. *See, also, Bradley v. Fisher*, 13 Wall. 335, and the late case of *Lange v. Benedict*, 73 N.Y. 12, very many authorities are reviewed and commented upon.⁴⁰

Critical to the leap in logic is that the case at issue, from the Court's perspective, concerns a discussion of "the question as to the liability of judges to civil actions for their judicial acts."⁴¹

Poles apart from this proposition, the proceeding before the Iowa Supreme Court *only* and *exclusively* dealt with the extent to which a party to an arbitration may file an action

40. *Id.* at 78 (emphasis added).

41. *Id.*

against an arbitrator based upon alleged intentional torts in the form of a counterclaim where the arbitrator in the capacity of plaintiff first sued the party for breach of contract. The term “arbitrator” is not found in any of the cases cited or otherwise alluded to by the Court in *Jones v. Brown*. The *Bradley v. Fisher* and *Yates v. Lansing* line of authority simply is inapposite to the actual issue underlying *Jones v. Brown*.

III. CONCLUSION

Judicial immunity in the United States was engrafted onto international arbitration based on the adoption of untested assumptions, the glitter of argumentation by analogy, and the visceral regurgitation of doctrine by common law authority that never has been challenged. The proliferation of international arbitration proceedings, in large measure spawned by a historically unprecedented integrated global market, suggests that process legitimacy, as well as consumers of arbitral services, would best be served by adopting a qualified immunity doctrine that holds arbitrators accountable for contractual non-compliance, and intentional torts, while according arbitrators protection beyond that of mere contractual stakeholders.