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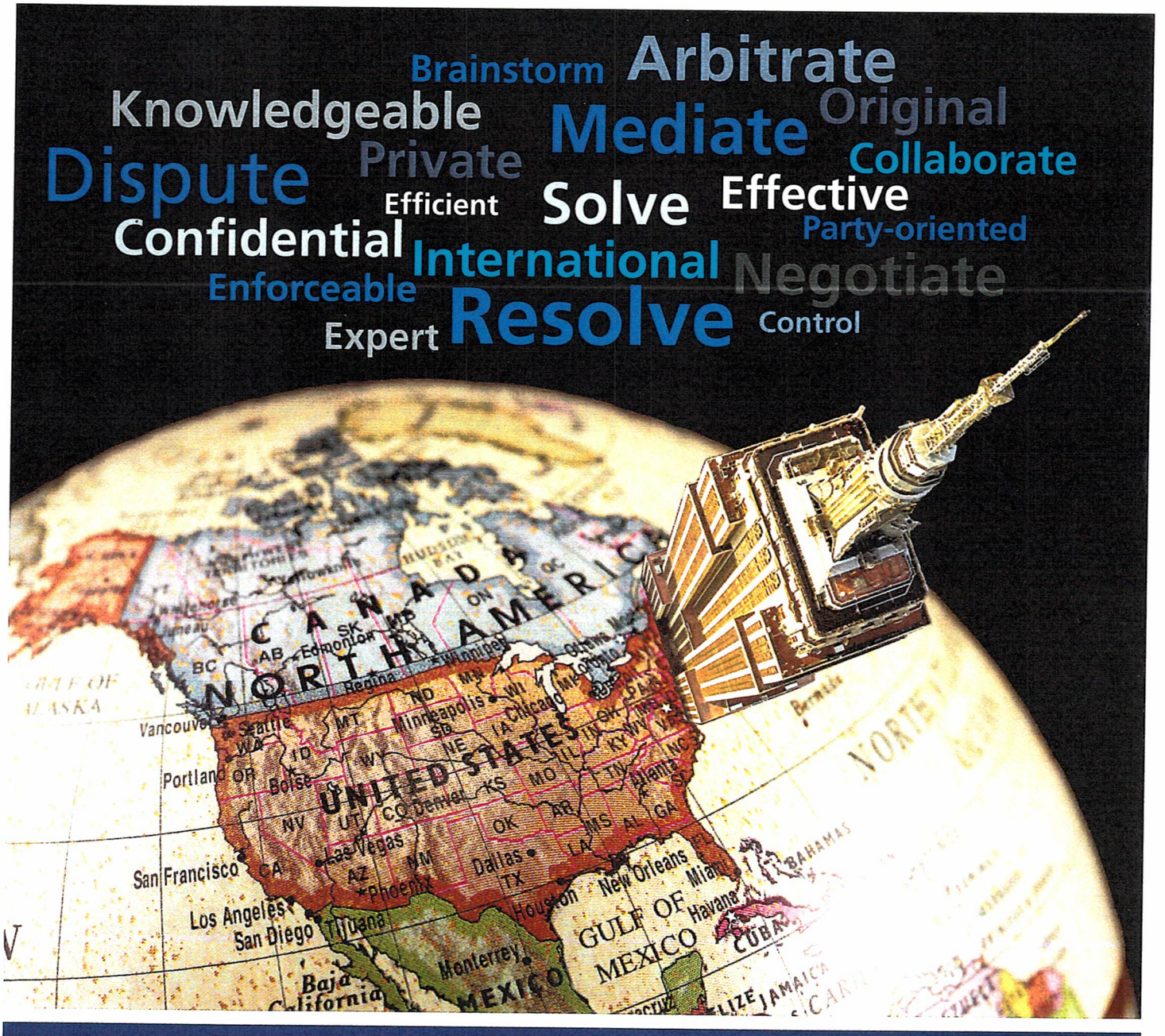

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Provider and Arbitrator Immunity for Acting in Their Official Capacities

By Gerald M. Levine

Once parties have voluntarily agreed to resolve their disputes by arbitration courts have no authority to intervene in the proceeding and only a limited role at the end of the process to determine whether it was tainted in some manner prejudicial to the losing party, and if it was neither tainted nor unfair to confirm the award. Other than that, courts treat providers and arbitrators with deference in considering arguments challenging their decisions. Citing authority in its own jurisdiction an Illinois court noted that "by contracting to arbitrate their disputes, parties must accept 'the arbitrator's view of the meaning of the contract' [with the corollary that] [w]e will not overrule that construction merely because our own interpretation differs from that of the arbitrator."[1] The same sentiment can be found in other jurisdictions.

While in theory decisions can be set aside and awards vacated, they rarely are. In the words of the U.S. Supreme Court, "a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11 of the FAA."[2] If there's any distinction between a "must" and a "shall" in this context it is barely measurable. Parties challenging a decision or moving to vacate "bear[] a high burden of demonstrating objective facts inconsistent with [one of the four statutory grounds]" by "clear and convincing evidence."[3]

Further: "There is nothing malleable about [this standard], which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies."[4] The best losing disputants can hope for is to avoid having to pay attorney fees and costs incurred for "acting in bad faith, vexatiously, wantonly, or for oppressive reasons," in seeking to overturn the arbitration award.[5]

There is a three-fold rationale for this hands-off policy: to protect the alternative dispute resolution space parties have elected; to assure parties receive the benefits of their agreements; and to support neutrals fulfilling their appointed roles. Immunity of providers and arbitrators acting in their official capacities expands the third prong of the hands-off policy. Unless conduct exposed by the record is so egregious as to support personal liability of providers or arbitrators, courts at every level and jurisdiction reject such claims.

A good place to begin this tour of recent cases is the U.S. Supreme Court's 1991 decision in *Mireles v. Waco*:[6]

> [judicial] immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.

In *Bell Atl. Corp. v. Twombly*[7] the Court (citing an earlier Eighth Circuit decision[8]) agreed that "[b]ecause an arbitrator's role is functionally equivalent to a judge's role, courts of appeals have uniformly extended judicial and quasi-judicial immunity to arbitrators."[9] As we will see, the policy also extends to providers acting in their official roles. The exclusive remedy for challenging conduct that taints awards lies in federal and state arbitration acts that provide adjudicatory space for the arbitral process.

Arbitrator Immunity

High though the bar is for vacatur it is still higher for finding personal liability. The Second Circuit Court of Appeals has held that the "functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits. Immunity furthers this need."[10] The court also pointed out that "the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity."

Failure to overcome immunity is illustrated in two New York cases, in 2016 in *Pinkesz Mut. Holdings, LLC v. Pinkesz*[11] and the other from 2014, *Siskin v. Cassar*[12] as well as in federal court, *Miskell v. Chase*.[13] In the federal action the court noted in dismissing the claim that under Maryland law arbitrators are accorded immunity "in the absence of an affirmative showing of malice or bad faith."[14] It also noted that in Illinois, "Parties who, although not judges, engage[d] in adjudication (such as private arbitrators or administrative tribunals)...enjoy absolute immunity."[15] In none of these cases was there evidence the arbitrators conduct was taken "in the complete absence of all jurisdiction" or out of "malice or bad faith."

In *Pinkesz Mut. Holdings* the court vacated the arbitration award (actually, an amended award) on the grounds that the panel lacked authority to amend its prior award. The court held that "immunity also applies to acts taken in excess of authority." Importantly, however, "the plaintiffs failed to allege how any of the acts of the rabbinical court defendants were undertaken in the clear absence of all jurisdiction." Implicit in the decision is that the bar for proving liability cannot be cleared with formulaic allega-

tions such as "merely assert[ing] conduct by the rabbinical defendants in their capacity as arbitrators."

While the fact pattern in *Siskin* is somewhat different, the court reached the same conclusion in dismissing the action against the arbitrator and provider (American Arbitration Association), essentially on the ground that plaintiff's failed to allege predicate facts sufficient to clear the higher bar for personal liability. The court held that "[t]he evidence submitted by the AAA defendants in support of their motion to dismiss the complaint...disproved the essential allegation of the complaint that the AAA defendants acted beyond the scope of their arbitral capacity, and established that the plaintiff does not have a cause of action sounding in negligence and breach of contract against them."

Where arbitrators have acted within the scope of their capacities there can be no basis for a claim beyond vacatur. These New York decisions in turn rest on earlier authority denying complaints against arbitrators for failure to state a claim.[16]

Provider Immunity

This policy ruling also embraces providers, most recently in *Imbruce v. Am. Arbitration Ass'n, Inc.*[17] and in *Owens v. Am. Arbitration Ass'n, Inc.*, Civ.,[18] although the tour also includes two lawsuits against the Forum, formerly known as the National Arbitration Forum (NAF), in one of which the Forum was accused of not acting in any official capacity. In *Imbruce*, the Court noted that the "[e]xtension of the policy to sponsoring organizations is also intended to avoid discouraging such organizations from conducting future arbitrations."

The *Imbruce* plaintiffs argued that their claim raised an "issue of first impression, namely whether the doctrine of arbitral immunity should be applied to conduct occurring after issuance of an arbitral award."[19] It appears the AAA was tardy in assessing a fee after the award. According to the plaintiffs the arbitrator and AAA were "stripped of authority under the common law principle of *functus officio*." The court rejected this argument as a "veiled attempt to evade arbitral immunity." The court continued: "If, as plaintiffs maintain, their objection is solely that AAA wrongfully collected a filing fee for a monetary counterclaim from the Henry Parties post award, then plaintiffs have not suffered harm that this suit could redress."

In *Owens*, plaintiff "rais[ed] claims for breach of contract, unjust enrichment, tortious interference with contract, and tortious interference with prospective economic advantage." It took issue with the AAA's "refusal to disqualify [an] arbitrator" and the question was whether doing so was within or outside its official role. The court held the AAA was acting within the "scope of its arbitral process:"

> The cases are clear that an organization that sponsors arbitration is immune from liability for acts it takes "within the scope of the arbitral process." [*Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996)]. Indeed, one court of appeals specifically stated that a sponsoring organization's "refusal to disqualify [an] arbitrator...falls within the scope of [arbitral] immunity." Jason v. Am. Arbitration Ass'n, 62 F. App'x 557 (table), 2003 WL 1202934, at *1 (5th Cir. Mar. 7, 2003).

The court distinguished the case before it from *In re NAF Nat'l Arbitration Forum Trade Practices Litig.*,[20] (the earlier of the two NAF cases) in which the decision "rested on the allegation that the 'arbitrations' performed by NAF related to consumer debt 'were not arbitrations at all,' but that the NAF would regularly defer to credit-card companies as to the appropriate decision in a given case, rather than having arbitrators make that decision."[21]

In re NAF is particularly noteworthy in that it represents a rare rebuke against a provider. In 2010 a putative class of individuals holding consumer debt sued NAF, asserting "systemic, pervasive, and far-reaching allegations of bias and corruption" that rendered "every single arbitration performed by NAF suspect." NAF moved to dismiss on the grounds of immunity, but the court denied the motion and ultimately held it liable on grounds of "systemic, pervasive, and far reaching allegations of bias and corruption." In that case, the court observed that the

> allegations Plaintiffs make are not procedural irregularities or even violations of the organizations' own rules. Rather, they are systemic, pervasive, and far-reaching allegations of bias and corruption, rendering every single arbitration performed by NAF suspect. At this stage of the litigation, NAF cannot claim arbitral immunity.

The other notable decision featuring the Forum held that it was acting in its official capacity.[22]

Fast forward to the new action against NAF, *Virtualpoint, Inc. v. Poarch Band of Creek Indians and National Arbitration Forum, Inc.*[23] In this case, plaintiff (a domain name investor and reseller) relying on *In re NAF* sought to hold the provider liable for common law fraud. However, the court found the facts in the new case entirely different from the earlier one.

In the administrative proceeding conducted under the auspices of the Uniform Domain Name Dispute Resolution Policy the panel found Virtualpoint to be a cybersquatter and ordered the subject domain name to be transferred to the trademark owner. Under the Policy, losing parties have a statutory right to challenge awards

under the Anticybersquatting Consumer Protection Act.[24] The ACPA part of the action is still pending but the court disposed of the claim against the Forum by dismissing the complaint.

Referring to the circumstances in the earlier case, the court noted that the

> doctrine [of immunity] exists to protect decision makers "from undue influence" and that plaintiffs were in fact alleging that all of NAF's arbitrations were corrupted by the sort of undue influence arbitral immunity is designed to prevent, so the application of immunity would have been improper.

It is significant that in dismissing the claim against the Forum the court (referring to *In re NAF)* "stressed the narrowness of its ruling…by acknowledging the 'undeniably broad' scope of arbitral immunity and noting that the claims before [it] would have been barred had they alleged only 'procedural irregularities or even violations of [the NAF's] own rules.'"

But in *Virtualpoint*, plaintiff

> has produced no examples of courts denying arbitral immunity based on allegations analogous to the ones it advances here, and the Court therefore concludes that its claims against NAF are clearly barred by the doctrine of arbitral immunity.

Instead, plaintiff alleged systematic bias in favor of law firms regularly appearing before it as complainants' counsel in the UDRP process. "But allegations of this sort cannot overcome arbitral immunity," citing a decision from the district court, Hawaii:[25] "[A]llegations of bias, bad faith, malice, or corruption generally do not bar the application of quasi-judicial immunity," although they may be grounds for vacatur.

Conclusion

Whether against arbitrators or providers, the evidentiary demands are significant for vacatur and even greater for overcoming immunity. Conduct that could conceivably result in vacatur of an arbitration award is insufficient to clear the higher bar. The higher bar is cleared only when providers and arbitrators act outside their capacity or in the complete absence of all jurisdiction, but arbitrators appointed and acting within their capacities are absolutely immune. In the rare instance in which a circuit found immunity overcome against a sitting judge, the Supreme Court reversed the judgment ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly.").[26] Against arbitrators the conduct would have to be extreme to be an inexcusable point, for which there are no recent (and perhaps few ancient) examples.[27]

Endnotes

1. *Cantor Fitzgerald & Co. v. Walton*, 2016 IL App (1st) 152946-U (Ill. App., Sept. 22, 2016).
2. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (quoting 10 U.S.C. § 9).
3. *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 105, 106 (2d Cir. 2013) (internal quotation marks omitted).
4. *Hall St. Asocs*, at 587.
5. *Local 97, Int'l Bhd. of Elec. Workers, A.F.L.-C.I.O. v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 132 (2d Cir. 1999).
6. 502 U.S. 9, 11-12 (1991).
7. 550 U.S. 544 (2007).
8. *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996).
9. *Bell Atl. Corp.*, at 545.
10. *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882 (2nd Cir 1990).
11. 2016 NY Slip Op. 4034 (2nd Dept. May 25, 2016).
12. 122 A.D.3d 714 (2nd Dept. 2014).
13. 16-cv-1460 (D. Md. Oct. 20, 2016).
14. Md. Code Ann., Cts. & Jud. Proc. § 5-615; § 3-2A-04(g).
15. *Coleman v. Dunlap*, 695 F.3d 650, 652 (7th Cir. 2012).
16. *Jacobs v. Mostow*, 69 A.D.3d 575, 893 N.Y.S.2d 560 (2nd Dept. 2010).
17. 15-cv-7508 (S.D.N.Y. Sept. 22, 2016).
18. CV 15-3320 (D. Minn., December 9, 2015).
19. Citing *New England Cleaning Servs., Inc. v. Am. Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999).
20. 704 F. Supp. 2d 832, 836 (D. Minn. 2010).
21. *Id., In re NAF*, pg. 5.
22. *Virtualpoint, Inc. v. Poarch Band of Creek Indians and National Arbitration Forum, Inc.*, CV 15-02025 (CD CA, Southern Division June 6, 2016).
23. CV 15-02025 (C.D. Cal., Southern Division June 6, 2016),
24. 15 U.S.C. § 1125(d).
25. *Bridge Aina Le'a v. State of Hawaii Land Use Commission*, 125 F. Supp. 3d 1051, 1077 (D. Hawaii 2015).
26. *Id., Mireles v. Waco*, 116 L.Ed.2d at 10.
27. *Cf. JAMS, Inc. v. Superior Court of San Diego Cnty*, D069862 (Cal. App., 2016) in which the motion court denied the petition of JAMS and "private judge" to dismiss an action against them under the California anti-SLAPP statute. The court denied by motion holding that the statements fell within the commercial speech exemption to the statute because the alleged statements that form the basis of plaintiff's claims were "posted on the JAMS [] [Web site] for the purpose of promoting and securing sales or commercial transactions in defendants' ADR services. The intended audience was [Kinsella], a party involved in dissolution litigation, who actually engaged the services of JAMS and Sonenshine." On a writ of mandate, the Court of Appeal affirmed. It noted that "all allegations of wrongdoing [omissions to her biographical information] relate to information Kinsella specifically viewed on defendant JAMS' [Web site] before he agreed to select Sonenshine as the [privately compensated temporary judge]."

Mr. Levine is an AAA commercial arbitrator and author of Domain Name Arbitration, a treatise on trademarks, domain names and cybersquatting.