CONCLUSION

6.44 The immunity allowed to arbitrators in German law is extensive. This immunity stems entirely from the contractual nature of his office, which is formalised in the Schiedsrichtervertrag, the contract between the arbitrator and the parties to the arbitration. He is liable contractually for wilful conduct and negligence regarding all his acts and omissions. With regard to the special case of the giving of his award, he is granted an immunity akin to that of the regular judge, though this immunity rests in contract and not in delict. Alternatively, he is liable delictually for acts not included in the Schiedsrichtervertrag and is accordingly subject to the normal principles of the German law of delict. He is also liable in both delict and contract where the contractual obligation breached lies alongside a recognised general legal duty. He is able to limit both his contractual and delictual obligations by agreement in the Schiedsrichtervertrag. As regards international arbitrations, he may only be offered such extensive immunity if German law applies to the Schiedsrichtervertrag or is, in cases of delictual liability, the lex loci delicti commissi. In the special case of application of the contractual immunity offered to the giving of his award, though it is possible to apply German criminal law abroad, the practical, legal and moral problems raised are so considerable as to make such application very difficult if not impossible.

VOLKER B. TRIEBEL AND JOHN S. HYDEN

CONCLUSION

7.24 Arbitrators' immunity for their contractual and non-contractual liabilities has neither been stipulated by any statute nor been discussed in any court's decision in Japan. On the other hand, Japanese judges do enjoy judicial and non-contractual immunity for their misconduct committed within the exercise of their judicial function, subject to the imposition of disciplinary action by a judicial court or removal by impeachment of the Diet.

7.25 Although the immunity of arbitrators has not been discussed in any depth by commentators, this writer submits that the judicial immunity of judges cannot be extended to arbitrators in its original form, insofar as the legal provisions upon which it is based apply only to judges. However, it is submitted that the arbitrators' contractual or non-contractual liability to the parties to an arbitral proceeding should be strictly construed so as to preserve the independence of the arbitrators' quasi-judicial function as much as possible. In the case of domestic arbitrations, the arbitrators' contractual and non-contractual liability can be limited to losses incurred by the parties due to the issue of a void award resulting from the failure of the arbitrator to meet the requirements of article 799 or by his failure to satisfy article 801(1) of the Code of Civil Procedure which makes the award voidable. For international arbitrations, in addition to the above limited liabilities arbitrators are still responsible for their failures which make the award unrecognisable or unenforceable under article V(1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
8.16 The writer believes that the solution should lie between these two extreme opinions: a failure to observe the duty of care should be accepted only in case of gross or intentional negligence on the part of the arbitrator. A mere refusal of an enforcement or setting aside of the award does not signify *ipso jure* such negligence. However, it is unsettled how the question of the arbitrators' liability is to be resolved under Dutch law. It may be doubted whether it will ever be resolved in view of the checks and balances built into the 1986 Arbitration Act and the general perception of arbitrators in the Netherlands to take their mandate very seriously.

ALBERT JAN VAN DEN BERG

9.14 It is generally accepted that an arbitrator may incur liability to compensate for economic damage or losses caused by the way the arbitrator discharges his contractual obligations towards the parties. However, I am not aware of any instance where such liability has been levied or paid under Norwegian law. Deliberate or grossly negligent behaviour on the part of the arbitrator may readily give rise to claims for economic losses or damages. As mentioned above, an arbitrator accepting or claiming bribes is liable to criminal sanctions and *a fortiori* to compensate for economic losses caused thereby. The same must apply to other manifest disregard of the arbitrator's duties, whether or not criminally sanctioned.

9.15 Unjustified delays in progressing the arbitration, or the unjustified withdrawal as arbitrator, may well give rise to claims for losses or damage occurring as a result.

[...]

CONCLUSION

10.35 In spite of everything, even without the concept of immunity as is known to common law countries, Spanish law, after expressing the liability of the arbitrator, limits his liability in such a way that, except in penal questions (corruption, fraud, etc.) and bad faith (non-penal bias, malevolence, animosity, intention to harm, etc.) or egregious harm (inexcusable negligence or ignorance), the arbitrator is probably exempt from liability. In the end, the concept of "immunity" of the arbitrator as is known in other legal systems also provides for certain exceptions to this "immunity" which would lead to more or less the situation which exists in Spanish law. Comparative law will thus probably demonstrate that, in this field, as in many others, solutions are approximately the same in all civilised nations, no matter how different the avenues used within the various systems.

BERNARDO M. CREMADES

In Switzerland, an arbitrator enjoys in practice a large degree of immunity, but it is not unlimited and, due to the contractual nature of his function, his action or inaction might give rise to a claim for compensation of the damage which
the parties to the case, or one of them, may have suffered as a consequence of breach of contract, or tortious action. In the absence of case law, one must consider the situation by analogy with the case of a judge (or of a practising lawyer), even though the status of a judge who is an organ of the state is different from, and stronger than, that of an arbitrator, who is an "agent" of the parties ("mandataire"), similar to that of a lawyer representing or advising his client. It is however likely that the state courts would consider with utmost care, and very restrictively, all the circumstances before condemning an arbitrator to pay compensation for tort or for a serious breach of contract. The situation might be slightly different, depending on whether the proceedings take place under the Concordat of 1969 or the Law on International Arbitration. Although the number of international arbitration cases, under the Concordat, is decreasing, several of them are pending and others might still be instituted in the future, if the parties so decide. It means that, because of the greater facilities which the Concordat opens for appeals against an award or a decision of the arbitrator, the person who claims to have suffered a damage from the latter's action or inaction may resort to the courts to claim remedy. This possibility is more restricted with the new statute, and this might be the door to some direct law suits for damages, by discontented parties, for the alleged unlawful action of the arbitrator. Although it is likely that such a situation, to a large extent theoretical, will arise very seldom in practice, it is a hazard of which an arbitrator should be aware when accepting the responsibility to serve. It also means that an arbitrator should always exercise due diligence and the greatest care in fulfilling his duties, having regard to the special risks stemming from the complexity of the factual and legal factors, notably in the field of international trade.

JEAN-FLAVIEN LALIVE

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16It is to be mentioned that the NAI Rules contain an exclusion of liability for "any action or failure to act with regard to an arbitration governed by these Rules". In ordinary contracts, an exclusion of liability can be overridden in Dutch law in cases of gross or intentional negligence.

Referring Principles:

XIII.2.7 - Immunity of arbitrator