LIABILITY AND IMMUNITY OF ARBITRATORS, ENGINEERS, CERTIFIERS, DISPUTE SETTLERS

by Associate Professor Ian Eagles

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Dr Eagles' thoroughly researched paper traces the development - through the examination of legal precedent - of the current status of immmunity for those involved in the functions of arbitration, valuation and certification.

The relevance of this paper extends well beyond one of the common processes of settling disputes, namely arbitration - it gives guidance to the status of immunity that may apply to a range of persons - many of them professionals - that are involved in the administration of business in the widest context, ie whenever a third party is called upon to interpret, certify or value an aspect of a contractual relationship.

The quasijudicial function, as Dr Eagle points out, is often only a part of a broader task undertaken by many professional advisers. Situations in which I am frequently involved as "Engineer-to-the-Contract" require the engineer, on the one hand, to represent the owner's interests in the contract (and the engineer's success with this task often depends upon the respect that he enjoys with both parties for making a reasonable interpretation of the intention of the agreement between the parties). At other times, the engineer, as with the architect, the valuer and the auditor, must discharge a quasijudicial role, frequently, but not exclusively, relating to the issuance of certificates. Confusion between these two roles has lead to misconceptions of an adviser's liability and sometimes to misconceptions of his power under the contract.

And so I read Dr Eagles' paper with much more than academic interest.

The paper is presented in three sections entitled

Immunity in context
Competing tests of immunity
Future developments and solutions

The author develops the complex and often contradictory background through the first two of these sections prior to postulating in the third the alternative courses of direction that may be taken. His advice, to those exposed to liability for their actions, is contained in the last section - it is both clear and practicable.

The earliest case history, right through to the prediction of future trends, shows a continual reduction in the extent of immunity even to the point made late in the paper that legal counsel - when acting in arbitration - may be denied immunity!

As the paper points out, so long as the definition as to whom immunity will apply remains obscure, there will be challenges to the protection that any person involved in arbitration can enjoy. However, some of the more likely definitions seem to draw the line between a "real arbitrator" and a lesser qualified mortal in an inappropriate position; whilst other definitions serve more to help in clarifying situations that would certainly deny claims to immunity. None of the definitions appear entirely suited. The view I arrived at in following Dr Eagles' argument is that a more specific definition of what constitutes a real arbitrator is just as likely to create fertile ground in which to sew seeds of doubt as it is to clarify the matter. Such definitions could well lead to yet more legal argument.

It seems that the more judicial the manner in which the arbitration is performed the more likely that immunity would be conferred. However, to prevent too many technical experts feeling that they are protected so long as they carry out their quasijudicial duties in an adversarial way, the paper warns that when exercising technical skills in the investigatory phase, immunity is unlikely to apply.

Unlike many of your other commentators, it is not for me to debate or even discuss the various views referred to in the paper or to draw differing conclusions on the extent of immunity and to whom it may apply. For me, as I guess for most of the laymen and perhaps even some of the judiciary who read this paper, is its relevance to the application of professional advice in general; ie with respect to both the routine advice given to clients as well as the more special case of the process of arbitration itself.

From my position the paper has signalled three issues.

The first is that no one can safely assume, when acting in any professional capacity as arbitrator, certifier or valuer, that he or she will not be held liable for their actions - unless they take steps in their commissioning to ensure otherwise.

My second concern goes, in part, beyond the subject of this paper. Dr Eagles, in his chapter on Policy Arguments for Arbitral Immunity, asserts that there appears to be no shortage of architects, auditors and so forth, offering themselves for work in this subject area, and that professional indemnity insurance is available for those who act. I fear that these views are optimistic and while this is the present case in countries whose legal processes are founded on British law, it is no longer so certain in the USA. In that country the relentless pursuit of absolute liability

has reached the stage that the public is being disadvantaged by unavailability, or difficulty in obtaining insurance and also by professional services being withheld for fear of the extreme consequences of the liability for error. This "hot topic" can be expected to have ramifactions beyond the USA; it is already seriously affecting insurance premiums worldwide. Notwithstanding this alarming trend, I believe that engineers will still come forward to serve as arbitrators - they should not regard the associated liabilities any greater than those they must carry in their other activities.

My third concern also relates to the responsibility rather than the liability for giving professional advice; ie whose job should it be - and the answer to that question clearly is dependant upon the subject concerned. I would like you to consider the situation in which a construction contract provides for arbitration, an arbitration is held and due to a failure to have due regard for some process of law, the award is set aside. This has happened on a number of occasions as we are all well aware. I have heard said by a number of disenchanted engineers that the process of arbitration is no longer appropriate and that disputes on building contracts should be settled in the courts. Now, as I can see from the paper, the arbitrator himself is likely to be held liable for the cost consequences of his decision. This is yet another circumstance which can reduce the acceptability of the arbitration process. I therefore think it is relevant to dwell for a moment on the possible outcome of this trend. When the court system is already overloaded I can hardly believe the judiciary want to see the full range of matters currently very adequately decided by practicioners in the construction industry suddenly come before the courts.

Construction contracts, by their very nature, present a continual barrage of issues which for the most part the managers of construction companies and architects, engineers, quantity surveyors resolve. I believe all the professionals involved in this process are all becoming painfully aware of the potential for liability which surrounds their day-by-day work. Nonetheless, the questions are usually of a technical nature and are dealt with in a satisfactory manner by the persons involved. Some cannot and go to arbitration and for the majority of these the decisions arrived at in arbitration are accepted. It would seem to me that the pragmatism which pervades this system is the right way to handle disputes on a building site.

I believe it would be a retrograde step if it becomes the vogue for one party or the other to be readily able to get issues referred to the courts. Handled well arbitration can achieve a speedy and cost effective resolution to disputes. Emphasis should be on developing better arbitrators.

As I see it, any contract which stipulates arbitration in terms of the ACt hasd been knowingly entered into by the parties and each of them is afforded an equal opportunity to select arbitrators who are judged competent to decide upon the issues. There is much to be commended in making the parties responsible for the quality of arbitrator they choose. It is also reasonable to presume that the procedure of arbitration was selected not only because it has been in customary use but also because it was considered appropriate. In these circumstances I think there is much to be said for not tampering with decisions so reached. Clearly this can only be achieved if arbitration proves to be just

and hence I believe we should put effort into achieving this end. As a corrollary if we are successful in improving the quality of arbitration, the question of liability of the arabitrator will not arise.

Dr Eagles, I compliment you on an exhaustive and lucid presentation of the issues relating to immunity and liability of the arbitrator. I am sure it will clarify these considerably for all those who study your paper.

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