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

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Those engaged in commerce have long been adept at devising modes of settling or avoiding disputes which will keep them out of the lawyers' hungry clutches. For over a century they have turned to accountants, valuers, engineers and architects to help keep them on the right (that is to say the inexpensive) side of the courtroom door. For most of this period those whose good offices were thus sought could carry out their functions safe in the knowledge that they could not later be sued by disgruntled or disappointed disputants. This immunity from suit was not the exclusive property of arbitrators but extended to all persons who took it upon themselves to decide between opposing parties in a way which required them "to hold the scales fairly"[1] between the interests of all involved. In bestowing this immunity the courts did not require the recipient to imitate a court. Nor did they distinguish between dispute settlement and dispute avoidance. Informality did not inevitably lead to liability. All this ran counter to the trend whereby the courts sought to capture or neuter alternative modes of dispute settling by an ever increasing judicialisation of procedure. It could not last and did not. In 1974 and 1976 the forensic barriers behind which valuers and certifiers had hitherto sheltered were rudely brushed aside by the House of Lords in Sutcliffe v Thackrah[2] and Arenson v Casson Beckman Rutley and Co.[3] Not content with depriving the unfortunate quasi-arbitrator (to use the terminology then current) of immunity the Law Lords

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1 The phrase is Buckley L.J's in Arenson v Arenson [1973] Ch 346 (C.A.) at 368. See also Stevenson v Watson (1879) 4 CPD 18

2 [1974] AC 727

3 [1977] AC 405

were so divided on matters of policy and their language so opaque that they managed to place in doubt the hitherto unquestioned protection bestowed upon arbitrators proper.

In Sutcliffe v Thackrah the exposed professionals were a firm of quantity surveyors and architects employed to supervise a construction contract containing the standard RIBA certifying clause. It was alleged that they had negligently issued an interim certificate for an excessive amount. These certificates were later shown to have included defective work. The building contractor, as so often happens in these cases, became insolvent, leaving the architects exposed as the only possible defendants and causing the plaintiffs to pursue the question of immunity with more than usual vigour. The Official Referee found for the plaintiffs. The case then went to the Court of Appeal who reversed his decision citing a long line of cases which held (i) that "quasi-arbitators" could not as a class be sued for negligence and (ii) that certifying architects were members of this class. By the time the matter came before the House of Lords the plaintiff had conceded the first point so that their Lordships were left only with the task of defining the protected class. All were agreed in holding that immunity fell to be decided according to whether the person claiming it was acting judicially, by which test the certifying architects were denied entry to the charmed circle. On the question of who else might be thus excluded their Lordships refused to be drawn, although some of their number did affirm that arbitrators proper were entitled to such protection. A very large question mark was thus left over the immunity of the now shrunken class of quasi-arbitrators. The somewhat meandering paths by which they reached this joint destination are considered below. To ascertain extent Sutcliffe affirms the general principles espoused in earlier decisions but attacks the application of those principles in particular cases. In Arenson v Casson,

on the other hand the principles themselves are examined and found wanting. This time the victims were a firm of accountants who were alleged to have negligently undervalued the plaintiff's shares. The shares had been bestowed upon the plaintiff by his uncle when he entered the employment of the family company. It was then agreed that should the nephew's employment cease the uncle would buy out the shares at "a fair value", defined for this purpose as such value as might be determined by the company's auditors for the time being, "whose valuation acting as experts and not as arbitrators shall be final and binding on all parties." When the nephew came to leave the company it was the defendant firm of accountants who were the auditors and who had to value the shares. If their valuation was ever acceptable to the plaintiff, it ceased to be so when some months later he found attached to a prospectus a report signed by these self-same auditors indicating that the shares were now worth almost six times as much. The now thoroughly disaffected nephew sought forensic vengeance on the accountants who responded by seeking to take refuge in whatever was left of a quasi-arbitrator's immunity after Sutcliffe, a refuge which they were to be denied by the House of Lords. Only on the result were their Lordships united however. Divisions which were only hinted at in Sutcliffe are aired for all to see in Arenson. While all members of the House of Lords were able to agree that the hapless accountants were on the wrong side of whatever line determined immunity, they disagreed as to where that line should be drawn in future cases. Somewhat surprisingly, no one was prepared to draw it between "arbitrators proper" and "the rest". The term quasi-arbitrator was by all eschewed as unhelpful. It was also accepted (here anticipating Lord Wilberforce's classic statement in Anns v Merton Urban

District Council[2A]) that all immunities were exceptional and that there was a presumption that negligence was to be compensated for unless policy dictated otherwise.[2B]

Having agreed upon this minimal common ground their Lordships them withdrew into three opposing camps. (i) That containing Lords Salmon and Fraser of Tullybelton (the latter keeping one foot elsewhere) who recognised that a test which conferred immunity upon those acting judicially would save some (but not all) valuers and certifiers and condemn some (but not all) "arbitrators" (however defined). Theirs can conveniently be called a "functional" approach (ii) That containing Lords Simon and Wheatley who recognised the test of judicial function but fudged its application so that all arbitrators,[3] but only some valuers, passed it. This they managed to do without effectively answering the obvious question of who might properly lay claim to the title of arbitrator and

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2A [1980] A.C. 728

2B Whether their Lordships actually adhered to this admirable principle in Arenson is another matter. Of all the speeches only Lord Kilbrandon's can be said to be truly policy based. The others adopt more or less arbitary categorisations with only the flimsiest attempts to clothe them in policy.

3 Lords Simon and Wheatley may have been influenced by the fact that the appellants' in Arenson were prepared to concede immunity to true arbitrators Ibid 410,411

the seemingly automatic immunity that went with it.[4] This I have called the "deeming" approach. (iii) The camp occupied by Lord Kilbrandon (and somewhat more equivocally by Lord Fraser) who, despairing of drawing a clear line between "arbitrators" "valuers" and "certifiers", called down a plague on all their houses by denying immunity to the lot on cogently argued policy grounds. This is called the "policy" approach in this paper.

A IMMUNITY IN CONTEXT

Before we explore the adequacy of these tests it is perhaps instructive to view Sutcliffe and Arenson against the not inconsiderable weight of authority which they overthrew and to set these cases in turn in the wider context of the historical development of the law of arbitration as a whole.

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4 One says seemingly because at one point in his speech Lord Simon teeters on the edge of adopting a dangerously circular reasoning by which all "arbitrators" are immune and all those who act judicially are arbitrators. I refer here to the passage in which he holds out the respondent accountants the straw of proving that they were acting as "arbitrators" (despite the clear contractual statement that they were not) by demonstrating that their role was a judicial one (Ibid 425.) Elsewhere in his speech Lord Simon seems quite clear that "arbitrators" do not include mutual valuers.

1 Arbitrators and Quasi-Arbitrators - A Short History

The rise and fall of the quasi-arbitrator is not, as Lord Simon in Arenson would have us believe, simply a case of the illegitimate and over enthusiastic extrapolation from a defensible and long established immunity for arbitrators properly so called to valuers and certifiers. Indeed the very earliest cases show that those appointed as arbitrators commonly stipulated that no action be brought against them in law or equity before they would agree to act. The courts acceptance of such stipulations when enforcing an award as a rule of court under the 1698 Act in no way suggests a general immunity. Rather the contrary.

After this somewhat false start there is century of silence. When the matter is next raised it is the quasi arbitrator who occupies centre-stage not the arbitrator. Here is no gradual broadening of the protected class but a sudden and precocious leap to its outer edges. All these ill defined groups were treated from the very outset as members of the same immune, albeit, amorphous class. There was therefore little point in drawing fine

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4A See Linwood v Croucher (1742) 2 Atk 395, 26 ER 639 and the unreported case of Robins cited therein. There are it is true some observations in An Anonymous Case (1748) 3 Atk 644, 26ER 1170 which might suggest the contrary. The report is too fragmentary to be sure, however. The case seems only to establish that arbitrators could not be joined for the purpose of obtaining a bill of discovery in proceedings to set aside an award. These were proceedings in Chancery and the only remedy sought against the arbitrator personally was to have him "rectify" his award by giving reasons.

distinctions between arbitrators and other dispute settlers for the purposes of deciding immunity. Why bother making a distinction which was without legal effect? This unwillingness to draw lines cannot be attributed to nineteenth century judges supposed unfamiliarity with the various different forms of dispute settling and dispute avoidance resorted to by commercial men. Even the rudimentary legislation of 1698 required the courts to distinguish between an arbitration and "mere valuation or certification" before the parties could invoke its assistance[5] - a distinction which was to be drawn with ever increasing rigidity after 1885[6] often by the very same judges who were conferring immunity on the "quasi-arbitrator." [7] The court's power to supervise and reinforce arbitrations proper were denied to more

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5 See Lee v Hemingway (1854) 15QB 306, 117 ER 474 in which the parties sought unavailingly to disguise a valuation as an arbitration so as to invoke the 1698 Act. Some of the earlier cases relate to stamp duties. There were different rates for "appraisals" and "awards". Blundell v Brettargly (1810) 17 Ves 232, 34 ER 90; Leeds v Burrows (1810) 12 East 1, 104 ER 1."

6 Northhampton Gas Light Co v Parnell (1885) 15 CB 650, 139 ER 572 (certifying engineers) Collins v Collins (1858) 26 Beav 306; 53 ER 916 Bos v Helsham (1866) LR 2Ex Ch 72 Re Carus - Wilson v Greene (1886) 18 QBD 7 (valuers)

7 Compare the views of Lord Coleridge in Turner v Goulden (1875) LR 9 CP 57 with those he expresses in Stevenson v Watson (1879) 4 CPD 148

informal arrangements from the very first appearance of those arrangements in the cases.[7A] A valuation could never be directly set aside or enforced. Nor could an action by-passing it be stayed. And yet this rigidity is seldom [8] carried over into questions of immunity. Indeed the two lines of authority barely acknowledge each other. When they do, the distinction between reviewability and liability is clearly drawn.[9] Nor do the early cases on arbitral immunity draw heavily on the long established [10] immunity of judicial officers (absolute in the case of courts of record, partial and incomplete in the case of lesser tribunals) an omission which is interesting in the light of later overworked analogies between judges and arbitrators.

7A Not that the courts were much impressed by terminology in drawing this distinction even at this early stage. Sometimes persons described as "valuers" were held to be "arbitrators" (Wrightson v Hopper (1867) LR 2 QBD 67). The reverse was more commonly the case, however. (Bottomly v Ambler (1877) 38LT 545, Re Hammond (1890) 62 LT 808

8 Turner v Goulden (1875) LR 9CP 57 is one of the few exceptions. See also Neale v Richardson [1938] 1All ER 783

9 Chambers v Goldthorpe [1901] 1 KB 624 Finnigan v Allen [1943] 1 KB 425 at 431 per Lord Greene MR

10 See Green and the Hundred of Buccle Church (1589) 74 ER 294; Floyd v Barker (1607) 77 ER 1305 at 1307; Taaffe v Downes (1813) 13 ER 15 at 23,24.

The earliest case to raise issues of arbitral immunity directly was Jenkins v Bletham[11], a rather unseemly squabble between an incumbent rector and the executors of his predecessor over the value of certain "dilapidations" (a term of some precision in ecclesiastical law). The parties had agreed that each side should appoint a "valuer". These were then to confer and appoint an umpire if unable to agree. The action was brought by the disappointed incumbent not against the umpire but his own valuer, who, it was alleged, had valued the dilapidations as if they were the subject of a mere temporal lease. Jervis CJ recognised that there were such persons as quasi-arbitrators but declined as to be drawn as to whether they were immune from suit. Should such an immunity exist, he opined, it had no application to the two step procedure in the case before him. If immunity attached to anyone it attached to the umpire. The valuers preliminary attempt at consensus remained unprotected. Indeed Jervis C.J. was not even sure that the umpire was immune, thus demonstrating that immunity depended on function not category even at this early date.

Only slightly less equivocal is Pappa v Rose[12] in which immunity was bestowed on a commodity broker who had to assess whether certain raisins sold by the plaintiff were of "fair average quality" notwithstanding the fact that he was acting throughout as the plaintiff's agent. The Court of Exchequer Chamber while accepting that the broker's position differed in several respects from that of an arbitrator were not prepared to withhold immunity on that

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11 (1855) 3 WR 283

12 (1872) LR 7CP 525

account. Their reasons for allowing immunity look a little odd to modern eyes: Neither arbitrators nor other dispute settlers warranted any particular degree of skill, they said, it was:

> "... for the parties themselves to take care that the person in whose judgment they confide shall possess the requisite skill to exercise it properly" [13]

The case is somewhat confused as to whether the skill which the defendant lacked was as a sampler of raisins or whether he stood accused of misconstruing the sort of raisins to which the contract applied, a mistake which got least one member of the court thought would have been a mistake of law. To use anachronistically modern terms the case seems to be as much about the content of the duty of care as it is about immunity. That such an approach was unlikely to be fruitful in the long term seems to have been realised in another case decided in the same year by a differently constituted Exchequer Chamber. This was Tharsis Sulphur and Copper Co Ltd v Loftus[14] in which it was sought to distinguish between want of skill (in which case the parties must take the dispute settler as he presents himself and the issue of immunity does not arise) and want of care. Only the latter raised issues of immunity, they said. On that issue they were quite unequivocal: neither arbitrators nor "quasi-arbitrators" could be sued for negligence.

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13 All members of the court were agreed on this point

14 (1872) LR 8 CP 1

(The embarrassing dearth of prior authority they got round by pointing to the lack of any known cases in which arbitrators had been sued and positing that the de facto safety of such obvious targets could only be explained on the basis that their potential persecutors knew they were immune from suit). In Tharsis the lucky recipient of immunity had been a loss adjuster appointed to apportion loss between ship and cargo under a general average loss clause in a marine insurance policy. In Stevenson v Watson[15] it was for the first time a certifying architect under a building contract. On this occasion the immunity was hedged about with several important limitations, a fact attributable to the ambiguous and complex role played by the architect under a building contract. The case contains an interesting divergence of views as to whether the architect was an arbitrator (Lord Coleridge CJ) or merely analagous to one (Denman J). No one thought this should determine immunity, however. Nor was the court impressed by arguments that there could be no immunity for actions taken or opinions offered before an actual dispute had arisen. No distinction was to be made they said, between interim and final certificates. Nor between the observation and supervision which necessarily preceded certification and the process of certification itself.[16] The court did accept, however, that an architect who colluded with the building owner to falsely withhold a certificate would be liable. They also distinguished between purely "clerkly" or ministerial acts (a distinction they may have taken from cases on judicial

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15 (1879) 4CPD 148

16 Ibid at 157

immunity[17]) and those requiring skill or judgment. The architect, it was said, was something more than a "mere caster up of figures", the clear implication being that purely arithmetical functions could give rise to liability.[18]

Attempts to sue certifying architects continued despite Stevenson v. Watson. They were with one unfortunate aberration, to continue to be rejected. The aberration was Rogers v. James[19] in which it was held that an architect could be sued for faulty supervision by the building owner who engaged him. The architects certificate, the Court of Appeal said, could not be conclusive of his own prior negligence. This point was rather unconvincingly taken up in Chambers v. Goldthorpe [20] although here the Court is rather uneasily aware that "supervision" and "ascertaining the factual basis for certification", are processes not easily separated.[21] The real significance of the latter case lies not in this rather artificial distinction but in its formulation of the first clear test for determining liability viz was the

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17 See Hamond v. Howell (1677) 2 Mod 218, 220; Fray v. Blackburn (1863) 3 B & S 576

18 Here the judicial analogy breaks down. No one has ever thought that judges were personally liable for arithmetical lapses.

19 (1891) 8 T.L.R. 67

20 [1901] 1QB 624

21 Ibid at 637

person claiming immunity "bound to exercise his judgment impartially between the parties", a role which a person was not precluded from playing just because they were paid and appointed by one party only.[22] Once again, the absence of a formulated dispute was held to be no bar to immunity. Nor did the majority in that case attach any significance to the fact that the building contract in question allowed some aspects of the architect's certificate to be challenged before a "true" arbitrator".[23] The undoubted immunity of the latter in no way precluded the immunity of the former it seemed. The case thus has a continuing relevance to the type of hybrid arbitration clause discussed below.

The test of impartiality was applied to exempt from liability surveyors appointed to value growing timber in Boynton v. Richardson[24] In Finnigan v. Allen [25] the focus shifts back to valuation, this time by accountants acting as auditors. Finnigan v. Allen is the high water mark of the quasi-arbitrator, a term which the Court of Appeal in that case freely acknowledged was incapable of precise definition while continuing to use as the bench mark of immunity. The case also contains an interesting

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22 Romer LJ dissented on this point Ibid 643.

23 Romer LJ by contrast thought that "true" and "quasi" arbitrators could not normally coexist in the same contract Ibid 644

24 [1926] WN 262.

25 [1943] 1KB 425

attempt to sidle past the issue of immunity by positing a collateral undertaking to value the shares according to a particular method or formula set out in the contract of sale. There was no evidence, said the Court of Appeal that the accountants had unequivocally bound themselves to use this method when they undertook the valuation. An expert was fully entitled to ignore an unworkable or inappropriate formula they said.[26] (unless, one assumes he expressly undertakes to value on that basis only).

What, it might be asked, has this pre Sutcliffe case law to teach us. Should not Finnigan v. Allen and its long line of precursors now be consigned to history. That would be unwise. In Sutcliffe at least three members of the House of Lords were at pains to state that most these decisions were justifiable on their facts.[27] By this presumably they meant that in all of these cases the person sued was in fact acting judicially. (A conclusion which is quickly seen to be preposterous when one examines, say, the role of the raisin sampler in Pappa v. Rose, a case much cited in Sutcliffe). We may therefore assume that some of their Lordships viewed the previous line of authority as a guide to how the various tests they propounded for determining immunity might fall out in practice, even if some of the statements of principle in those cases can no longer be accepted in their entirety. One should also make the point that in the only New

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26 The parties are of course, equally entitled to reject a method of valuation which is contrary to that set out in the contract between them

27 Lord Reid Ibid at 738, Lord Morris of Borth-y-Gest Ibid at 746ff, Viscount Dilborne, Ibid, at 755ff.

Zealand case in which arbitral immunity is directly addressed, Finnigan v.Allen is swallowed whole. This was Pemberthy v. Dymock [28] a case remarkably similar to Arenson on its facts. [29] Given the impracticability and conceptual impoverishment of the tests propounded in Arenson it should not be assumed that arbitral immunity is an issue on which the New Zealand Court of Appeal will blindly follow the House of Lords even if it could be ascertained precisely where the latter were purporting to lead us.

2 Immunity and Judicial Capture

It is perhaps misleading to view the expansion and subsequent contraction of arbitral immunity in isolation. Its drastic curtailment in Sutcliffe and Arenson is but the last act in the courts long struggle to subdue or to absorb alternative modes of dispute settling. In this war of attrition the judges have largely chosen to avoid head on clashes preferring instead to deprive commercial arbitration (and more latterly its look alikes) of precisely those features which make it attractive to the business world. Enforced imitation of judicial methods leads in the end to a situation where the advantages of arbitration over litigation are so marginal that few will wish to resort to it. Depriving arbitrators of their

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28 [1954] NZLR 130

29 Like Arenson the case concerned a buy back of an employee's shares at a fair value. In Pemberthy the relevant clause provided that the auditor was to be called in only if there was a dispute whereas in Arenson the auditor's decision was automatically invoked.

immunity unless they conform to the norms of the courtroom is merely the last step in this process of judicial capture.[30]

No effective system of commercial arbitration can exist completely outside the formal legal system. At some point it is necessary to invoke the aid of the courts if only to keep legal proceedings at bay until the arbitration is over and to enforce the award once made. Without these props commercial arbitration would collapse. The attitude of English judges has been, after some initial hostility, and with occasional prodding by the legislature, to offer this assistance but at a price. The coinage in which that price was paid was both substantive and procedural. Among the mechanisms used to bring arbitrators to heel were:

(a) Extension of judicial control over the outcome

The New Zealand Arbitration Act 1908 confers no power on the Courts to review an award on the merits. This is equally true of the Act's English forerunners. From the very outset Parliament has sought to make the arbitral process as final as possible, allowing only the bare minimum of judicial control. Over the centuries judges have devoted a great deal of effort to expanding this tiny bridgehead. The Act of 1698 allowed awards to be set aside only if procured by fraud or corruption. By the early years of the nineteenth century the judges had supplemented this with a power to set aside an award for an error of law on its face,[31] a power which they

30 The subject is exhaustively dealt with by H.W. Arthurs in "Without the Law - Administrative Justice and Legal Pluralism in Nineteenth Century England", Toronto, 1985 pp50-88.

31 Kent v. Elstob (1802) 3 East 18

initially found in the seemingly inscrutable words of the statute and later supplemented by resort to the inherent jurisdiction.[32] There then followed the same inevitable elision of law and fact which is to be seen in administrative law.[34] Nor did judicialisation stop there. When in 1889 the Courts acquired the power to remove an arbitrator for misconduct[35] they interpreted this as embracing procedural mishaps as well as dishonesty or impropriety.[36] Again, so unwilling were arbitrators to use the case stated procedure when it was first made available by statute that Courts eventually had to request, and be given, the power to compel its use.[37] They then had to refuse to allow the parties to oust this by now highly unpopular procedure by contract.[38]

(b) Hijacking the reference on its way to arbitration

Parties who after entering into an arbitration agreement subsequently seek to avoid its consequences by issuing a

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32 Meyer v. Leanse [1958] 2QB 371

34 See Prodexport State Co v. ED & F Man Ltd [1973] QB 389

35 See Arbitration Act 1908, s.12

36 Tatem Steam Navigation Co v. Anglo Canadian Shipping Co [1955] L LR 161 Eastcheap Dried Fruit v. N.V. Gebroeders Catz [1962] 1 Lloyds Rep 283, Thomas Borthwick (Glasgow) Ltd v. Faure Fairclough [1968] 1 Lloyd Rep 16.

37 In New Zealand, see Arbitration Amendment Act 1938, s.11.

38 Czarnikow and Co v. Roth Schmidt & Co. [1922] 2K.B. 478.

writ have not infrequently been encouraged in this course by the courts. In the very earliest cases this was done by allowing either party to revoke the arbitrators authority at any time before the actual making of the award.[39] More latterly much the same effect was achieved by surrounding the courts inherent and statutory powers to stay an action with a web of conditions and provisos. Even now a stay may be refused if the dispute is largely one of law,[40] the plaintiff is too impoverished to arbitrate,[41] if fraud is alleged against one of the parties[42] or the submission seeks to exclude legal representation.[43]

(c) Requiring the arbitrator to apply the law

It is easy to envisage a situation where the parties to a commercial arbitration wish the arbitrator to apply trade custom, or equity and good conscience, rather than strict, and in their eyes inappropriate, legal rules. The judges acted early to dispel such delusions. In 1802 it was stated by one of their number that an arbitrator was bound

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39 Vyniors Case (1610) 8 Co Rep 80, Newgate v. Degelder (1666) 2 Keb 10.

40 Roose Industries v. Ready Mix Concrete [1974] 2 NZLR 246

41 Fakes v. Taylor Woodrow Construction Ltd [1973] QB 437; See also Denton v. Legg (1895) 72 LT 626

42 Wells v. Hirsch (1856) 1 CBNS 316

43 Perez v. John Mercer and Sons (1921) L L Rep 1 at 2 per Bankes LJ.

by rules of law like every other judge.[44] Initially this seems to have been justified in terms of an implied term in the arbitration agreement[45] thus leaving the parties notionally free to expressly authorise the arbitrator to decide according to what is fair or reasonable, a loophole which is now generally regarded as having been closed by later cases which rest the prohibition against arbitrations extra-legam squarely on public policy.[46] One of the undoubted side effects of the insistence on applying the law is that it forces the parties to seek an arbitrator with the appropriate legal training.

(d) Encouraging an Adverserial Procedure

There has never been any formal requirement that arbitrations should follow any set procedure.[47] Arbitrators remain in theory free to use inquisitorial methods provided that they observe the minimal requirements of natural justice. Discovery, oral evidence and pleadings may all be dispensed with.[47]

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44 Chambre J. in Aubert v. Maze (1801) 2 Bos & Pul 370 at 375; 126 ER 1333 at 1336.

45 Blenerhasset v. Day (1811) 2 Ball & B. 104, Ramkissendas v. Sassoon and Co [1929] WN 27

46 The whole issue is treated in detail by D. Rhidian Thomas in Commercial Arbitration - Justice According to Law (1983) 2 Civ. Jus. Q.166.

47 Neumann v. Edward Nathan and Co (1930) 37 LI L. Rep 249 at 260; Abu Dhabi Gas v. Eastern Bechtel Corporation [1982] 2 Lloyd Rep 425.

There are however several informal sanctions which tend to force arbitrations into the adverserial mould. Any reference to a formal hearing, discovery or pleadings in the agreement is usually taken as a declaration of intent to adopt all of the procedural paraphernalia of a High Court action.[48] If court like hearings are common in a particular trade or industry there will be a presumption that such proceedings are to be followed in all similar disputes unless expressly excluded. Indeed there are judicial statements which suggests that the mere silence of an arbitration agreement on the question of procedure implies that an adversarial process was intended[49] When one adds to this the evident intent of some members of the House of Lords in Arenson that immunity is to be earned by eschewing inquisitorial methods it is scarcely any wonder that most arbitrators are only too eager to ape the procedural intricacies of a trial at law (A point to which we shall later return).

3 How Useful is the Public Law Analogy

As can be seen from the preceding sections many of the issues which have typically exercised the Courts in their attempts to control the arbitration process have a public law parallel. It is all too fatally easy to view the law of arbitration as a time warped public law in which the

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48 Mustill and Boyd "Commercial Arbitration", London 1985 at 249ff. See also The Myron v. Tradax Export s.a. [1970] 1 QB 257.

49 Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation [1980] 1 Lloyds Rep 255 and [1981] 1 Lloyds Rep 253.

courts alternately anticipate or lag behind developments in administrative law generally. There is the same evasion of statutory bars to review, a parallel evolution of the concept of error of law on the face of the record. The courts expressed unwillingness to let arbitrators rule on the existence or termination of the contract which appoints them, can, at a pinch, be viewed as a form of jurisidictional error. No doubt such analogies are useful but they remain just that, analogies. No doubt too the evolution of arbitration law anticipates in many ways the sometimes faltering steps the Courts have taken to subject private organisations to judicial control, first regulating the domestic tribunal and then taming the wilder exuberances of the governing body itself as in Finnigan v. Rugby Union [50] It would be tempting therefore to cap those analogies by deciding immunity according to the admirably general principles set out in Anns v. Merton Borough Council[51] It is true of course that Anns is unexceptional as a statement of the frame of mind with which one should approach all putative immunities i.e. one of healthy, even intense, scepticism. Certainly all members of the House of Lords in Arenson claimed to be doing precisely that. And yet their subsequent failure to agree on a test illustrates as nothing else can the limits of useful analogy. Whatever the policy basis of arbitral immunity may be it does not lie in the operational/policy dichotomy favoured by Lord Wilberforce in Anns. The real models used in Arenson are far older. They are the now discredited "judicial function" tests once used to limit the application of natural justice. An analogy with current notions of expectational fairness might have seen Finnigan v. Allen reinstated. One could equally well say that neither test is appropriate. Both concern the availability of review

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50 [1985] 2 NZLR 181.B

51 [1980] AC.

rather than damages and it is the latter we are concerned with here.

B COMPETING TESTS OF IMMUNITY

Does arbitral immunity exist at all and if it does, should it? How should one test for the existence of such immunity? Can anything useful be distilled from Sutcliffe and Arenson or should New Zealand courts look elsewhere? Can some factors be excluded at the outset as irrelevant?

1 Some Non-Tests

While there may not be enough common ground between the speeches in Arenson to devise a single overarching principle of immunity it is possible to find some factors which their Lordships were able to agree did not decide immunity. Some of these merely restate what was said in earlier cases. Others are new. Most are glib in the sense that while often true as far as they go, they are subject to silent amplifications which restrict their usefulness in practice.

(a) Terminology not decisive. It has long been accepted that the parties cannot turn their dispute settlers into arbitrators merely by giving them that name.[52] The converse also applies. A person may be called a valuer but be treated by the parties and accepted by the Courts as an arbitrator.[53]

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52 Charles v. Cardiff Collieries Ltd (1928) 44 TLR 448. See also Ajzner v. Cartonlux Pty Ltd [1972] VR 919 at 929; Hammond v Wolf [1975] VR 108 at 114

53 Re: Evans, Davies and Caddick (1870) 22 LT 507; Taylor v. Yielding (1912) 56 Sol Jo 253.

Nor can the presence or absence of judicial function be conclusively determined by existence of a requirement that the dispute settlor is to "judge" between the parties. The term umpire is equally devoid of magical effect [54] Nor can one derive much assistance here from the statement in Section 2 of the Arbitration Act 1908 that, except where the context indicates otherwise, references in the statute to arbitrators shall be taken to include "referees and valuers." Application of the Act does not determine immunity and even if it did Section 2 does not answer the question "Does the Act apply to this particular valuation". New Zealand courts accepted early that section 2 has nothing to do with interpreting or categorising a putative arbitration agreement and have not since departed from that position.[54A]

Granted that terminology can never of itself determine liability this does not mean that it is never relevant to deciding who is an arbitrator or who acts judicially (assuming for the moment that these are different tests). It is difficult to believe, for example, that the assertion by the parties in Arenson that the auditors were to act as "experts and not as arbitrators" had no effect on the outcome. At the very least it showed that the parties had in mind something other than an arbitration as traditionally conceived. Thus while as was stated earlier the use of the term umpire is no talisman it is possible to find cases where its use has had some effect. [55]

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54 Re Carus Wilson and Greene (1886) 18 QBD 7.

54A Re Wallace Smith and Brightling (1911) 14 GLR 86 at 88 per Dennington J.

55 See cases noted at 53 supra.

Nor should it be assumed that the choice lies only between "arbitrators" and "valuers". Many other terms are in commercial use. "Appraisers", "assessors", "samplers", "adjusters" are all persons who may have an equal claim to immunity with those expressed to be arbitrators. To place the adjective "mere" in front of their names (as was done with valuers) merely begs the question.

(b) Duty to act fairly confers no immunity - A dispute settler may have a duty to act fairly between the parties and yet have no immunity. That certifying engineers have such an obligation was made clear by the New Zealand Court of Appeal in A.C. Hatrick (N.Z.) Limited v. Nelson Carlton Construction Limited [56] and Canterbury Pipelines Limited v. Christchurch Drainage Board.[57] The duty is owed to both parties irrespective of who actually pays or appoints the engineer.[57A] Similar obligations were placed on mutual valuers in Finnigan v. Allen. None of this cut any ice in Arenson where all Law Lords agreed that an obligation to hold the scales equal between the parties which fell short of a duty to act judicially conferred no immunity on the person who owed it. (One should not, of course, assume that a failure to act fairly ipso facto amounts to negligence. Conversely, a person may act in an impeccably impartial manner and yet be successfully sued for a substantive mistake.)

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56 [1965] NZLR 72

57 [1979] 2 NZLR 356

(c) Immunity and reviewability do not go hand in hand

In a tidy world immunity would be the reward bestowed on arbitrators for the inconvenience of having their awards set aside or remitted to them for reconsideration. One remedy would preclude the other. Since no machinery exists for reviewing mutual valuations directly it is entirely appropriate that those who give them should be liable in damages. This was certainly reason given by Lord Denning M.R. in the Court of Appeal in Arenson for keeping the auditors in the action.[58] (All of the speeches in the House of Lords are silent on the point). While Lord Denning's views have a certain pleasing symmetry it is now clear that valuations are in some circumstances directly assailable. In Burgess v. Purchase and Sons[59] Nourse J was able to seize on a distinction implicit in earlier cases [60] to hold that a "speaking" valuation (i.e. one where the valuer gives reasons) could be successfully impugned (even though it was expressed to be "final, binding and conclusive") if its erroneous basis was apparent on its face. Since valuers do not confer

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58 [1973] Ch 346 at 363

59 [1983] 2 WLR 361,

60 Dean v. Prince [1953] Ch 590, Campbell v. Edwards [1976] 1 WLR 403; Beber v. Kenwood Manufacturing Co Ltd [1978] 1 Lloyds Rep 175 were all cases in which parties were prevented from attacking "silent" or "non-speaking" valuations.

immunity on themselves by the mere fact of giving reasons (it is conceded that giving reasons may be one of the indicia of acting judicially) one is driven to conclude with Buckley and Karminski LJJ in Arenson that reviewability cannot determine immunity.

(2) Will the Real Arbitrator Please Stand Up?

If one holds, as Lord Simon and Wheatley did in Arenson, that all arbitrators are deemed to be immune (ie their judicial function is assumed while that of other dispute settlers must be demonstrated) one is immediately under a corresponding obligation to define what precisely is meant by an arbitrator for this purpose. It could of course be defined so as to encompass only those arbitrations which are governed by the Arbitration Acts. This would exclude, for example, oral submissions to arbitration or written submissions which have been enlarged by oral agreement or the acquiescence or conduct of the parties.[61] There are hints in Sutcliffe[62] that such common law arbitrators have no automatic immunity and Lord Simon in

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61 Mustill & Boyd op cit at 54. Section 2 of the Arbitration Act 1908 defines a submission as a "written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, or under which any question or matter is to be decided by one or more persons to be appointed by the contracting parties or by some persons named in the agreement."

62 [1974] AC at 744 per Lord Reid (who used the now discredited term quasi arbitration to describe common law arbitration.)

Arenson[63] seems to have taken a similar view. Why this should be so is not made clear. There seems no reason why the parties should have to demonstrate a judicial role if they make verbal accretions to a written submission but can assume immunity if they adhere precisely to the written document.

Even if one accepts that "arbitrator" here does mean "a person to whom the Arbitration Acts apply" it is not self evident that such a definition will exclude those normally thought of as certifiers or valuers. Slessor LJ in Neale v Richards[64] for example thought that if an architect refused to give a final certificate under a building contract both the builder or owner were entitled to apply to the court for the appointment of a new arbitrator under a provision in the then English Act[65] broadly similar to section 12 of the Arbitration Act 1908. Neale is virtually indistinguishable on its facts from Sutcliffe (save that the latter concerned an interim, rather than a final certificate) and would presumably no longer be regarded as good law. It does, however, hold out the possibility that even a certifying architect can be brought under the umbrella of the statutory arbitrator with only a slight change of wording to the standard form building contract.

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63 [1971] AC at 423

64 [1938] 1 All ER 753

65 Arbitration Act 1890 (U.K.)

It is not that one is without judicial guidance in determining at least the essentials of an arbitration. Indeed, there is a wealth of authority which seeks to do just that. It must be emphasised however, that the question "what is an arbitration" is never asked in a vacuum. One may wish to define a given procedure as an arbitration to deny the other party a particular remedy or to avail oneself of the statutory power to stay or set aside. It by no means follows that the definitions are the same for each purpose or that they can or should be used to decide questions of immunity.[66] A unified theory of arbitration which fails to ask itself the question "Why do we need to define an arbitration in the first place" is apt to come up with the wrong or inappropriate answer in policy terms. There is the further (if unrelated) difficulty that the very same criteria used to define arbitrations can also be used as indicia of a judicial function. The notion of a pre-existing dispute for example is used in precisely this way in Arenson, not just by Lord Salmon [66] (of whom one would expect it) but by Lord Simon in whose hands it threatens to blur the distinction between the deeming and functional approaches. If the status of "real" arbitrator is to be determined by the same test by which non-arbitrators demonstrate their immunity why bother making the distinction at all.

(a) A pre-existing dispute One method of denying valuers the title of arbitrator is to draw a distinction between

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66 For a strongly argued contrary view see the article by Mr Justice McPherson Arbitration, Valuation and Certainty of Terms (1986) 60 ALJ 8

settling a dispute which has already arisen and avoiding one which has yet to arise. The distinction has a long history[67] and was applied in the early New Zealand case of Re Wallace Smith and Brightling[68] to prevent a party from directly enforcing a valuation as an award independently of the contract of sale of the property which the valuation was designed to effectuate. (The case concerned the sale of a brickworks at a price to be fixed by two "valuators" or their umpire). If this is to be the test of immunity (and it was specifically rejected as such by Lord Fraser in Arenson[68A]) one can envisage it leading to some rather odd results. In the case of a share valuation for example, if the parties say "I wonder what these shares are worth, lets ask the auditor" the latter will be liable if the shares are valued negligently whereas if one party states "I think these shares are worth X" to which the other replies "No they are worth Y" the auditor will escape liability. Should liability depend so closely on the form of words used? The example given above poses a second problem. In determining the existence of a dispute does one look only at the arbitration clause or is one entitled to delve into the dealings between the parties. If the latter view be correct then extrinsic evidence may be given to show that the parties have in fact fallen out prior to certification or valuation. Immunity should not depend on whether the parties are still talking to each other at the time of

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67 Collins v Collins (1858) 26 Beav 306; 36 ER 916; Re Carus Wilson and Greene (1886) 18 QBD 7

68 (1911) 14 G.L.R. 86

68A [1977] A.C. at 442

valuation much less on the cordiality or otherwise of the conversations between them. Nor is it immediately obvious that there is a greater public interest in settling disputes than avoiding them in the first place.

(b) Existing and future rights

Some Australian judges have sought to avoid these problems by drawing a distinction between creating new rights and resolving conflicts as to existing ones.[69] On this view a valuer, by fixing the price of shares or property, brings the contract of sale into effect. Until he does so neither party has specifically enforceable rights under the contract. A true arbitrator, on the other hand, deals only with rights which exist at the time a decision is called for. Certainly this approach has the considerable advantage of focusing on the arbitration agreement rather than the later dealings between the parties. It is once again necessary to ask, however, precisely what it is which makes the maintenance of rights more socially worthwhile than their creation to the extent of conferring immunity on those who undertake the former task while denying it to those who embark on the latter. The distinction owes something to the dichotomy between disputes of right and disputes of interest in industrial law. (This may be yet another example of the confusion caused by the use of the term arbitration in industrial relations legislation to describe compulsory dispute settling procedures.) The validity of the distinction

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69 AMP Society v Overseas Telecommunication Commission [1972] 2 NSWLR 806 and 809, 814 per Jacobs J. Booker Industries Pty Ltd v Wilson Parking (QLD) Pty Ltd (1982) 56 ALJR 825. The point was made by Andrews J at first instance in the Queensland Supreme Court. It does not figure in the judgment of the High Court of Australia.

between right enforcement and right creation must now be regarded as having been thrown into doubt by the decision of the Privy Council in Queensland Electricity Generating Board v New Hope Pty Ltd[70] in which a clause which in its comprehensiveness and complexity was by any traditional measure an arbitration agreement (and indeed was held to be so) was seen as perfectly efficacious to create future rights.

(c) External objective standard

A third way out of this conceptual maze is offered by Mr Justice McPherson of the Supreme Court of Queensland writing ex curia in a recent article in the Australian Law Journal. For His Honour the essence of an arbitration lay in the existence of some external objective standard by which a dispute is to be resolved. A requirement that a price be fixed by reference to market value imposed such an objective standard and was therefore by His Honour's test an arbitration. Similarly where the formulae for ascertaining price are set out in the contract of sale (as in the Queensland Electricity case) McPherson J's test is a useful synthesis of the cases on specific performance of contractual terms which require "arbitration" or "valuation" for their completion. Regrettably, however, in none of the cases he cites is the test put in quite this way (Indeed in most of them, as McPherson J himself admits, the judges concerned thought they were applying some other test).[71] There are also as His Honour concedes, some difficulties in applying such a test where the agreement is silent as to the criteria to be used

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70 [1975] AC 444

71 (1968) 60 ALJ 8 at 14

or it uses terms such as "fair" or "reasonable." Fair price may mean market value. It could equally well mean "generally accepted among a particular group of persons as reasonable." The latter is still an objective test. In Arenson for example, the phrase "fair value" could have been interpreted in either fashion and yet this did not save the unlucky auditor. As Sir Robin Cooke pointed out in delivering the advice of the Privy Council in Queensland Electricity it will be a rare case indeed in which it can be plausibly argued that the parties have deliberately selected a completely subjective standard.[72] Architects and accountants are not selected on the basis of their ability to think beautiful thoughts.

(d) Decisions or recommendations

An arbitration requires that the arbitrator actually makes a decision. A process which results merely in advice or recommendations which the parties are thereafter free to ignore is not an arbitration.[74] Nor is a person who nudges or cajoles the parties into a settlement an arbitrator (the process variously described as conciliation or mediation.[73])

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72 It is scarcely surprising that the objective standard test should have first been suggested by Lord Diplock in Sudbrook Trading Estate Ltd v Eggleton [1983] AC 444 where he gives it as a purely hypothetical example. A hypothesis is precisely what this test seems fated to remain

73 "Conciliation" suggests a more formal procedure than "mediation." The legal effect is the same however.

74 FF Ayriss and Co v Board of Industrial Relations of Alberta (1960) 23 DLR 2d 584

(e) How relevant is finality

As Arenson makes clear on its facts liability is not avoided simply because the defendant's decision is purportedly accepted by the parties as "final" or "conclusive". If finality does not tell in favour of immunity may not its absence tell against it? It is submitted not. Even a true arbitration is never final in the sense of precluding resort to the courts. But what if the parties should seek to make it so, either generally, or as to particular aspects of the dispute? Does their futile attempt to bring about the legally unattainable deprive the arbitrator or his or her immunity? It is difficult to see what useful purpose is achieved by punishing the arbitrator for the parties' attempted sin (especially a sin in which the parties cannot in the light of Scott v Avery [75] successfully commit). A dispute settler is no more or less immune for issuing interim decisions which are adjusted in the final result. (It was not because the architects certificate was interim only in Sutcliffe that he was denied his immunity)

(f) Is mutuality necessary?

It is occasionally suggested that a clause which allows only one party to submit a dispute for decision cannot be an arbitration.[76] Once again it is necessary to ask why it is the arbitrator who should be put at risk because of the arbitration agreement's lack of mutuality.[77] The

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75 (1853) 8 Exch. 487, (1856) 5HL Cas 811; 10 ER 1121

76 See Baron v Sunderland Corporation [1966] 2 QB 56

77 Mustill and Boyd take the view that a unilateral right to submit was a submission to arbitration to which the Arbitration Acts applied. op cit at 52

arbitrator gains nothing from the unilateral nature of the contract and should not therefore lose anything because of it.

(g) Formal and informal modes combined

In Sutcliffe, it will be remembered, the building contract contained a formal arbitration clause as well as provisions for certification by the architect. Lord Morris of Borth-y-Gest [77A] and Viscount Dilhorne[77B] saw this as persuasive (if not conclusive) evidence that the architect could not have been intended to play the part of a second arbitrator. Lord Simon in Arenson took the contrary view that combinations of formal and informal procedures will seldom be decisive.[77C] This must surely be right. There is little difference in principle between splitting the formal and informal modes between two persons and allowing a single arbitrator to change modes in mid-hearing something which the law has always permitted[77D]

(3) Defining the Judicial Role

If performing a judicial function is to be the test of immunity, as Lords Salmon and Fraser thought in Arenson, a person may pass all of the tests set out in the preceding section and yet still be deprived of immunity. On this view it is only by imitating a judge as closely as possible that in arbitrator or anyone else can be assured of immunity. Whether the judicial analogy is apt will be considered later. We are concerned here with the criteria

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77A [1974] AC at 744

77B Ibid at 757

77C [1977] AC at 420

77D See text accompanying n 80 infra

by which one tests for the judicial role and its application to some common forms of dispute settling.

(a) Procedural tests for immunity

In Arenson all of the Law Lords who sought to define the judicial role did so mainly in terms of procedure. The consensus seems to be here that the more closely a valuer or certifier adheres to the adversary mode the more likely they are to be immune, or so it was thought by Lords Simon and Salmon. The two part company however, when Lord Salmon avers that even true arbitrators might be deprived of immunity if their role is purely investigatory. (For Lord Simon a true arbitrator remains protected however inquisitorial his methods) By "investigatory" Lord Salmon seems to have meant that the arbitrator did his own evidence gathering. English law has neither insisted that arbitrators are required as a matter of law to eschew the inquisitorial mode or prevented them from making much greater use of their own skill and expertise than the doctrine of judicial notice allows to judges. Should the law take with one hand by denying immunity the seemingly generous procedural freedom it bestows with the other? The ruthless application of such a test would deny protection to those "look and touch" arbitrators who sample and test goods in contracts of international sale, persons whose right to the title of arbitrators has never been doubted[78] and whose exclusion from the charmed circle of immunity might have incalculable effects on this country's export trade if they were aware of it.

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78 Neumann v Edward Nathan and Co Ltd (1930) 37 Ll.L. Rep 249 at 260 per Scrutton LJ. See also J Aron and Co Inc. v Miall (1928) 31 Lloyds Rep 16 at 18 and Star International Hong Kong UK Ltd v Bergbau Handel GmbH [1966] 2 Lloyds Rep 16 at 18 per Mocatta J.

Just how adversarial is one's procedure obliged to be before one may lay claim to immunity? Receiving rival contentions seemed to be important to both Lord Simon and Lord Salmon, although these may be oral or written and mix evidence and argument. The giving of a reasoned judgment was also mentioned, despite the fact that English law at that time[79] (as New Zealand law now) did not require arbitrators to give reasons for their awards. Again, if giving reasons is to be pivotal what is one to make of the speaking valuation. No doubt these factors are not intended to be taken in isolation. No doubt too, in evidential matters the courts will be less demanding. The reception of hearsay or opinion evidence which would be inadmissible in civil proceedings, would not, one imagines, deprive arbitrators of their immunity. Nor will they be at risk if the parties chose not to deploy the full array of interlocutory devices available to them under section 10 of the Arbitration Act 1938. The overall effect of the emphasis on adversarial norms is nevertheless to force dispute settlers into adopting a procedure which neither they nor the parties would choose if left to their own devices. What public interest is served by having valuers and certifiers going through the motions of an adversary hearing and then making their decision as they have always made it: on the basis of their own inquiries and observations.

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79 See now Arbitration Act 1979 (UK) s.1 of which confers a limited power to require reasons.

Much of the reasoning in Arenson assumes that matters of procedure are well settled before the arbitration or valuation commences. This is not invariably the case. In many arbitrations the procedure evolves as the arbitration progresses. As Mustill and Boyd point out it would be strange if the arbitrator gained or lost immunity according to procedural decisions taken on an ad hoc basis the grounds of convenience alone.[80]

(b) Two step procedures a special case?

Umpires have been part of the arbitration process since its beginnings. Parties have always been free to appoint two arbitrators and provide for disagreement among them through the medium of an umpire. More latterly the courts have been empowered to appoint an umpire where either the arbitrators or the parties cannot agree on one.[81] Within these broad limits a bewildering multiplicity of structures is possible. The picture is further complicated by the fact that the process of valuation can easily be made to conform to the same two step procedure[82] (again with multiple variations on a common theme). The confusion is sometimes compounded even more by the inappropriateness of the terminology used to the function actually performed. If procedure be the chief determinant of judicial function it is necessary to ask who among this varied dramatis personae has immunity and at what stage in the proceedings do they gain or lose it?

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80 op cit p193 n.11

81 Arbitration Act 1908, s.6

82 As in Re Wallace Smith and Brightling (1911) 14 GLR 86

(i) alternate roles It may be that neither the arbitrators nor the umpire adopt a sufficiently adversarial procedure in which case all are equally exposed to liability. More commonly the first step will be inquisitorial while the second is more clearly adversarial, as was the case in Jenkins v Betham[82A] discussed earlier. Here immunity adheres to the umpire alone. This will be especially so where those at the first stage carry out separate investigations and then consult with a view to agreement. But what of the situation where some kind of case is presented to them jointly. Logic would seem to require that they have immunity up until the moment of disagreement.[83] They may, however, switch roles at this point and become advocates, each urging his or her clients case on the umpire.[84] They would then have no greater

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82A (1855) 139 ER 384. Sometimes this procedure will be reversed as in Australian Mutual Provident Society v O.T.C. [1972] 2 NSW LR 806 so that the "valuation" comes after an abortive "arbitration"

83 The model set out here is, it is conceded, overly simplistic. It can sometimes be a very nice point as to precisely when the arbitrators have disagreed on enough issues to let in the umpire. Mustill and Boyd op cit at p 226.

84 See Veritas Shipping Corp v Anglo Canadian Cement Ltd [1966] 1 Lloyd Rep 76

immunity than any other advocate in an arbitration (that is to say on the view taken by the writer later in this paper none). What is the position of the umpire in all this? He or she may be permitted to be present throughout the first stage and read all the documents. Alternatively (or sometimes as well) he or she may be provided with a written statement by the arbitrators which sets out the points of agreement or disagreement between them. Such statements guide, but do not usually bind, the umpire. In most cases the umpire will re-hear the parties in the same form in which they presented their case before the arbitrators. It is not usually the practice for documents or exhibits to be re-submitted. They pass straight to the umpire. Such a procedure is clearly adversarial enough to protect the umpire. But what if he or she should dispense with a do novo hearing and decide the dispute on the papers and/or the arbitrators' notes (if any). Some arbitration agreements envisage just such a procedure. An umpire should not be deprived of immunity just because his or her role is essentially appellate. A full rehearing just to secure immunity would be a gross waste of time and costs.

(ii) roles discretionary from the outset

Sometimes the parties hope that an informal procedure will solve their difficulties but provide for the dispute settler to change roles if things seem to be getting sticky. An example of such a provision is to be found in the Victorian case of Hammond v Wolt[85] where the clause in question provided:

85 [1975] VR 108

> "Any Arbitrator appointed under the provisions of this Agreement shall at his own discretion act as Arbitrator or Assessor. Where he considers that any question arising out of the dispute refers to the quality or value of any work or materials supplied he may act as an expert and arrive at and make his assessment in such manner as he considers fit. Where any question arising out of the dispute shall relate to the interpretation or existence of any Agreement between the parties hereto then the Arbitrator should act as Arbitrator and allow the parties to appear before him and to produce witnesses and evidence to him relating to the dispute and on the evidence so given and on his own investigations and on any assessment which he may make arrive at his decision and make his Award."

It was held in that case that the indiscriminate, discretionary, mixing of roles meant that the whole clause was ineffective as a submission to arbitration under the relevant legislation. This is too crude an approach to be applied to the issue of immunity. It may be difficult to disentangle the roles of assessor and arbitrator but the attempt should nevertheless be made. Such clauses are a perfectly sensible means of confining the use of adversarial procedures to resolving those issues to which they are best suited. (i.e. the existence or interpretation of the contract) while reserving inquisitorial methods for those where they are not (i.e. disputes as to the quality or value of work done). The use of such clauses should not be discouraged by depriving the assessor/arbitrator of total immunity.

4 Towards a Policy - Based Test

It was Lord Kilbrandon alone in Arenson who took seriously the task of subjecting the whole question of arbitral immunity to scrutiny on policy grounds. Lord Fraser flirts with this approach but flinches from Lord Kilbrandon's bleak conclusion which was to deny immunity to valuers certifiers and arbitrators alike, whatever their procedures and however closely they may have succeeded in approximating the role of the judge.

Fearful arbitrators could, he said, protect themselves by appropriate disclaimers of liability like anyone else. Should they choose to face the parties without one then they must accept the consequences. For Lord Kilbrandon the proper place to draw the protective line was between public and private functions. Only members of those tribunals which owed their competence to the state were entitled to immunity. He rejected utterly the analogy between judges and arbitrators in a passage worth setting out in extenso:

> "The state - I use the word for convenience - sets up a judicial system, which includes not only the courts of justice but also the numerous tribunals, statutory arbitrators, commissioners and so on, who give decisions, whether final or not, on matters in which the state has given them a competence. To these tribunals the citizen is bound to go if he wants to maintain particular rights or to obtain an opinion carrying authority ultimately enforceable by the public agencies; like as before them the citizen must appear to answer claims or complaints made against him. (This is subject to the rights citizens may have to make agreements one with another to submit their civil differences elsewhere.) The citizen does not select the judges in this system, nor does he remunerate them otherwise than as a contributor to the cost of government. The judge has no bargain with the parties before him. He pledges them no skill. His duties are to the state: it is to the state that the superior judge at least promises that he will do justice between all parties, and behave towards them as a judge should."[86]

He goes on to say:

> "It is for the state to make such arrangements for the correction of careless or erroneous judicial decisions; if those arrangements are deemed to be inadequate it is for Parliament to put the matter right."[87]

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86 [1974] AC at 431

87 Ibid at 432

and later:

> "You do not test a claim to immunity by asking whether the claimant is bound to act judicially; such a question, as Lord Reid pointed out in Sutcliffe v Thackrah [1974] A.C. 727,737 leads to arguing in a circle. Immunity is judged by the origin and character of the appointment, not by the duties which the appointee has to perform, or his methods of performing them."[88]

Was Lord Kilbrandon right to reject the analogy with judges so completely? Are there policy reasons for protecting arbitrators independently of that analogy?

1 The Policy Arguments for Arbitral Immunity

Some of the reasons given for protecting arbitrators from liability in negligence apply equally to valuers and certifiers, or at the other end of the spectrum, judges. They are:

(a) Who would be an arbitrator[89]

It is said that no one would wish to decide between two potential plaintiffs one of whom at least is bound to be disappointed by the result, unless under a shield of immunity. Such arguments are unconvincing. All professionals run the risk of being sued for something, and post Hedley Byrner v. Heller, by a multiplicity of parties at that. One does not notice the supply of aspiring accountants architects or engineers drying up on this account. One might also add that the uncertainty introduced into the law by Sutcliffe and Arenson does not seem to have greatly inhibited the activities of

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88 Ibid

89 Lingood v Croucher (1742) 2 Atk 395 at 398

arbitrators, valuers or certifiers. The Institute of Arbitrators has not collapsed. Accountants still undertake mutual valuations. Building contracts continue to be signed daily giving architects or engineers a certifying role. Again, whatever may have been the case with earlier professional indemnity policies, those most commonly in use in New Zealand now provide cover for the insured's activities as an arbitrator (provided he or she is paid). Immunity cannot be justified on the grounds that insurance is unobtainable or uniquely expensive. (Most policies do not charge an extra premium for arbitral activities).

(a) Avoiding the timid compromise

If arbitrators are not protected from suit they will, so it is sometimes argued, keep too nervous an eye on the likely reactions of the parties. Their decisions will tend towards compromise and waffle in an endeavour to please both sides. Such assertions await empiricial verification. So far as true arbitrators are concerned any tendency to compromise must be tempered with the thought that they may, given the court's power to remit under section 11 of the Arbitration Act 1908, have to hear the matter all over again if their timidity becomes too apparent. There are limits to the sins of omission an arbitrator may plausibly commit.

(iii) by passing the redress provided by statute

By allowing the parties to sue the arbitrator for damages the courts would be opening up a means of by-passing the mechanisms provided by statute for reviewing the arbitrator's decision. Such mechanisms are deliberately limited in the interests of ensuring that the great majority of awards are in fact final. Suing the arbitrator would be a means of obtaining an appeal on the merits which Parliament has seen fit not to provide. This is to overstate a minor problem. Most complaints against arbitrators are confined to a relatively narrow focus, contentrating on a particular aspect of the arbitrator's conduct. Rarely will an action for negligence require the court to reopen and traverse the whole of the proceedings before the arbitrator. Nor are the remedies provided by the Arbitration Act always appropriate to the harm. They do not recover the costs sunk in the first abortive arbitration. If the matter is remitted the parties may be further burdened with costs. Nor is the process of removing and replacing an arbitrator costless. The statute provides no means whereby a party can be compensated for losses other than the costs associated with the arbitration. The real losses may be much higher especially if the defective arbitration has been in some way acted on. It would be deeply hypocritical for the courts to plead here the cause of arbitral finality which they themselves have done so much to subvert.

(iv) the parties should abide by their choice of arbitrator

Having chosen their abitrator the parties are stuck with their choice and should not later be encouraged to repent of it in the form of a civil action. Such arguments are tendentious. The power to remove under section 12 indicates that the parties are not forever enmired in

their original choice. Nor is the process of submitting oneself to arbitration always wholly voluntary. It is sometimes imposed by the strong on the weak by means of a standard form contract (as formerly with many insurance policies.[90]) No doubt where the parties are equal they should keep their bargain but that bargain does not consist of submitting oneself without demur to an incompetent or dilatory arbitrator.

(v) Why deny to the arbitrator what is allowed to the advocate?

Might it not be anomalous to deprive an arbitrators of a protection which is allowed to those who appear before them. Quite apart from the fact that it is not at all clear that what remains of counsel's immunity in New Zealand[92] can be invoked in respect of his or her appearance in an arbitration, there is the obvious point that it is equally anomalous to deny to the lay advocate what is allowed to the lawyer, especially given the frequency of lay representation in arbitrations (cf the arbitrator/advocate mentioned earlier). One could equally well turn this argument on its head and remove the anomaly by removing counsel's immunity in arbitrations. Many of the reasons given in Rondel v Worsley[93] for allowing such immunity have no application to arbitration. One cannot equate the barristers very real duty to the court with some notional duty to the arbitrator or the even

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90 See now Insurance Law Reform Act 1977, s.8

92 See Rees v Sinclair [1974] 1 NZLR 180, Thompson v Howles [1977] 1NZLR 16; Biggar v McLeod [1977] 1 NZLR 321

93 [1969] 1 AC 91

more abstract "arbitration process." Nor is there in arbitrations the (admittedly remote) prospect of a plaintiff remorselessly suing an endless succession of barristers. There is only one arbitrator to be sued. It is doubtful that the "cab-rank" principle applies to arbitrations. Barristers are as free to turn down a brief to appear in an arbitration as the proposed arbitrator is to decline that role. To the extent that barristers' immunity is an attempt, (to paraphrase Lord Diplock in Saif Ali v Sydney Mitchell and Co)[94] to avoid the public folly of allowing one court to try the question of whether another court of co-ordinate jurisdiction reached a wrong conclusion, this has no relevance to actions against arbitrators. There is no co-ordinate jurisdiction between judicial and arbitral fori.

(b) Can the public private distinction hold?

This writer is generally in agreement with Lord Kilbrandon's view that there are fundamental differences between judges and arbitrators. To his list of distinctions can be added (i) Arbitrators do not make law. Their decisions are seldom published. (ii) Judges are not liable even for actual bias, corruption, malice or bad faith.[94A] No one has ever suggested that an arbitrator's immunity extended this far.[95] One should

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94 [1980] AC 198 at 223

94A Anderson v Gorrie [1895] 1QB 668 at 671 Per Lord Esher M.R. Fray v Blackburn (1863) 3 B&S.576

95 Mustill and Boyd op cit at 198. See also Stevenson v Watson (1879) 4 CPD 148 at 161. Whether an arbitrator was ever liable for mistakenly exceeding his jurisdiction as judges of the inferior courts once were is uncertain. See now Sirros v Moore [1975] QB 118.

however, be wary of according the public/private distinction the unwise veneration shown to the judicial/non judicial dichotomy by the majority in Arenson. Lord Kilbrandon for example would have ceded immunity to "statutory arbitrators."[96] In the New Zealand context this would include arbitrators appointed by the court to try pending cases (in whole or in part) under section 15 of the Arbitration Act 1908. And yet it is not clear what policy grounds separate such a proceeding from a purely private arbitration.[96A] Nor is it clear whether Lord Kilbrandon would extend immunity to private tribunals which, although wholly created by contract, have public or regulatory functions which owe nothing to statute or the prerogative. In the light of R.v. Panel on Takeovers and Mergers Ex Parte Datafin plc[97] it would be unwise to assume that private regulatory bodies of this kind did not have immunity from suit. (An entirely different question one concedes, from whether they are subject to review via public law remedies[98])

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96 [1977] AC at 431

96A Referees appointed by the court under section 14 have better case for immunity since they merely inquire and report back to the judge under whose control they remain. This is not a little ironical given that their functions more nearly resemble those of a "valuer" than an arbitrator proper.

97 (1987) 3 BCLC 10

98 This whole question is admirably dealt with by A Tompkins in Judicial Review and the Public Domain [1987] NZLJ 120.

C FUTURE DEVELOPMENTS AND SOLUTIONS

How should New Zealand courts proceed in the light of Sutcliffe and Arenson? Are matters so uncertain that legislative intervention is called for? What can arbitrators, valuers and certifiers do to protect themselves in the interval?

1 The likely response of the New Zealand courts

If a case similar to Sutcliffe or Arenson were to reach the New Zealand Court of Appeal, what would their likely response be? How would they treat a claim for immunity by an arbitrator who had faithfully adhered to judicial norms? The choices would appear to be four:

(i) They could require all those who sought immunity to demonstrate that their role was sufficiently "judicial" in terms of the procedures followed. This, as was stated earlier, could send valuers and certifiers off on a frenzied search for adversarial disguises, most of them totally irrelevant to the functions such persons are actually called upon to perform. At a time when commercial causes have been provided with their own fast track it would seem more appropriate to encourage methods of settling or avoiding commercial disputes outside the courtroom which do not simply ape the trial process.

(ii) They could draw the line where no member of the House of Lords was prepared to draw it. between "real" arbitrators and "the rest", the latter category encompassing all those forms of dispute resolution which are not submissions to arbitration for the purposes of the Arbitration Act. This would have the undoubted virtue of neatness and

symmetry. The general case law on who is arbitrator would then be available to guide the courts if sometimes to a destination which may be unsuitable in policy terms. This last may be thought to be a small price to pay for coherence and uniformity in the law of arbitration. Reviewability and immunity would be almost seamlessly joined. The only fraying would be caused by the speaking valuation. Even here neatness could be preserved by ignoring Burgess v Purchase and Sons (Farms) Ltd[99] and refusing to allow even speaking valuations to be directly questioned in the courts. (This would be in line with recent Australian trends[100]). Alternatively the speaking valuer could be granted immunity but remain subject to direct review. This latter course has much to recommend it. The recipients of a mutual valuation are usually more interested in obtaining the valuer's reasons than the procedures used and may be prepared to concede immunity to that end. (Valuers might also be more willing to provide reasons if freed from the prospect of personal liability)

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99 [1983] 2 WLR 361

100 In refusing to subject valuations to direct attack Australian judges do not appear to have been greatly swayed by whether or not the valuation in question "speaks". See Karenlee Nominees Pty Ltd v Gollin and Co Ltd [1983] VR 657; Email Ltd v Robert Bray (Langwerrin) Pty Ltd [1984] VR 16. The point was left open in Mayne Nickless Ltd v Solomon [1980] Qd R 171.

(iii) They could adopt the "deeming" approach of Lords Simon and Wheatley, giving real arbitrators automatic protection but requiring everyone else to display attributes which were convincingly judicial. This approach has nothing to recommend it. It combines all the vices of (i) and (ii) above without any of their virtues.[101]

(iv) They could opt for the brutal clarity of Lord Kilbrandon. Those engaged in dispute resolution would have to take their chance along with other professionals, whatever their title, methods, or function. This approach is both certain and soundly based in policy. By denying immunity to everyone the courts would discourage both the

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101 It is, however, the approach adopted by American courts who have protected arbitrators proper Corey v New York Stock Exchange 493F Supp 51 (1980); Larry v Penn Truck Aid 94 FRD 708 (1982) while denying immunity to accountants valuing shares Gammel v Ernst and Ernst 72 NW 2d 364 (1955). Their attitude to certifying architects is more equivocal. Compare Ernst Inc v Manhattan Construction Co 551 F2 1026 (1977) and Blecick v School District No 18 of Cochise County 406 P2d 750 (1965). It must be said, however, that American courts are highly tolerant of informal or inquisitorial procedures and will not generally refuse an arbitrator immunity on that account. See Tamari v Conrad 552 F 2d 778 (1977).

adoption of inappropriate procedural forms and the artificial inflation of disputes or differences between the parties. It has to be said, however, that Lord Kilbrandon is at his least convincing when he tries to erect an impenetrable barrier between public and private dispute settling. Some private tribunals may have functions which are sufficiently public to earn them immunity. The courts would also have to understand that by taking the Kilbrandon path they might one day have to accept, on equally cogent policy grounds, some dilution of their own aboslute immunity.[102]

2 Limiting or Deflecting Liability

If arbitrators and their surrogates are to be left naked in the face of actions for negligence they may choose to clothe themselves by issuing the necessary disclaimers

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102 See Feldthusen Judicial Immunity: In Search of an Appropriate Limiting Formula (1980) 29 U.N.B.LJ 73; Carey- Miller Defamation by a Judge? Fixing the Limits (1980) Jur. Rev 88; Sadler Judicial and Quasi Judicial Immunities: A Remedy Denied (1982) 13 M.U.L.R 508

before they start on their task.[103] Alternatively the parties may undertake in their own contract not to sue those who assist them in resolving or avoiding disputes.[104] Assuming these devices to be

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103 It is assumed here that the basis of an arbitrator's liability is contractual rather than tortious. The contract in question is not that containing the submission to arbitration or valuation but that engaging or appointing the arbitrator or valuer. It may be express or implied. All such contracts unless it is expressly stipulated otherwise, will contain an implied term that the arbitrator or valuer will proceed with due care and diligence. It is conceded that there may be difficulties where the person acting is appointed and paid by one of the parties only (as is usually the case with certifying architects and engineers). The argument in Mustill and Boyd op cit at p189 that an arbitrator's liability depends on status has no support in the cases. (Nor can it be applied to valuers and certifiers.) The timing of the exemption or disclaimer is crucial whether the liability be contractual or tortious.

104 Here the basis of the arbitrator's protection may be estoppel. Alternatively it could be argued that such agreement negated the existence of an implied term as to skill and care in the arbitrator's contract of appointment, since he or she will be taking up their appointment, subject to that clause. See also Contracts Privity Act, 1982, s.4.

both legally effective (at the very least the avoidance of liability must be timely and unambiguous) and realistically available,[104A] is their adoption wise? Lord Salmon in Arenson thought not, saying that the imposition of such conditions would scarecly be likely to improve the arbitrator or valuer's chance of obtaining business.[105] Lord Kilbrandon on the other hand, thought that exclusion of liability would become so common as to attract no opprobrium.[106] It is as yet too early to say which prognosis will prove correct.

Can arbitrators, valuers and certifiers protect themselves by less embarrassingly visible means than complete disclaimer. One's advice to those so minded would run something like this (i) Always call yourself an arbitrator. It is not decisive but it may do some good. Do not, like the poor accountants in Arenson, agree to act under a clause which explicitly denies you that title.(ii) Make the parties submit some kind of case,

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104A At what point of time should a certifying architect nervously stutter out his disclaimer and to whom? A disclaimer issued with the certificate may be too late to be effective. To pinpoint any earlier time requires a distinction to be made between supervision and certification which is impractible, (as the attempts to do so in the older cases show) Again, to be effective the disclaimer would have to be communicated to both owner and builder.)

105 [1977] AC at 440

106 Ibid at 431

even if only in writing. Never mind that they merely reiterate facts of which you are already well aware (iii) Require the parties to sign a statement that they cannot agree and need you to settle the dispute between them. You should especially do this where the dealings between the parties appear to be amicable (iv) Make your decision as inscrutable as possible. (If the giving of reasons guarantees no immunity why bother to provide ammunition for a potential plaintiff?) Persons who took this advice would be relatively safe from suit. They would also have ceased to act professionally.

3 Is a Statutory Response to the Problem Possible or Desirable?

New South Wales and Victoria have recently enacted legislation which confers immunity on arbitrators and umpires acting under the relevant arbitration statute.[107] These provisions bring no great certainty. The position of valuers and certifiers is still governed by the common law. The Acts do not exclude immunity for such persons, they merely fail to provide for it. It is difficult to see how this could be otherwise. Whether it was to deny or to confer immunity that one wished to enact a statute one would still have to positively define the class in question. Even if such a definition could catch all potential members of this class it is unlikely to be wide enough to embrace all possible future developments in dispute resolution. In the United States and Europe commercial organisations are beginning to use high technology to formulate and resolve matters in issue

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107 Commercial Arbitration Act 1984 (N.S.W.) s.51; Commercial Arbitration Act 1984 (Vic) s.51.

between them. Attempts to freeze the law of immunity in a statutory definition would almost certainly prove to be misguided. Nervous valuers and certifiers can expect no legislative salvation. They must either resignedly await the slow unfolding of stare decisis or deflect or disclaim liability themselves.