

# REVAMPING ARBITRATOR IMMUNITY: A CASE FOR RECONSIDERING SECTION 42-B OF THE ARBITRATION & CONCILIATION ACT, 1996

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*Arbitrator immunity is recognised across jurisdictions. While some arbitration statutes grant absolute immunity to arbitrators, most statutes recognise a qualified immunity but do little else. The silence of the UNCITRAL Model Law on arbitrator immunity has led to the adoption of varied scope and standards for such immunity, that too without specifying the procedure. Following the practice in other nations, India has also jumped on the bandwagon of introducing qualified immunity based on the recommendations of the High-Level Committee. However, the recommendation has been made without much discussion, and in complete ignorance of the provisions of the Judges (Protection) Act, 1985, which grants absolute immunity to arbitrators. Further, even the standard of ‘good faith’ provided under Section 42-B of the Arbitration & Conciliation Act, 1996, can have various imports, and it is unclear what threshold will be required for arbitrators to prove their acts were in ‘good faith’. This paper surveys the sources of arbitrator immunity, its scope, standard and procedure required for effectively protecting arbitrators. It attempts to demonstrate how the introduction of Section 42-B after the 2019 Amendment will lead to harassment of arbitrators instead of protecting them. Accordingly, the paper proposes an alternative draft provision which may be considered to replace Section 42-B of the Act.*

**Keywords:** *arbitrator immunity, Section 42-B, 2019 Amendment, absolute immunity, qualified immunity.*

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## I. INTRODUCTION

Arbitration proceedings by their very nature resolve the dispute between parties by means of a final and binding award which is considered to be equivalent to the judgement of a court.<sup>1</sup> This recognition of an award as an order of the court is granted under the *lex arbitri*, i.e. the law of the seat. Thus, courts enforce an award as a judgment passed by a court of law and since the award is deemed to be a decree of the civil court<sup>2</sup> and recognised as binding and capable of enforcement,<sup>3</sup> a natural corollary of this fiction ought to be that arbitrators are equivalent to judges in courts.

It is trite law that judges are granted protection or immunity for acts done in the performance of a judicial function.<sup>4</sup> The rationale for such protection is two-fold: (a) to provide confidence to the judges to perform their duties<sup>5</sup> without the fear<sup>6</sup> or risk of personal liability at the hands of a dissatisfied or disgruntled party<sup>7</sup>; and (b) to ensure independence and impartiality while adjudicating the dispute between the parties.<sup>8</sup>

The accepted position across the globe is that an arbitrator is legally empowered to do everything which a civil court has the power to do.<sup>9</sup> A consequence of this empowerment is the need to extend the immunity granted to judges to arbitrators in arbitration proceedings. Unfortunately, the Model Law of United Nations Commission on International Trade Law ('Model Law') is silent on the same,<sup>10</sup> leaving a vacuum and creating uncertainty amongst nations on the question of arbitrator immunity.<sup>11</sup>

Currently, each country is grappling with drawing the line between attracting arbitrators and parties to their jurisdictions,<sup>12</sup> and the concern that the sanctity afforded to judicial proceedings is not diluted by a contractual arrangement such as arbitration. It is in

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<sup>1</sup> *Kripa Sindhu Biswas v Sudha Sindhu Biswas* (1973) SCC OnLine Cal 64.

<sup>2</sup> The Arbitration and Conciliation Act, 1996 (Act) s 36 (1).

<sup>3</sup> United Nations Commission on International Trade Law 1985 (Model Law) art 35.

<sup>4</sup> Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 NY Sch J Intl & Comp L 16.

<sup>5</sup> *Sat Narain v Punjab and Haryana High Court, Chandigarh* 2003 SCC OnLine P&H 630 para 3.

<sup>6</sup> *Zunjarrao Bhikaji Nagarkar v Union of India* (1999) 7 SCC 409.

<sup>7</sup> Christian Hausmaninger 'Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform' (1990) 7 J Intl Arb 7, 17; Martin Domke, 'The Arbitrator's Immunity from Liability: A Comparative Survey' (1971) 3 Toledo L Rev 99.

<sup>8</sup> Sarah Schæffer, 'Approaches to Arbitrators' Liability: Immunity or Liability?', in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2* (Kluwer Law International 2020) 249, 255.

<sup>9</sup> *Eros International Media Ltd v Telex Links India Pvt. Ltd* 2016 SCC Online Bom 2179.

<sup>10</sup> Howard M. Holtzmann and Joseph Neuhaus, 'Matters Not Addressed in the Final Text of the 2006 Amendments to the UNCITRAL Model Law', in *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (2015 Kluwer Law International) 674.

<sup>11</sup> *ibid* 674.

<sup>12</sup> Bruno Guandalini, 'The Rational Decision-Maker Arbitrator: Unveiling the Arbitrator's Utility Function' in 'Economic Analysis of the Arbitrator's Function' (2020) 55 Int'l Arb.L Lib, KLI 211, 246.

this context that the liabilities of arbitrators and their protection has become an issue requiring attention.<sup>13</sup>

To promote institutional arbitration in India, the government constituted a High-Level Committee ('HLC'), which had recommended the inclusion of an express provision on arbitral immunity in the Arbitration and Conciliation Act, 1996 ('Act') in India.<sup>14</sup> Pursuant to such recommendation, Section 42-B was introduced in the Act by the Arbitration and Conciliation (Amendment) Act, 2019, ('2019 Amendment'),<sup>15</sup> which grants arbitrator immunity for "*anything which is in good faith done or intended to be done under this act or the rules, regulation, made thereunder.*" It is pertinent to note that the protection extends to any "*suit or other legal proceedings*" against an arbitrator. At first blush, Section 42-B appears to be a huge leap forward in granting protection to arbitrators, recognising them as persons discharging a judicial function and in ensuring their independence and impartiality. However, a study of similar provisions across jurisdictions and a more in-depth analysis of the implementation of the provisions in India reveals an entirely different story.

Part A of this paper discusses the need for arbitrator immunity, the genesis of such immunity, its scope, and standard across various jurisdictions. Part B surveys the history of protection granted to judges in India, the ignorance of the existing regime in the report of the HLC, the applicability of such protection as the arbitration proceedings, the rationale for the 2019 Amendment and the practical implementation of the same. Part C critically analyses arbitrator immunity across the world and post the 2019 Amendment, in India, to highlight how the present regime leads to harassment of arbitrators instead of protecting them. Part D further surveys the considerations that should be kept in mind while revamping Section 42-B of the Act and provides a draft provision which should replace Section 42-B of the Act. The paper concludes with a recommendation to revamp Section 42-B of the Act along the lines of the suggested provision to truly protect arbitrators from frivolous allegations, yet make them responsible for their acts and omissions.

## II. ARBITRATOR IMMUNITY ACROSS JURISDICTIONS

The term 'immunity' is *per se* a common law concept<sup>16</sup> and is used at par with the term 'non-liability'.<sup>17</sup> The roots of the concept lie in the immunity granted to judges for performing a judicial function.<sup>18</sup> Therefore, the question of arbitrator immunity rests primarily on arbitrators being equivalent in stature and function to judges of a court of law.

Interestingly, civil law jurisdictions do not recognise the concept of immunity.<sup>19</sup> In such jurisdictions, arbitrators are considered to be professionals engaged by means of a contract to decide the dispute between the parties.<sup>20</sup> They are not granted the same stature as

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<sup>13</sup> Report of the High-Level Committee, Review the Institutionalisation of Arbitration Mechanism in India (2017) 71.

<sup>14</sup> *ibid* 70.

<sup>15</sup> Notification No. SO3154(E) dated 30.08.2019 Arbitration and Conciliation (Amendment) Act, 2019 Section 9 - Insertion of new sections 42A and 42B.

<sup>16</sup> Adedoyin Rhodes-Vivour, 'Immunity of Arbitrators' in Michael O'Reilly (ed), *Arbitration: (2017) (83) 4Intl J Arb Med DM CI Arb Sweet & Maxwell* 447.

<sup>17</sup> *ibid* 447.

<sup>18</sup> Susan (n 4) 16.

<sup>19</sup> *ibid* 18.

<sup>20</sup> Anastasia Tsakatoura, 'Arbitration: The Immunity of Arbitrators' *Lex E- Scripta Online Legal* June (2002), <<http://www.inter-lawyer.com/lex-escripta/articles/arbitratorsimmunity.htm>> accessed 30 November, 2020.

their judicial counterparts, which means that they are liable for their acts and omissions which would otherwise fall under the realm of professional misconduct.<sup>21</sup>

### A. FOUNDATIONS OF ARBITRATOR IMMUNITY

The divide between the different understanding of the liability and the immunity of arbitrators has resulted in a debate as to the foundational basis or source of arbitrator immunity. Arbitral immunity can be sourced from (a) the contractual theory; (b) the jurisdictional theory, and (c) the hybrid theory.

#### A) Contractual Theory

The origins of the contractual theory relate back to the 19<sup>th</sup> century.<sup>22</sup> Arising out of *merilins perception*, the theory rests on the fact that the arbitration agreement is a contract<sup>23</sup> and since the arbitrators derive their powers from the arbitration agreement and not from any public authority,<sup>24</sup> they cannot be termed as judges. The function of an arbitrator is not of a public character<sup>25</sup> and hence, like any other professional, civil liability ought to be imposed on arbitrators.<sup>26</sup> Most civil law jurisdictions follow this theory and do not formally recognise arbitrator immunity as it exists in common law jurisdictions.

#### B) Jurisdictional Theory

In common law countries, arbitrator immunity can be traced to the jurisdictional theory, i.e., since arbitrators perform a judicial function akin to judges within a national legislative framework,<sup>27</sup> they should be afforded the same protection as judges. This rationale is further buttressed by the fact that the awards are rendered by an arbitrator and the power exercised by them is also governed under a national legislation.<sup>28</sup>

Since the State actively promotes the arbitration processes<sup>29</sup> such as implementation and enactment of arbitration law,<sup>30</sup> court assistance to arbitration proceedings<sup>31</sup> and by ratifying international conventions related to arbitration,<sup>32</sup> arbitrators perform a judicial function which is of a public character, similar to that of a judge.<sup>33</sup> Given that courts are bound to make a mandatory reference to arbitration under Article 8 of the Model Law, their jurisdiction is ousted in favour of arbitration and consequently the jurisdiction of a judge in favour of the arbitrator.

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<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*; Jenny Brown, 'The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion' (2009) J Disp Resol 229.

<sup>23</sup> *ibid.*

<sup>24</sup> E Onyeama, '*International Commercial Arbitration and the Arbitrator's Contract*' (New York: Routledge, 2010) 36.

<sup>25</sup> Anastasia (n 20).

<sup>26</sup> Anastasia (n 20).

<sup>27</sup> Onyeama (n 24) 33.

<sup>28</sup> Adedoyin (n 16) 449.

<sup>29</sup> Nadia Smahi, 'The Arbitrator's Liability and Immunity Under Swiss Law – Part I' (2016) (34) 3 ASA Bulletin, KLI 876, 881.

<sup>30</sup> Christophe Seraglini, *Lois de police et justice arbitrale internationale* (10, Paris Dalloz 2001) 41.

<sup>31</sup> Jianlong Yu, 'Arbitrators: Private Judges, Service Providers, or Both? – CIETAC's Perspective' (2007) (3) S Intl Arb Rev 3 (2007) 1, 2-3.

<sup>32</sup> Nadia (n 29) 881.

<sup>33</sup> *ibid.*

### C) Hybrid Theory

A compromise of the above two approaches is the hybrid theory. Under this theory, arbitrators derive their power under the national arbitration statutes and yet perform their function on the basis of the arbitration agreement.<sup>34</sup> In essence, the hybrid theory recognises that an arbitrator is given the task of administering justice by the State,<sup>35</sup> which is why they perform a judicial task<sup>36</sup> and hence, can be regarded as judges.<sup>37</sup> This theory also pays due homage to the fact that arbitrators ultimately perform the contractual task of resolving the dispute between the parties.<sup>38</sup> Therefore, the propagators of the hybrid theory believe that the reality lies in between the jurisdiction and contractual theories<sup>39</sup> i.e., it grants protection to arbitrators, but not to the same extent as judges. However, the mere identification of the source of arbitrator immunity still leaves open the scope of such immunity.

### B. THE SCOPE OF ARBITRATOR IMMUNITY

The silence of the Model Law on the issue of arbitrator immunity has led to a void in international arbitration jurisprudence. This void is filled by institutional rules, arbitration agreements, or national legislations according to their own domestic law standards.<sup>40</sup> Even within these broad spectra of choices, jurisdictions across the world differ on whether arbitrators are entitled to (a) absolute immunity,<sup>41</sup> or (b) qualified immunity.<sup>42</sup> This section analyses both these types of immunities.

#### A) Absolute Immunity

Absolute immunity refers to the complete protection afforded to arbitrators, which includes protection from liability even in the case of negligence, bad faith, misconduct or fraud.<sup>43</sup> The rationale for absolute immunity is that arbitrators are expected to perform their task in an objective and neutral manner, and an absolute immunity is imperative to protect their decision making.<sup>44</sup> Further, a fundamentally strong, legislative framework granting wide immunity<sup>45</sup> to the arbitrators<sup>46</sup> is necessary to attract arbitrations.<sup>47</sup> If arbitrators are made liable for every breach of contract or negligent act, without deciding the degree or propensity,

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<sup>34</sup> Onyeama (n 24) 57.

<sup>35</sup> Stefan Riegler & Martin Platte, 'The Arbitrator – Arbitrators' Liability' in Gerold Zeiler, Irene Wesler (eds), *Austrian Arbitration Yearbook 2007*, Vienna (Manz'sche Verlags- und Universitätsbuchhandlung 2007), 108.

<sup>36</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, (6th edn, OUP 2015), 323; Michael Hwang, Katie Chung, Fong Lee Cheng, *Claims Against Arbitrators for Breach of Ethical Duties*, in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation*, (The Fordham Papers, New York, Martinus Nijhoff Publishers 2007), 226.

<sup>37</sup> Emmanuel Gaillard, John Savage (ed.) Fouchard, Gaillard, '*Goldman On International Commercial Arbitration*' (KLI 1999), 557.

<sup>38</sup> Bernard G. Poznanski, 'The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration' (1987) (4) *J. Int'l Arb.* 71.

<sup>39</sup> Jenny (n 22) 229.

<sup>40</sup> Christoph H Schreuer, Lorretta Malinoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2<sup>nd</sup> edn, CUP, 2009) 62, 65.

<sup>41</sup> Gary B Born, *International Commercial Arbitration* (2<sup>nd</sup> edn, KLI 2014), 2030.

<sup>42</sup> *ibid* 2031.

<sup>43</sup> Adedoyin (n 16) 456.

<sup>44</sup> Sarah (n 8) 256.

<sup>45</sup> Bruno (n 12) 246.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid*.

it would practically become impossible to protect the integrity of the arbitrators.<sup>48</sup> In the absence of absolute protection, the flood gates for frivolous litigation, unfounded disputes and questions on the integrity of the arbitrators would be opened.

Initially, the courts in the United States of America ('US') granted broad immunity<sup>49</sup> which included immunity against negligence,<sup>50</sup> bad faith,<sup>51</sup> and even fraud.<sup>52</sup> In the view of the courts, decision-makers are entitled to absolute immunity in order to ensure that arbitrators perform their duty without intimidation and harassment<sup>53</sup> without which, maintaining a continuous supply of arbitrators would be impossible.<sup>54</sup> No person can be expected to accept their nomination as an arbitrator<sup>55</sup> or take the assignment to arbitrate a dispute<sup>56</sup> if such individuals are at the risk of lawsuits<sup>57</sup> and exposed to unwarranted liabilities.<sup>58</sup>

Similarly, in the United Kingdom, prior to the enactment of the (English) Arbitration Act, 1996<sup>59</sup> ('EA'), arbitrators were granted wide immunity similar to judges,<sup>60</sup> with the exception of fraud.<sup>61</sup> Interestingly, Ireland continues to extend absolute immunity to arbitrators. Section 22 of the Arbitration Act, 2010 of Ireland provides that "*An arbitrator shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions.*" In fact, the absolute immunity is extended to an employee, agent, advisor of the arbitrator,<sup>62</sup> and to the person or arbitral institution designated to appoint the arbitrator<sup>63</sup>

However, some authors<sup>64</sup> and courts<sup>65</sup> do not subscribe to this view. They criticise the grant of absolute immunity to arbitrators<sup>66</sup> as the grant of such immunity might destabilise the

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<sup>48</sup> Sarah (n 8) 256.

<sup>49</sup> *Austern v Chicago Bd of Options Exchange* (1990) 898 F.2d 882, 886; *Malik v Ruttenberg* 942 A.2d 136,140 (N.J. 2008).

<sup>50</sup> *Stasz v Schwab* (2004) 121 Cal.App.4th 420, 437; Yu H, 'Who is an arbitrator? A study into the issue of immunity' (2009) 12(2) Int'l Arb LR 3, 10.

<sup>51</sup> *Int'l Med. Group, Inc. v Am. Arbitration Ass'n* (2002) 312 F.3d 833, 844; *City of Durham v Reidsville Eng'g Co.* (1961) 120 S.E.2d 564.

<sup>52</sup> *Jones v Brown* (1880) 6 N.W. 140.

<sup>53</sup> Philippe Fouchard 'Le statut de l'arbitre dans la jurisprudence française' (1996), 3 Rev Arb 325, 359.

<sup>54</sup> Maureen A. Weston 'Re-examining Arbitral Immunity in Age of Mandatory and Professional Arbitration' (2006) 88 Minnesota LR 484.

<sup>55</sup> *Austern* (n 49) 124.

<sup>56</sup> Christian (n 7) 16.

<sup>57</sup> *Tamari v Conrad* (1997) 552 F.2d 778, 781.

<sup>58</sup> Ramon Mullerat and Juliet Blanch 'The Liability of Arbitrators: A Survey of Current Practice' (2007) 1 Dis. Res. Int'l 99, 108.

<sup>59</sup> *Arenson v Casson Beckman Rutley & Co.* [1975] 3 All ER 901, 917 [HL]; *Sutcliffe v Thackrah* [1974] 1 All ER 859 [HL], Born (n 41) 2031.

<sup>60</sup> Nadia (n 29) 893.

<sup>61</sup> *Arenson* (n 59) 917; *Sutcliffe* (n 59); Born (n 41) 2031.

<sup>62</sup> Arbitration Act 2010 (Ireland Arbitration Act), art 22 (3).

<sup>63</sup> Ireland Arbitration Act, art 22 (3).

<sup>64</sup> E. Loquin, 'apud Club des Juristes, The Arbitrator's Liability' 2017 <<http://www.leclubdesjuristes.com/rapport-responsabilite-de-larbitredisponibleanglais/>> accessed on December 12, 2020.

<sup>65</sup> Mark A Sponseller, 'Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators' (1993) 44 Hastings LJ 421, 438.

<sup>66</sup> Bruno (n 12) 246.

fundamental principle of equality<sup>67</sup> and perhaps discard the contractual nature of arbitration.<sup>68</sup> The grant of absolute immunity may foster carelessness and lack of responsibilities amongst arbitrators.<sup>69</sup> Therefore, to maintain the sanctity of the arbitration process, and to ensure that the process remains fair and reasonable to each party,<sup>70</sup> most jurisdictions moved toward qualified immunity as absolute immunity was undesirable.<sup>71</sup>

Interestingly Article 21 of the Convention on The Settlement of Investment Disputes Between States and Nationals of Other States, ('ICSID Convention'), provides a broad grant<sup>72</sup> of absolute immunity<sup>73</sup> for the acts done by the arbitrator for performing their task for the International Centre for Settlement of Investment Disputes ('ICSID Centre'). The immunity protects the arbitrators from lawsuits and criminal prosecution,<sup>74</sup> brought in national courts jurisdiction.<sup>75</sup> However, the ICSID Convention provides that such immunity may be waived by the ICSID Centre.<sup>76</sup> Therefore, even the ICSID Convention recognises the need for making arbitrators liable for their acts or omissions.

### B) Qualified Immunity

Qualified immunity refers to general protection granted to arbitrators, subject to exceptions, i.e., parties may be indemnified in case of serious misconduct by an arbitrator.<sup>77</sup> Over time the courts in the US limited the scope of the immunity granted to the arbitrator for not giving awards in a timely manner,<sup>78</sup> fraud,<sup>79</sup> or misconduct.<sup>80</sup> Following suit, English Courts began to question the concept of absolute immunity<sup>81</sup> and its legitimacy.<sup>82</sup>

In order to address these concerns, in 1996, the EA contained a mandatory provision dealing with arbitrator immunity. Section 29 of the EA states that "*An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.*". Therefore, the EA adopted the general philosophy of immunity in the common law system<sup>83</sup> but circumscribed it by the conduct of the arbitrator being in bad faith.<sup>84</sup> In effect, the EA provides for two kinds

<sup>67</sup> *ibid* 247.

<sup>68</sup> *ibid* 246.

<sup>69</sup> Sarah (n 8) 256.

<sup>70</sup> *ibid*.

<sup>71</sup> Susan (n 4) 31-32.

<sup>72</sup> Born (n 41) 2027.

<sup>73</sup> Schreuer (n 40) 62.

<sup>74</sup> *ibid* 63.

<sup>75</sup> Born (n 41) 2027.

<sup>76</sup> ICSID art 21: *The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity.*

<sup>77</sup> Sarah (n 8) 256.

<sup>78</sup> *E.C. Ernst, Inc. v Manhattan Constr. Co. of Texas* [1977] 551 F.2d 1026, 1033.

<sup>79</sup> *Grane v Grane* [1986] 493 N.E.2d 1112.

<sup>80</sup> *Lundgren v Freeman* [1962] 307 F.2d 104; *City of Durham v Reidsville Eng'g Co.* [1961] 120 S.E.2d 564.

<sup>81</sup> Nadia (n 29) 894.

<sup>82</sup> Julian DM Lew, 'Immunity of Arbitrators Under English Law' in Julian D.M. Lew (ed.) *The Immunity of Arbitrators, London/New York/Hamburg/Hong Kong* (Lloyd's of London Press Ltd. 1990) 25.

<sup>83</sup> Sarah (n 8) 257.

<sup>84</sup> *Melton Medes Ltd v Securities and Investment Board* [1995] 3 All ER 880.

of limitations, i.e., express and implied limitation,<sup>85</sup> the express limitation being the threshold of bad faith and the implied limitation being the performance of functions as an arbitrator.<sup>86</sup> Thus, Section 29 of the EA also expressly provided the threshold or standard required for qualified immunity. In a limited sense, it can be said that Section 29 of the EA reflects the hybrid theory as it protects acts done or omitted in ‘discharge of his functions as arbitrator’ recognising the acts to be akin to judicial function, and at the same time, restricts the immunity to acts not done in bad faith to account for the contractual task entrusted to an arbitrator.

### C. THE STANDARD FOR IMMUNITY

Since absolute immunity by its very definition does not contain any exceptions, there was no need for determining the standard for the same. However, the shift from absolute to qualified immunity necessitated the determination of the appropriate standard required to be met before calling into question the conduct of an arbitrator. Different jurisdictions approach this question differently. However, apart from Portugal which grants similar protection as that granted to judges,<sup>87</sup> the various approaches can be broadly be categorised under two heads:

- (a) Intent Based Liability; or
- (b) Faulty Based Liability

#### A) Intent Based Liability

Most jurisdictions such as Spain<sup>88</sup>, South Africa<sup>89</sup>, Malaysia<sup>90</sup>, Bahrain,<sup>91</sup> Mauritius,<sup>92</sup> Lagos,<sup>93</sup> Scotland<sup>94</sup> use the standard of bad faith to hold arbitrators liable for their conduct. Similarly, Malta<sup>95</sup> and Italy<sup>96</sup> caveat the liability arising out of negligence with malice or fraud. In Hong Kong, arbitrators are liable for acts done dishonestly.<sup>97</sup> Thus, a party alleging misconduct of the arbitrator needs to show that an act or omission was done with ill-intent or malice.

#### B) Fault Based Liability

On the other hand, a fault-based liability does not require a party to prove what the intent of the arbitrator was at the time of the act or omission. Instead, a fault-based liability requires the arbitrator to prove that the arbitrator acted with due care and caution. Jurisdictions such as Spain<sup>98</sup> New Zealand,<sup>99</sup> Singapore,<sup>100</sup> Italy,<sup>101</sup> Peru<sup>102</sup> protect an

<sup>85</sup> Thayanathan Baskaran, ‘*Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act*’ (2019 KLI 2019) 357-358.

<sup>86</sup> *ibid.*

<sup>87</sup> Portuguese Voluntary Arbitration Law 2011, art 9(4).

<sup>88</sup> The Consolidated Arbitration Law 60/2003 (with 2009 and 2011 amendments), art 21(1).

<sup>89</sup> International Arbitration Act 2017, s 9(1).

<sup>90</sup> Arbitration Act 2005, s 47.

<sup>91</sup> Law No. 9/2015 Promulgating the Arbitration Act, art 7.

<sup>92</sup> International Arbitration Act 2008, art 19.

<sup>93</sup> Lagos State Arbitration Law of 2009, art 18.

<sup>94</sup> Arbitration (Scotland) Act 2010, r 73.

<sup>95</sup> Arbitration Act, 1996 amended through 2018, ss 20(5) & 66.

<sup>96</sup> Code of civil procedure, Book Fourth, tittle VIII, Arbitration, Amended by Legislative 2006 (Italy) art 813.

<sup>97</sup> Arbitration Ordinance (Cap. 609), s 104.

<sup>98</sup> The Consolidated Arbitration Law 60/2003 (with 2009 and 2011 amendments), art 21(1). *The test is of ‘recklessness’.*

arbitrator from any negligence in respect of anything done or omitted to be done in the capacity of an arbitrator.<sup>103</sup>

Further, Singapore extends the protection to an arbitrator for “any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.”<sup>104</sup> However, the protection is not extended to the breach of contract, bad faith, fraud and other basis of civil liability.<sup>105</sup>

Another standard prescribed in The Chartered Institutes of Arbitrators London Centenary Principles 2015 is that of good faith. The Principles provide for a clear right to arbitrator immunity from “civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.”<sup>106</sup> Such a standard has been adopted by Kenya<sup>107</sup> and Latvia.<sup>108</sup>

#### a. Burden of Proof

At this juncture, it is crucial to draw a distinction between the standard of bad faith and that of acts done in good faith because such distinction is vital to address qualified immunity.<sup>109</sup> While both standards are often referred to as two sides of the same coin,<sup>110</sup> and appear to arrive at the same conclusion, they substantially differ in the procedural requirements as the burden of proof drastically shifts from the party alleging misconduct under the standard of ‘bad faith’ to the arbitrator to demonstrate that the arbitrator acted in ‘good faith.’

While often referred to as two sides of the same coin, good faith implies the duty to employ honest loyal and fair behaviour,<sup>111</sup> i.e., a positive obligation on the arbitrator to prove that her act(s) or omission(s) is both sincere and in furtherance of good intention.<sup>112</sup> In essence, there should be an absence of malice or intention to deceive,<sup>113</sup> and if an arbitrator can prove that she has acted without such malice or intention to deceive, she ought to be granted immunity.<sup>114</sup> The vital point of difference here is that the arbitrator ought to demonstrate that her actions were ‘not in bad faith’.<sup>115</sup>

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<sup>99</sup> Arbitration Act 1996 (as amended 2019), s 13.

<sup>100</sup> International Arbitration Act (Chapter 143A) (SI Act), s 25.

<sup>101</sup> Italy, art 813. *The requirement is ‘gross negligence’.*

<sup>102</sup> Legislative Decree No. 1071 Regulating Arbitration, in effect 1 September 2008 art 32.

<sup>103</sup> SI Act, s 25

<sup>104</sup> SI Act, s 25 (b).

<sup>105</sup> Daniel Kalderimis, ‘Daniel Street & Julian Brown, ‘New Zealand Delos Guide to Arbitration Places’2020 <<https://delosdr.org/wp-content/uploads/2019/10/Delos-GAP-1st-edn-New-Zealand.pdf?pdf=GAP1-NZ>> accessed on December 12, 2020.

<sup>106</sup> CI Arb London Centenary Principles (CI Arb), r 10.

<sup>107</sup> The Arbitration (Amendment) Act 2009, s 16(b).

<sup>108</sup> The Law of the Republic of Latvia, The Arbitration Law, as amended 2015, art 22.

<sup>109</sup> David E Pozen, ‘Constitutional Bad Faith’ (2016) 129(4) Har. LR 885, 887.

<sup>110</sup> Duarte Gorjão Henriques, ‘The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith?’ 2015 (33) 3 ASA Bulletin KLI 514.

<sup>111</sup> *ibid* 517.

<sup>112</sup> Elizabeth A. Nowicki, ‘Not in Good Faith’ (2007) 60(2) SMU LR 441, 454.

<sup>113</sup> Duarte (n 110), 517.

<sup>114</sup> *ibid*.

<sup>115</sup> Elizabeth A (n 112).

Under the standard of good faith, an abusive party or a disgruntled party would simply allege misconduct by the arbitrator,<sup>116</sup> and the arbitrator would have to discharge the burden of proof of good faith leading to unnecessary harassment of the arbitrator.<sup>117</sup> An arbitrator would have to prove she was not at fault. Thus, the defense of qualified immunity is asserted<sup>118</sup> by showing the conduct was in ‘good faith’. However, it remains unclear whether the conduct will be judged by a subjective state of mind or an objective standard of reasonable belief.<sup>119</sup> Thus, under the standard of ‘good faith’ arbitrators would be immensely demoralized and be reluctant to act as arbitrators in future proceedings. It was exactly this fear that was sought to be addressed by the concept of arbitrator immunity.

On the contrary, under the standard of bad faith, the party alleging that the arbitrator acted in bad faith would have to prove why an act or omission was done with malice or intention to deceive, or cause prejudice or harm to one of the parties.<sup>120</sup> It implies not simply bad judgment or negligence but the conscious doing of a wrong with dishonest purpose or moral obliquity.<sup>121</sup> Thus, the standard of bad faith represents a higher threshold or ‘daunting task’<sup>122</sup> which is to be satisfied by a disgruntled party before liability proceedings would even be initiated against an arbitrator i.e., a party must prove that an arbitrator acted maliciously or dishonestly.<sup>123</sup> In a sense, the party will have to establish probable cause before an inquiry can be initiated on merits.<sup>124</sup> Therefore, the standard of ‘bad faith’ protects an arbitrator from unnecessary harassment and justification of her acts or omissions in the course of arbitral proceedings.<sup>125</sup>

### III. ARBITRATOR IMMUNITY IN INDIA

It has been observed by the HLC that before the insertion Section 42-B of the Act there was no provision of arbitrator immunity in India and the only source for such immunity were the rules of arbitral institutions.<sup>126</sup> However, the same may not be entirely true. Surprisingly, the HLC did not refer to the Judges (Protection) Act, 1985 (‘JPA’) or its precursor, the Judicial Officers Protection Act, 1850 (‘JOPA’) which provide for immunity to any person empowered by law to give a definitive judgement. Therefore, it is necessary to briefly examine the history of judicial immunity in India before addressing the apparent void that existed prior to the 2019 Amendment.

#### A. HISTORY OF JUDICIAL IMMUNITY

Under the JOPA, judicial officers were granted protection from civil proceedings. Section 1 of the JOPA provided for “*Non-liability to suit of officers acting judicially, for*

<sup>116</sup> Dennis R Nolan and Roger I Abrams, ‘Arbitral Immunity’ (1989) 11(2) Ind. Rel. LJ 228, 233, 258.

<sup>117</sup> L.(Nos. 2 and 6) vEPO, Judgement No. 4262, International Labour Organisation Administrative Tribunal (2010).

<sup>118</sup> Martin A. Schwartz, ‘Fundamentals of Section 1983 Litigation’ (2016) 17(3) Touro LR 525, 538; *Richardson v McKnight* (1997) 521 U.S. 399, 413-14 (*determining whether certain defendants are entitled to assert qualified immunity*).

<sup>119</sup> Mark N Ohrenberger, ‘Prison Privatization and the Development of a “Good Faith” Defense for Private-Party Defendants to 42 U.S.C. § 1983 Actions’ (2005) 13 (3) Wm. & Mary Bill Rts. J. 1035, 1045.

<sup>120</sup> Elizabeth A (n 112)454 - 456.

<sup>121</sup> *McGowan v Ferro* 859 A.2d 1012, (Del. Ch. 2004) 1031, 1036.

<sup>122</sup> *United States v Gilbert* (1999) 198 F.3d 1293, 1302-03.

<sup>123</sup> *Med. Specialist Group, P.A. v Radiology Assocs L.L.P.*, 171 S.W.3d 727, 734.

<sup>124</sup> Kenneth Duvall, ‘Burdens of Proof and Qualified Immunity’ (2012) (37) Sou. Ill. Uni. LJ (2012) 136.

<sup>125</sup> Thayanathan (n 85) 358.

<sup>126</sup> High-Level Committee (n 13) 70.

*official acts done in good faith, and of officers executing warrants and orders.*” It is pertinent to mention that the JOPA contained only one section and adopted the standard of good faith.

The JOPA was subsequently repealed by the JPA, which was much broader in scope than the JOPA.<sup>127</sup> It granted protection to judges from civil as well as criminal proceedings.<sup>128</sup> More importantly, the JPA fostered judicial independence<sup>129</sup> by providing for absolute protection<sup>130</sup> not only upon the person holding the post of a judge but to any person “(a) who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, (b) ) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in clause (a)<sup>131</sup>.” The JPA also did away with the requirement of proving whether an act was done in good faith or not.

### B. ARBITRATOR IMMUNITY UNDER THE JPA

The JPA covers all persons discharging a legal duty<sup>132</sup> and those persons empowered by law to give a judgement. In this context, Section 2(9) of the Code of Civil Procedure 1908 (‘CPC’),<sup>133</sup> defines a judgement to mean “*the statement given by the judge of the grounds of a decree or order.*” Section 36 (1) of the Act equates an award with a decree of the court. The natural consequence is that the award rendered by an arbitrator in the course of arbitration proceeding amounts to judgement<sup>134</sup> for the purposes of Section 2 of the JPA.

Even otherwise, the protection under the JPA is extended to any person empowered by law in any legal proceeding.<sup>135</sup> Since, an arbitrator is empowered under the Act, giving her actions the force of law, an arbitrator would squarely fall within Section 2 of the JPA.<sup>136</sup>

Even if, for the sake of argument, this protection is not directly extended to an arbitrator on the basis of the exclusion contained under Section 3 of the Evidence Act, 1872, which expressly excludes arbitrators from the definition of a “court”, it cannot be denied that arbitration proceedings are quasi-judicial proceedings.<sup>137</sup> Further, a catena of judgements have recognised that the JPA applies with equal force to quasi-judicial proceedings<sup>138</sup> and hence arbitrators are protected under the JPA.<sup>139</sup> Therefore, the absence of this discussion or consideration of the JPA in the report of the HLC raises questions about the rationale for the introduction of the Section 42-B of the Act.

### C. HLC REPORT

<sup>127</sup> *High Court of Karnataka v C.M. Manjuanth* 2020 SCC Online Kar 1679 para 24

<sup>128</sup> *E.S. Sanjeeva Rao v Central Bureau of Investigation (C.B.I.) Mumbai and others* 2012 SCC OnLine Bom 1908 para 19.

<sup>129</sup> *E. Giri Yadav v Union of India* 2008 SCC OnLine AP 742 para 37.

<sup>130</sup> *Rahendra Baglari ASI v Sub-Divisional Judicial Magistrate (M) and Others* 2020 SCC OnLine Gau 3972.

<sup>131</sup> The Judges (Protection) Act 1985 (JPA), s 2.

<sup>132</sup> *Kunal Saha v Gora Chand Dey* 2012 SCC Online Cal 10338 para 40.

<sup>133</sup> The Code of Civil Procedure 1908 (CPC), s 2(9)

<sup>134</sup> *Sudhir Prasad v State of Jharkhand* 2010 SCC Online Jhar 333 para 20; *Born* (n 41) 3746.

<sup>135</sup> JPA, s 2(b).

<sup>136</sup> *Ram Lal v State of Punjab* 2013 SCC OnLine P&H 1235; *General Officer Commanding and Ors v CBI and Ors*, MANU/SC/0351/2012 para 12.

<sup>137</sup> *Meena Mehra v Lokayukta Organisation* 2011 LAWS (MPH) 9-8.

<sup>138</sup> *ibid.*

<sup>139</sup> *Ratilal Bhanji Mithani v State of Maharashtra* (1979) 2 SCC 179 para 28.

The HLC discussed the position of law in various jurisdictions and without an extensive discussion on its adaptation, it recognised that the qualified immunity granted to arbitrators across jurisdictions and also the standard of bad faith<sup>140</sup> for attracting such liability.<sup>141</sup> The committee was correct to the extent that there is no express provision in the Act for the same.<sup>142</sup> However, the observation that, in the absence of the express provision on arbitrator immunity, arbitrators in ad hoc arbitration would not be protected<sup>143</sup> was misplaced. Even in the absence of an express provision, the immunity of an arbitrator continues to be governed by the general law of the land, i.e., JPA. While the committee rightly recommended the adoption of the provision similar to Section 29 of the EA, it did so on the ignorance of the provisions of the JPA.

#### D. 2019 AMENDMENT

On the basis of the recommendation of the HLC, the 2019 Amendment introduced Section 42-B in the Act which states “**Protection of action taken in good faith.** - No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.”

A bare reading of the provision unequivocally demonstrates that the protection granted to arbitrators is not absolute, unlike the JPA, and the qualified immunity granted to arbitrators applies only to actions taken in good faith and not otherwise.

Thus, in-line with other jurisdictions, India has made a shift from absolute immunity to qualified immunity of arbitrators without intending the same. The language used in Section 42-B appears to have been borrowed from the CIArb Centenary Principles 2015,<sup>144</sup> which also provide for the standard of good faith. However, it is unclear what would be the most appropriate definition of ‘good faith’ in the context of arbitration proceedings in India since the Act does not define ‘good faith’ and one may have to resort to general law for such a definition.

#### E. ‘GOOD FAITH’ UNDER INDIAN LAW

The concept of ‘good faith’ under Indian law has varied import and subject to certain conditions.<sup>145</sup> Even amongst the general law of the land, three different statutes, i.e., (a) General Clauses Act, 1977 (‘GCA’); (b) Limitation Act, 1963 (‘LA’); and (c) Indian Penal Code, 1860, (‘IPC’) prescribe three different versions of the meaning of ‘good faith’.

Under Section 3(14) of the GCA, good faith is tested on the criteria of a thing being done “honestly”, irrespective of whether it was done negligently or not.<sup>146</sup> In contrast, under Section 2(h) of the LA defines good faith in a negative manner, excluding everything except ‘due care and attention’.<sup>147</sup> Similarly, Section 52 of the IPC uses the same definition as contained in Section 2(h) of the LA but includes not only a thing to be done but also “believed” in good faith.

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<sup>140</sup> Dennis (n 116) 266.

<sup>141</sup> High-Level Committee (n 13).

<sup>142</sup> *ibid* 70.

<sup>143</sup> *ibid*

<sup>144</sup> CIArb, r 10.

<sup>145</sup> *Narayan Diwakar v CBI* 2006 SCC Online Del 291 para 15.

<sup>146</sup> The General Clauses Act 1977 (GCA), s 3(14).

<sup>147</sup> The Limitation Act 1963 (LA), s 2h.

Therefore, while the GCA requires the element of honesty,<sup>148</sup> even though the act *per se* may have been negligent, the LA and the IPC require the demonstration of fault.<sup>149</sup> Hence, an arbitrator, in order to establish “good faith” will have to demonstrate that the arbitrator conducted a proper and a reasonable inquiry<sup>150</sup> with due care and attention.<sup>151</sup> Due care means the degree of reasonableness in the care sought to be exercised.<sup>152</sup> It is such care as an ordinary prudent person would exercise under the conditions existing at the time he is called upon to act.<sup>153</sup> It will not be sufficient for the arbitrator to justify that the arbitrator honestly believed that she was acting in good faith.<sup>154</sup>

Thus, the adoption of the standard of ‘good faith’ means that the burden of proof is on the arbitrators to prove that an arbitrator acted in good faith.<sup>155</sup> Arbitrators would now have to justify their acts or omissions, and any disgruntled party may allege wrongdoing to cause prejudice to the arbitral process and the integrity of the arbitrator. Given the inherent subjectivity of a concept such as ‘good faith’, it is unclear how an arbitrator is to discharge this burden or justify her actions for them to be considered to be in ‘good faith’.

#### IV. THE PITFALLS OF SECTION 42-B OF THE ACT

Section 42-B of the Act has many disastrous implications. It has created more ambiguities and leads to, *inter-alia*, the following consequences:

(i) *Undesirable Standard*: It is necessary to highlight that most jurisdictions that grant qualified immunity to arbitrators, therefore, provide for a standard of bad faith as the party making allegation would first have to discharge the burden that the alleged acts or omissions were *prima facie* done with wrong intent, before an arbitrator is called upon to justify her conduct.<sup>156</sup> It is surprising that the recommendation of the HLC to adopt section 29A of the EA was disregarded since there exists no discussion in the public domain on the reasons for the same.

(ii) *Narrower Scope*: The ignorance of the provisions of the JPA, has led to an apparent and unintended shift from absolute immunity to qualified immunity as there is no exception of ‘good faith’ under the JPA.<sup>157</sup> Section 3 of the JPA provides complete protection from civil or criminal proceedings for any act or thing done in discharge of the official or judicial function. Such protection is extended to ‘every conduct, thing, or word, committed, done or spoken’ while discharging an official or judicial function.<sup>158</sup>

(iii) *Lack of Scrutiny*: The result of this ignorance has created a grey area on the procedure to be followed in cases of claims/suit/complaints against arbitrators. Before the 2019 Amendment, if a party were to bring a claim against an arbitrator, it would have

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<sup>148</sup> *R K Mohammed Ubaidullah v Hajee C Abdul Wahab* AIR 2001 SC 1658; *Assistant Commissioner Anti Evasion Commercial Taxes Bharatpur v Amtek India Ltd* (2007) 11 SCC 407.

<sup>149</sup> *Harbhajan Singh v State of Punjab* AIR 1966 SC 97.

<sup>150</sup> *In re R Karuppan*, 2004 Cr LJ 4284 (Mad) (FB).

<sup>151</sup> *State of Orissa v Bhagaban Bank* AIR 1987 SC 1265; *Chaman Lal v State of Punjab* AIR 1970 SC 1372.

<sup>152</sup> K Kannan and Anjana Prakash, ‘*Ratanlal & Dhirajlal: Indian Penal Code (PB)*’ (36<sup>th</sup> edn. Lexis Nexis Online Version 2020) [Ratanlan & Dhirajlal].

<sup>153</sup> *In re SK Sundaram* AIR 2001 SC 2374.

<sup>154</sup> *Ratanlal & Dhirajlal* (n 152).

<sup>155</sup> *ibid.*

<sup>156</sup> Mumbai Centre for International Arbitration Rules 2016, r 34.1.

<sup>157</sup> *N.V. Shamsunder v Savitabai* 2006 SCC OnLine Bom 759 para 7.

<sup>158</sup> *ibid.*

required prior sanction from the government under Section 197 of the Code of Criminal Procedure 1973 ('CrPC').<sup>159</sup> The requirement of prior sanction is considered to be a protection against a browbeating of the litigants and persons aggrieved by the judicial function of judges.<sup>160</sup> The introduction of 42-B of the Act removes such protection, since the provision is silent on the procedure to be adopted while entertaining complaints under the said provision.

(iv) *Lack of Procedural Clarity*: A connected question to the aforesaid ambiguity is regarding which court is supposed to entertain a complaint against the arbitrator. Would the appropriate court be the court defined under Section 2 (1)(e) of the Act for both civil and criminal liability? If that is so, how would a commercial court entertain a criminal complaint? Furthermore, would such complaint have to be brought before the court at the seat, or at the place of residence of the arbitrator? To compound this problem, even if an appropriate court is determined, how would it exercise its jurisdiction over non-resident/foreign arbitrators? Will such arbitrators require extradition and oddly enough, how would orders be enforced, even if the same were to be passed against foreign arbitrators in arbitrations seated in India?

(v) *No Limitation Period*: Section 42-B of the Act, and similar provisions across the globe are silent on when a party is entitled to bring a claim against the arbitrator. Can a claim be brought only after the termination of the mandate of the arbitrator, the passing of an award or at any time during the pendency of the arbitration proceedings? If a party is aggrieved by the conduct of the arbitrator during the proceeding, then the Act already contains safeguards in Section 14 (3) of the Act for the termination of the arbitrator's mandate.

Similarly, allegations of lack of independence and impartiality of the arbitrator can be addressed through the challenge procedure under Section 12 and 13 of the Act which broadly covers misconduct. Any allegations of unequal treatment or violation of Section 18 of the Act are also protected by having the award set aside under Section 34(2A) of the Act as well as on the ground of "patent illegality".<sup>161</sup> That is the reason Section 25 of the (Singapore) International Arbitration Act, 2002, ('SI Act') grants immunity to arbitrators for any mistake of law, fact or procedure<sup>162</sup> as bonafide, yet the erroneous exercise of judicial power is not an act of misconduct.<sup>163</sup>

In the absence of any clarity whether the liability of arbitrators is a civil liability, criminal liability or both, a disgruntled party may bring a criminal action years after an award has been passed since the LA would not apply to criminal liability. Furthermore, with the recent Arbitration and Conciliation (Amendment) Ordinance, 2020, providing for an unconditional stay on allegation of fraud and corruption, an errant party may be incentivised to call into question the conduct of the arbitrator to prevent the enforcement of an award.

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<sup>159</sup> *Pravin Niwritti Sawant v J.D. Anandgaonkar, Ex. J.M.F.C., Ichalkaranji* 2007 SCC OnLine Bom 394 para 13. *Under section 197 of the CrPC no court can take cognisance of an offence allegedly committed by a Judge or Magistrate without the prior sanction of the Government.*

<sup>160</sup> *Subhash Sadashiv Risbud v State of Maharashtra* 2013 SCC OnLine Bom 882 para 8.

<sup>161</sup> Act s 34 (2A): *An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.*

<sup>162</sup> SI Act, s 25(b): *any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.*

<sup>163</sup> *P.C. Joshi v State of UP & Ors* (2001) 6 SCC 491.

(vi) *Conflict with the JPA*: The glaring silence to the above questions by itself is sufficient to warrant an amendment to Section 42-B of the Act, if not repeal. The inconsistencies, unfortunately, do not rest with the aforesaid questions alone. Due to the ignorance of the provisions of the JPA, there is an apparent conflict between the provisions of the JPA and Section 42-B of the Act. Applying the ordinary cannons and rules of statutory interpretations, the special law, i.e., the Act ought to prevail over the provisions of the general law, i.e., the JPA. However, the JPA contains a saving clause that “*The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force providing for protection of Judges.*”<sup>164</sup> Therefore, the JPA would continue to apply as it is in addition<sup>165</sup> to the protection granted under any other law.<sup>166</sup> Since a saving clause is used to protect existing rights,<sup>167</sup> remedies and privileges from destruction,<sup>168</sup> the absolute immunity granted under the JPA would continue to be extended to arbitrators.<sup>169</sup>

Even if the line of reasoning mentioned above were to be discarded, the absence of any non-obstante language such as “*notwithstanding anything contained in any other law for the time being in force*” as contained in section 42A (which was also inserted by the 2019 Amendment), the saving clause of the JPA would prevail. Further, the language of Section 42-B does not permit derogation of any kind based on the will of the parties due to the absence of the language “*unless otherwise agreed by the parties*” and would also supersede anything contained in institutional rules agreed to by the parties.

Therefore, all things considered, under the prevailing regime, arbitrator ought to be granted absolute immunity under the JPA as it provides for a higher degree of protection.<sup>170</sup> Penalty provisions have to be applied in a manner which grants more protection to an individual when two different levels of protection are available.<sup>171</sup> A natural consequence of this interpretation is that the Section 42-B of the Act is rendered otiose, bringing into question the need for an express provision on arbitrator immunity in the first place.

## V. THE WAY FORWARD

In order to save Section 42-B of the Act, from being rendered redundant, an overhaul of the provision is imperative. The provision should protect “*all but the plainly incompetent or those who knowingly violate the law*”.<sup>172</sup> It should address the scope of arbitrator immunity, the standard, the procedural threshold and the appropriate court, which is to adjudicate such complaints. Therefore, the following changes may be considered:

(i) *Scope*: The scope of arbitrator immunity should not be absolute as it does tend to incentivise callousness and misconduct.<sup>173</sup> The appropriate scope of such immunity ought to be a qualified immunity as is recognised across the world and was recommended the HLC as well. The only caveat to this qualified immunity should be the use of a higher threshold which makes an arbitrator liable for such acts, which cannot be remedied under the existing

<sup>164</sup> JPA s 4.

<sup>165</sup> *P. Sujanapal v State of Kerala* W.P. (C) 19651/2013.

<sup>166</sup> *Manjuanth* (n 127) para 22.

<sup>167</sup> G.P. Singh, ‘*GP Singh: Principles of Statutory Interpretation*’, (Lexis Nexis 2015, Online Version).

<sup>168</sup> *ibid.*

<sup>169</sup> *Manjuanth* (n 127) para 22.

<sup>170</sup> *Kunal Saha* (n 132) para 41.

<sup>171</sup> *Rahendra* (n 130).

<sup>172</sup> *Malley v Briggs* (1986) 475 U.S. 335, 341.

<sup>173</sup> *Anastasia* (n 20).

provisions such as a challenge to the arbitrators or setting aside of the award. Thus, Section 42-B of the Act should provide for immunity similar to that contained in Section 25 of the SI Act, which affords protection against negligence, and any mistake of law, fact or procedure as the same can be remedied under the existing provisions of the Act. The liability should only be attracted when the conduct of an arbitrator results in consequences which are beyond remedy or as a matter of public policy tends to lower the faith of parties in arbitration or arbitral process as a whole. A similar interpretation has been made by courts in Dubai which have held that arbitrators can only be held liable in case of “fundamental errors,” i.e., a failure to comply with unambiguous legal principles or ignorance of clear-cut facts.<sup>174</sup>

(ii) *Standard*: It is imperative for the law to ensure that arbitrators are effectively protected. The same cannot be done unless the standard on which their conduct is to be tested is prohibitively high to prevent frivolous allegations and harassments. If the standard were to be lowered, the essence of protecting arbitrators and their discharge of judicial function<sup>175</sup> would be moot. Hence, the standard should be the same as recommended by the HLC, i.e., bad faith which provides a higher threshold but at the same time does not absolve arbitrators from deliberate misconduct such as fraud or corruption.

(iii) *Procedure*: In order to ensure that arbitrators are not subjected to unnecessary harassment or abuse of the process of law<sup>176</sup> by being called upon to justify all their acts, it is necessary that adequate procedural safeguards are provided within the provision. Since an arbitrator operates under the national legislative framework and the court has supervisory jurisdiction over the arbitration proceeding under the *lex arbitri*,<sup>177</sup> it is court having jurisdiction under the *lex arbitri* that ought to at least take a *prima facie* view on the merit of the complaint.<sup>178</sup> Similar to the scrutiny provided for under the ICSID, it is only when the court on such a *prima facie* view finds that an inquiry is warranted, should the court take cognisance of the matter and direct further investigation or proceedings. If the court comes to the conclusion that a criminal offence is made out, then the court can adopt a similar provision as provided under Section 340 of the CrPC for perjury and refer the matter to the appropriate court.<sup>179</sup>

Therefore, Section 42-B should specify that a complaint would initially be brought before the court having the court under Section 2 (1)(e) of the Act. The court would then take a *prima facie* view of whether the complaint requires any enquiry or should be dismissed at the threshold. Only subsequent to such determination, the court would then either decide the civil liability of the arbitrator or refer the matter to the appropriate court under the CrPC if it appears that an offence has been committed by the arbitrator in the proceedings or in relation to the proceedings.

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<sup>174</sup> Mercedes Torres Lagarde, Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration, 2015 (33) 4 ASA Bulletin, KLI, 787, 804, 806.

<sup>175</sup> *Sat Narain* (n 5) para 3.

<sup>176</sup> *Ram Lal* (n 136).

<sup>177</sup> *BGS SGS SOMA JV v NHPC* (2020) 4 SCC 234.

<sup>178</sup> Jason L. Honigman, ‘Proof of Good Faith’ (1925) 23 (8) Mic. LR 870, 872.

<sup>179</sup> CrPC s 340 (1): *When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary.*

(iv) *Limitation*: A crucial aspect to ensure the efficiency and integrity of the arbitral process is that any allegations of misconduct against an arbitrator are made a procedural tool to cause prejudice to the arbitral process itself. Such allegations should not become a tool in the hands of errant parties to delay proceedings, resist enforcement of awards and also dampen the spirit of arbitrators. Hence, it is necessary to specify when and until what period such claims can be made against arbitrators. Further, Section 42-B of the Act should contain an express provision similar to that contained in Section 36(2) of the Act which states that the enforcement of the award should not be stayed because of the mere filing of an application to set aside the award.<sup>180</sup>

It is also necessary to ensure such challenges are not made during the course of arbitration proceedings as there are existing procedures such as Section 13 and 14 of the Act which already provides for a suitable remedy. Furthermore, an arbitrator cannot be held liable *ad infinitum*. Therefore, any claim alleging misconduct should be brought within 90 days the termination of the mandate of the arbitrator, i.e., either after passing of the award or when the arbitrator's mandate is terminated under Section 14 of the Act or if the arbitrator withdraws from the proceeding.<sup>181</sup>

However, this would leave room for allegations against the arbitrator on facts which come to the knowledge of a party after the expiry of 90 days. Hence, the provision should provide for a limitation of 30 days from the date of knowledge of such facts.

#### *Draft Provision*

Based on the above, it is suggested that the following provision may be considered to replace Section 42-B of the Act:

“Section 42-B: Protection to Arbitrators:

- (1) Notwithstanding anything contained in any other law for the time being in force, unless otherwise provided in the rules agreed to by the parties, no court, or judicial authority, shall entertain any complaint, suit or other legal proceedings against an arbitrator, unless the Court under this Act, *prima facie* finds that the act(s) or omission(s) or conduct of the arbitrator is shown to have been done in bad faith.

*Provided that* an arbitrator shall not be liable for (a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.

*Provided further* that no complaint, suit or other legal proceedings shall lie against an arbitrator after the expiry of 90 days from the date of termination of the

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<sup>180</sup> Act s 36 (2): *Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of subsection (3), on a separate application made for that purpose.*

<sup>181</sup> Italy art. 813: *The arbitrator shall be liable for damages caused to the parties if he or she:*

(1) *has fraudulently (dolo) or with gross negligence (colpa grave) omitted or delayed acts that he or she was bound to carry out and has been removed for this reason, or has renounced the office without a justified reason;*  
 (2) *has fraudulently or with gross negligence omitted or prevented the rendering of the award within the time limit fixed according to Articles 820 and 826.*

mandate of such arbitrator, or within 30 days of the knowledge of the facts by the aggrieved party giving rise to the complaint.

- (2) If the Court under sub-section (1) finds that the act(s) or omission(s) or conduct of the arbitrator is was *prima facie* in bad faith, the Court shall decide the civil liability of the arbitrator as if it were a suit under the Code of Civil Procedure 1908, or send such complaint to the appropriate court under the Code of Criminal Procedure, 1973, if it appears that an offence has been committed in, or in relation to the arbitration proceedings.
- (3) Where an application has been made under sub-section (1), the mere filing of such application shall not by itself render the award unenforceable, unless the court grants an order of stay of operation of the award, for reasons to be recorded in writing.”

## VI. CONCLUSION

The concept of arbitrator immunity gained currency because it was widely recognised that an arbitrator is empowered to do everything that a civil court can do,<sup>182</sup> and since an arbitrator can act in place of a court, an arbitrator performs a judicial function.<sup>183</sup> Given that judges are afforded protection for acts done in discharge of judicial function, there stands no reason why the arbitrators should not be afforded the same protection.

Though, this understanding of immunity is more common law centric,<sup>184</sup> even civil law countries recognised the need to protect arbitrators in order to encourage arbitration seated in such jurisdictions. However, despite various jurisdictions bringing in amendments to protect arbitrators, the conspicuous absence of a provision relating to the liability of the arbitrators in the Model Law has led to piecemeal fixes across arbitration statutes.

Most arbitration statutes today recognise qualified arbitrator immunity but do little else. The lack of uniformity on the source, scope, nature and standard relating to arbitrator immunity, has thrown open more questions and dilemmas, instead of providing answers. The limited recognition of the immunity has failed to address procedural aspects of whether such liability will be civil, criminal or both. More importantly, it is also not clear which court would exercise jurisdiction, especially over foreign arbitrators.

In India, the introduction of Section 42-B of the Act has expressly recognised qualified arbitrator immunity. Unfortunately, the same has come at the expense of ignorance of a regime providing absolute immunity to arbitrators under the JPA. This ignorance has laid to devastating and unintended consequences as the Parliament while enacting Section 42-B of the Act has discarded the recommendation of the HLC.

The current position is mired in conflicting cannons of interpretation and absolute lack of clarity on the appropriate standard to be adopted while judging claims against arbitrators. Though a compromise can be found in the saving clause of the JPA which would continue to extend absolute immunity to arbitrators, it is nonetheless unclear whether courts would accept such an interpretation in the face of a contrary express legislative intent.

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<sup>182</sup> *Sundaram Finance Ltd. v P. Sakthivel* 2018 SCC OnLine Mad 3080 para 13.

<sup>183</sup> *Onyeama* (n 24) 33.

<sup>184</sup> *Susan* (n 4) 17.

It is more likely that the courts may give primacy to Section 42-B of the Act, which would mean that an arbitrator would have to justify her actions and face the never-ending litigation battle before Indian courts. More importantly, the integrity and confidence of an arbitrator would be shattered by mere allegations alone. To compound on this devastation, an arbitrator would have to stand trial, discharge the burden of ‘good faith’ and ultimately may be vindicated, but be punished by the process inevitably.

For the time being, a possible way to prevent such harassment, foster confidence of the arbitrators, and make India a pro-arbitration regime, the standard of ‘good faith’ should be read in consonance with the GCA and not the LA or the IPC as it affords more protection to arbitrators as it uses the test of ill-intent. For any lack of due care and attention, the Act already contains sufficient remedies, *inter-alia*, a challenge to arbitrators and the setting aside of awards.

Though absolute immunity may not be the way forward, the qualified immunity granted under Section 42-B requires a comprehensive re-look, especially as the same has been introduced without keeping in mind the extant provisions of the JPA. Furthermore, several procedural questions require examination, failing which, arbitrators in India may be subject to unnecessary harassment at the hands of disgruntled parties, instead of being protected. Therefore, the Parliament may consider replacing Section 42-B with the draft provision suggested in this paper.