

A Discussion on the Three-Tier Logic of Arbitrators' Civil Liability

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Abstract: The system of arbitrator liability is a core issue in the arbitration legal system, involving a balance between the fairness and efficiency of arbitration and the protection of the parties' rights. This paper, starting from the theoretical foundation of the legal status of arbitrators, systematically analyzes the composition, exemption boundaries, and improvement paths of the arbitrator liability system. First, based on contractual relationships, it explores the special service contract relationship between arbitrators and parties; second, from the perspective of their status, it analyzes the quasi-judicial functions and professional duty of care of arbitrators; finally, combining the theory of judicial immunity, it proposes to construct a limited exemption system "based on the degree of fault in defining the scope of liability." By comparing international legislative examples with the limitations of Article 38 of China's Arbitration Law, it proposes suggestions for improving China's arbitrator liability system, including clarifying the nature of liability, optimizing procedural safeguards, and establishing professional insurance mechanisms, to achieve a value balance between the fairness and efficiency of arbitration.

Keywords: Arbitrator's civil liability, Status attributes, Limited immunity.

1. Theoretical Basis of the Civil Liability System for Arbitrators

1.1. The dual legal relationship between arbitrators and parties to arbitration – identity – contractual relationship

To explore the relationship between arbitrators and parties to arbitration, a clear understanding of the interests at stake in arbitration is essential.[1] Taking ad hoc arbitration as an example, the arbitrator, the party appointing the arbitrator, and the opposing party each have potentially conflicting interests. The party appointing the arbitrator has dual interests: first, based on the arbitration agreement, they expect a legal and fair resolution of the dispute within a framework excluding interference from public authorities; second, they implicitly assume the financial responsibility of paying the arbitrator's remuneration, forming a de facto commitment to payment.[2] The opposing party's interests also manifest in two dimensions: on the one hand, they worry that the arbitrator may be biased due to their financial ties with the appointing party, thus emphasizing the need for the arbitrator to maintain an independent and impartial adjudicative stance to ensure the fairness of the arbitration process and outcome; on the other hand, regarding cost-sharing, they are only willing to pay necessary and reasonable expenses, refusing any financial burden exceeding expectations.[3] The arbitrator's interests also have dual attributes: first, they hope to avoid affecting their independence and impartiality due to connections with specific parties during the arbitration process, maintaining a neutral adjudicative professional image; second, they expect to obtain the agreed remuneration, achieving reasonable economic benefits, even if the amount may exceed the opposing party's expectations.[4] Therefore, two core value judgment standards exist in arbitration practice: first, ensuring the legality of the arbitration procedure and the fairness of the award, thus maintaining the credibility of the arbitration system; and second, reasonably defining the scope of cost sharing to balance the economic interests of all parties.[5]

Only by achieving the coordination and unity of these two values can a healthy and orderly arbitration relationship be built, and the dispute resolution effectiveness of the arbitration system be fully realized.[6]

Based on the above research on the value choices of arbitrators and arbitration parties, it can be concluded that the legal relationship between arbitrators and arbitration parties is essentially a composite one, including both a status-based legal relationship with the object of making an award and a service contract relationship with the object of providing arbitration services. The status-based legal relationship, centered on the right to award, originates from the transfer of state judicial power, thus broadly authorizing arbitration parties to resolve their disputes outside of litigation in accordance with legal procedures. Arbitration parties trigger this broad authorization through the arbitration agreement and exercise the right to allocate the award power within it. Through the appointment of arbitration parties and the acceptance of the appointment of arbitrators, arbitrators, in their capacity as arbitrators, legally acquire the right to award on the dispute and perform the duties of arbitrators as stipulated by law based on their status. Arbitrators do not receive remuneration for exercising their award power according to law, but enjoy immunity from liability in the event of an erroneous award. The contractual legal relationship involves all arbitration services other than the award itself, including reading legal documents submitted by the arbitration parties, organizing arbitration hearings and cross-examination, and drafting the arbitration award, etc., and its legal basis is the arbitration service contract reached between the arbitrator and the arbitration parties regarding the aforementioned arbitration services. Arbitrators who provide arbitration legal services are entitled to receive remuneration from the parties to the arbitration in accordance with the arbitration service contract, but unless otherwise agreed or there are special provisions in the law, they do not enjoy the exemption from liability for breach of contract under contract law.

1.2. Historical and Current Status of Research on the Legal System of Civil Liability of Arbitrators

Strictly speaking, China does not stipulate the civil liability of arbitrators. At a lower standard, only Article 38 of the Arbitration Law relates to civil liability. Article 38 states that if an arbitrator meets privately with parties or their agents, or accepts gifts or entertainment from parties or their agents, and the circumstances are serious, or if they solicit or accept bribes, engage in favoritism or malpractice, or render a wrongful award in an arbitration case, they shall bear legal responsibility according to law, and the arbitration commission shall remove them from the commission. The term "legal responsibility" in the article does not clearly define its nature; it is merely a general provision. It does not mention the procedures or subjects for pursuing liability, nor are there any supplementary laws to supplement this provision, rendering it largely ineffective. Therefore, it is practically impossible for parties whose legitimate rights and interests have been infringed to file a lawsuit based on this article. While the academic community generally agrees that arbitrators should bear civil liability for improper conduct, there are significant differences in the choice of liability model. Currently, three main models exist in Western practice: full liability model, absolute immunity model, and limited liability immunity model. The full liability model is mostly adopted by civil law countries. Based on contract theory, this model holds that arbitrators and parties are bound by a service contract and are liable for damages for negligence. The absolute immunity model, on the other hand, is based on the quasi-judicial nature of arbitration, granting arbitrators immunity similar to that of judges. This model is primarily applicable to common law countries. With the exchange and integration of the two legal systems, the limited liability immunity model has gradually emerged, with countries like the UK and the US showing a trend towards this model. Under this model, the arbitrator's immunity is limited; they are only exempt if their conduct complies with the law, and are liable for damages if they violate mandatory legal provisions.

In constructing a system of civil liability for arbitrators, research primarily focuses on three core issues: the scope of liability, the elements constituting liability, and the methods of assuming liability. Regarding the scope of liability, most scholars advocate for a moderate expansion, suggesting that acts such as gross negligence, unjustified withdrawal from arbitration, and breach of disclosure obligations be included within the scope of liability. Regarding the elements constituting liability, the fault-based liability principle enjoys widespread support, with subjective intent or gross negligence, breach of professional duty, and actual damage as constituting elements. However, there is disagreement on whether to include the causal relationship element, with some scholars advocating for the introduction of the presumption of fault principle to balance the difference in status between the parties and the arbitrators. Regarding the methods of assuming liability, while traditional civil liability methods such as cessation of infringement and compensation for losses have reached a consensus, significant controversy exists regarding the upper limit of compensation, mainly including three viewpoints: limited to remuneration, full compensation, and compensation based on circumstances. Furthermore, scholars have proposed supporting systems such as establishing professional liability insurance, strengthening

professional training, and setting up a compensation fund to ensure the effective operation of the civil liability system for arbitrators.

2. A Detailed Discussion of the Three-tiered Logic of Arbitrators' Civil Liability

2.1. First layer of logic: Liability for breach of contract under contractual relationship

Arbitrators' liability for breach of contract stems from the special service contract relationship formed between them and the parties. Based on comparative law experience and Chinese practice, the elements of arbitrator liability for breach of contract can be divided into procedural breach and substantive breach. Procedural breach mainly refers to arbitrators violating procedural obligations agreed upon by the parties or the arbitration rules, including failure to render an award within the time limit agreed upon by the parties (for example, the Xuancheng Arbitration Commission rules explicitly list "serious consequences caused by negligent delay in handling a case" as a ground for liability); disclosing the contents of the arbitral tribunal's deliberations or the parties' trade secrets before the award; violations of the confidentiality obligations stipulated in Article 40 of China's Arbitration Law may trigger disciplinary and civil liability; and violations of procedural impartiality, such as failing to give parties an opportunity to present their cases or failing to recuse themselves when required. According to Supreme People's Court precedents, such conduct may lead to the annulment of the award, and the arbitrator will bear corresponding responsibility. The principle of liability for procedural breach usually adopts fault-based liability, that is, it is necessary to prove that the arbitrator acted intentionally or with gross negligence. Substantive breach of contract involves the arbitrator's adjudication of the disputed subject matter. Firstly, it involves the deliberate misinterpretation of contract terms or legal norms. However, it's important to note that mere differences in legal understanding do not constitute a breach of contract; only "deliberate violation of facts and law" can lead to liability (Article 399-1 of the Criminal Law). Secondly, it involves flaws in fact-finding, such as deliberately ignoring key evidence or accepting false evidence. Liability includes acts such as "tampering with or falsifying evidence." Finally, it includes formal defects in the award, such as refusing to sign the award. The Hamburg Court of Appeal in Germany has ruled such actions constitute breach of contract. The determination of substantive breach of contract requires a strict distinction between "freedom of judgment" and "malicious abuse of power." "Substantive adjudication is a professional judgment made by the arbitrator based on considerations of fairness and justice in a specific case, and it is the core of the judicial nature of arbitration. From the perspective of arbitral independence, it should generally be exempt from liability."

To balance the constraints of liability with the independence of arbitration, most countries have established rules limiting liability. Article 584 of the Austrian Code of Civil Procedure stipulates that arbitrators are only required to return their remuneration, not to pay full compensation. The legal basis for this rule is twofold: firstly, arbitrators receive limited remuneration and should not bear excessive professional risk; secondly, the adjudicative act is irreversible,

and monetary compensation cannot fully compensate for losses due to errors in the award. Although China has no explicit provisions, the Xuancheng Arbitration Commission's practice of "withholding or recovering remuneration" reflects a similar concept. In practice, parties can limit the arbitrator's liability through agreements. Article 7 of the International Bar Association's Code of Conduct for Arbitrators allows parties to agree to exclude liability for minor negligence, but there are boundaries to autonomy of will, and liability for intentional or gross negligence cannot be excluded. Courts should exercise restraint in intervening in the arbitrator's liability, examining only whether statutory procedures were violated during review, without interfering with the substantive award. When stipulating the arbitrator's liability for breach of contract, the value of arbitration efficiency should be emphasized; excessive liability will lead to excessive caution by arbitrators. Risk sharing should also be reasonable: risk should be dispersed through mechanisms such as professional insurance, rather than being borne solely by the arbitrator. In summary, the principle of "limited exemption" should be upheld in determining the liability of arbitrators for breach of contract: procedural breaches should be strictly investigated, while substantive adjudicative acts should be exempted in principle, with exceptions only for intentional or grossly negligent acts, and the scope of liability should be reasonably limited through mechanisms such as reimbursement and autonomy of will.

2.2. The second layer of logic: the professional duty of care in the identity attributes of arbitrators

The quasi-judicial status of arbitrators stems from the recognition and delegation of the arbitration system by the state's judicial power. This special legal status has a dual characteristic: on the one hand, the power of arbitration derives from the contractual authorization of the parties; on the other hand, the enforceability of arbitral awards depends on the endorsement of the state's judicial power. Article 53 of my country's Arbitration Law explicitly stipulates that arbitral awards have the same legal effect as court judgments, which essentially places arbitrators in a "quasi-judge" legal position. From a comparative law perspective, legislation such as Article 29 of the UK Arbitration Act 1996 and Article 584 of the German Code of Civil Procedure recognize that arbitrators possess judicial attributes similar to judges in their functions, including core powers such as the determination of facts, the application of law, and the issuance of final awards. Based on this quasi-judicial status, arbitrators must bear a more stringent professional duty of care than general professionals. In terms of substance, arbitrators should comprehensively examine the evidence to avoid major oversights. A 2020 case by the Court of Appeal of Asturias Province, Spain, clearly states that an arbitrator's failure to examine key technical evidence constitutes gross negligence. The spirit of the law must be correctly understood. Article 399-1 of China's Criminal Law stipulates that "intentionally violating facts and laws" is a constituent element of the crime of wrongful judgment. In areas with greater discretion, such as contract interpretation, industry practices and the principle of fairness must be followed to ensure impartiality in the judgment.

In terms of procedure, both parties must be treated equally. Article 33 of the "Rules of Arbitration for Labor and Personnel Disputes" prohibits arbitrators from "favoring one party." Countries such as Austria and Portugal stipulate that

arbitrators who issue awards after the deadline are liable for compensation. Arbitrators must also fulfill their professional ethical obligations. my country stipulates that arbitrators must not "meet privately with parties and their agents, or accept gifts or invitations." The International Bar Association's "Guidelines on Conflicts of Interest" requires disclosure of all circumstances that may affect impartiality. Furthermore, confidentiality obligations must be observed; disclosing trade secrets may trigger both civil and criminal liability, as seen in the "hot pot base case" where an arbitrator was criminally prosecuted.

2.3. The third layer of logic: the limitation of arbitrators' liability under judicial immunity

The core value of the arbitrator's immunity system lies in balancing the dual needs of independent adjudication and accountability. From a functional perspective, immunity aims to create an environment where arbitrators are not subject to undue interference from parties. US case law likens arbitrators to judges, arguing that their professional roles are essentially the same, differing only in their enforcement areas. This quasi-judicial positioning requires arbitrators to enjoy immunity similar to judges in substantive awards; otherwise, the losing party might exert pressure through liability litigation, undermining the impartiality of arbitration. From an efficiency perspective, the finality of an award requires limiting secondary disputes. Section 29 of the UK Arbitration Act 1996 stipulates that exempting arbitrators from liability can prevent parties from delaying enforcement under the pretext of accountability, maintaining the "time-saving and cost-effective" advantage of arbitration. Law and economics analysis further points out that the cost of holding highly discretionary awarding parties accountable is too high and may distort arbitrator behavior; therefore, immunity becomes a more efficient option.

Modern legislation generally adopts a dichotomy of conduct to define the boundaries of exemptions, dividing them into the scope of exemption and the scope of non-exemption. The scope of exemption includes both substantive and discretionary conduct. Substantive adjudication conduct includes errors in the application of law and deviations in fact-finding; US case law even exempts conduct involving "serious violations of procedural rules," arguing that the substance of the award is unaffected by procedural flaws. Procedural discretionary conduct includes matters such as standards for admissibility of evidence and court arrangements; German law stipulates that unless mandatory procedural rules are violated, arbitrators' procedural discretion is not subject to liability. The scope of non-exemption includes gross negligence and procedural irregularities. Article 34, Paragraph 4 of China's Arbitration Law lists "meeting with parties privately or accepting gifts or entertainment" as grounds for liability; the American Arbitration Association, while adopting the principle of exemption, explicitly excludes exemption for "intentional wrongdoing"; and gross procedural irregularities include failure to disclose conflicts of interest and resignation without just cause; Portuguese Arbitration Law stipulates that arbitrators who resign without cause must compensate for losses; Italian law requires liability for invalid awards resulting from exceeding the time limit. The core dilemma facing limited exemptions lies in the subjectivity of judging good faith/malice. While Kenya's Arbitration Law provides

for immunity for arbitrators based on "good faith" conduct, the court in the Junction Apartments case held that determining good faith requires a comprehensive review of evidence, rendering the immunity ineffective in litigation. To resolve this contradiction, modern institutional design emphasizes:

1. Procedural alternative mechanism: France allows lawsuits to overturn rulings for procedural violations, rather than directly holding arbitrators accountable;

2. Supplement to professional self-discipline: For example, Chinese arbitration institutions implement disciplinary actions such as dismissal or expulsion through the "Code of Conduct for Arbitrators";

3. Diversification of economic risks: Some arbitration institutions have established liability insurance to cover compensation for arbitrators' negligence.

This "principle-based exemption + exception-based accountability" model maintains the independence of arbitration through judicial conduct exemptions while restraining the abuse of power by clearly defining exceptions (such as the "good faith exception" in English law), thus achieving a dynamic balance of arbitration's value objectives.

3. Conclusion

The arbitrator liability system needs to coordinate the three values of freedom of contract, professional authority, and judicial immunity to form an organically unified normative system. The service contract relationship between the arbitrator and the parties constitutes the basis of liability, but unlike a general engagement contract, this contract has the characteristic of "outcome obligation"—the arbitrator must not only fulfill procedural obligations but also produce a legally valid award. Austrian law refers to such contracts as "arbitrator contracts," emphasizing their dual attributes of service and adjudication. The quasi-judicial status of arbitrators requires them to bear a higher duty of care than general professionals. The Spanish Supreme Court, through the "Technical Arbitrator Case," established "professional expert standards," requiring arbitrators to demonstrate "the skill level expected of experts of their kind." The Xuancheng Arbitration Commission's provision that "compensation must be recovered if a gross negligence leads to the annulment of an award" reflects this logic. Judicial immunity is not a privilege but a design for checks and balances. The UK House of Lords, in the *Arenson* case, pointed out that immunity aims to prevent "the losing party from interfering with arbitration through litigation threats." However, immunity should not be absolute. Article 16B of the Kenyan Arbitration Act employs the "bona fide exclusion" technique, protecting the independence of arbitration while curbing the abuse of power. In improving the arbitrator liability system, three core values should be upheld. First, a dynamic balance between fairness and efficiency is crucial. Overly strict liability leads to "defensive arbitration," while overly lenient exemptions induce moral hazard. "Proportional liability"—determining

the proportion of compensation based on the degree of fault—achieves value equilibrium. Second, a dialectical unity between the rights of the parties and the protection of arbitrators is essential. The liability system must prevent the abuse of power while avoiding the overgeneralization of liability that stifles the vitality of arbitration. Establishing professional liability insurance and a compensation fund is key to resolving this paradox. Improving the arbitrator liability system is a crucial step in enhancing the credibility of arbitration in China. This analysis shows that the defects of the current system are essentially a systemic normative imbalance, requiring structural reconstruction through revisions to the Arbitration Law. Future legislation should adhere to the principle of "limited exemption," constructing a hierarchical and interconnected liability system: embedding professional standards into contractual logic, injecting autonomy of will into identity attributes, and retaining necessary constraints within judicial immunity. By establishing liability standards based on the degree of fault, optimizing procedural safeguards such as the "safe harbor rule," and innovating industry risk-sharing mechanisms, a modern liability system that both constrains the abuse of arbitration power and guarantees the independence of arbitration will ultimately be formed. This reform is not only about protecting the rights and interests of arbitrators, but also a strategic measure to optimize the business environment and enhance my country's international competitiveness in arbitration. It is recommended that the legislature establish a special chapter on arbitrator liability in the revision of the Arbitration Law, that the Supreme People's Court issue supporting judicial interpretations, and that arbitration institutions simultaneously improve their professional protection mechanisms to jointly promote the modernization of the arbitration governance system.

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