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The process of settling private disputes through arbitration has long been favored as a quick and certain alternative to litigation and overcrowded court dockets. To further this process, arbitrators have historically been granted quasi-judicial immunity in order to assure the exercise of their free and independent judgment. A grant of immunity also serves to encourage individuals to become arbitrators. Recently, however, in *Baar v. Tigerman* the California Court


2. *Baar v. Tigerman, 140 Cal. App. 3d 979, 984, 189 Cal. Rptr. 834, 838 (1983)* (“the courts have looked favorably upon arbitration as an alternative to litigation in the courts”). See also Saxis Steamship Co. v. Multifacs Int’l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967) (arbitration provides for the speedy disposition of disputes without the expense and delay of extended court proceedings); Rhine v. Union Carbide Corp., 343 F.2d 12, 16 (6th Cir. 1965) (“under federal law it is now a clearly established national policy to encourage the use of arbitration”); M. Domke, *supra* note 1; Burger, *Isn’t There A Better Way*, 68 A.B.A. J. 274 (1982).


4. See, e.g., Tamari v. Conrad, 552 F.2d 778, 781 (7th Cir. 1977) (“individuals... cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit”).

of Appeal held that an arbitrator could be held liable for damages for failure to render a timely decision. Rather than extending quasi-judicial immunity to protect Tigerman, a private arbitrator who failed to render a timely award, the court examined the nature of arbitration and quasi-judicial immunity and concluded that Tigerman could be held liable for compensatory and punitive damages for breach of contract and for several other possible causes of action.  

This decision has not only been a cause of great concern for those in the field of arbitration, but it also raises questions which touch on the very essence of arbitration, and on the concept of judicial immunity. The resolution of the issues in *Baar* is made particularly difficult by the presence of two equally compelling, but diametrically opposed policies. Holding an arbitrator liable for failure to render a timely award furthers the policy favoring arbitration as a means for the speedy resolution of private disputes. Consequently, a grant of immunity for such conduct would run directly contrary to this policy. However, holding arbitrators liable for failing to make a timely decision could also have a “chilling effect” on arbitration — fewer individuals would be willing to offer their services as arbitrators, lest they be required to answer in court for damages. As a result, the policy of encouraging arbitration as an alternative to litigation would be hindered. In addition, parties involved in arbitration might be less willing to grant extensions to arbitrators, knowing that they could recoup not only the arbitrator’s fees, but costs and attorney fees as well. Thus, rather than using arbitration as a means for avoiding the courts, the parties would again find themselves on the courthouse steps. Finally, the quality of the arbitrator’s decision could be af

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6. *Id.* at 986, 189 Cal. Rptr. at 834. See also infra note 16 and accompanying text.  
7. See, e.g., *Petition For Hearing In The Supreme Court After Decision By The District Court Of Appeal, Second Appellate District, Division Three, And Denial Of Petition For Re-Hearing Therein* at 5-7, *Baar v. Tigerman*, 2nd Civil Nos. 64463, 65501 and 65888 (1983) [hereinafter cited as *Petition of the AAA*].  
8. See *supra* note 2 and accompanying text.  
10. See, e.g., Tamari v. Conrad, 552 F.2d at 778, 781 (7th Cir. 1977); *Petition of the AAA*, *supra* note 7, at 6.  
11. See generally *Burger, supra* note 2.
fected, the arbitrator being more concerned with getting his decision out on time than with making the "right" decision. This would be especially true in cases in which difficult and complex issues are involved. All of these policies act in favor of granting an arbitrator immunity, at least to some extent, for failure to render a timely decision, thus setting the stage for a confrontation between two equally laudable, though opposing, policy considerations.

I. STATEMENT OF THE CASE

In 1975, pursuant to the terms of their limited partnership agreement, plaintiffs Baar and others engaged the American Arbitration Association (AAA) to administer arbitration proceedings. The AAA selected Tigerman as the arbitrator and hearings commenced on November 1, 1976. Over a period of more than three years, approximately forty-three days of evidentiary hearings ensued, finally concluding on March 11, 1980. The parties submitted final briefs on July 17, 1980 and Tigerman was given thirty days to render his decision. Tigerman was later granted a three month extension, but still had not made an award seven months after the arbitration was submitted. The parties then filed a written objection and Tigerman lost his authority to make the award.


The award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration. The parties to the arbitration may extend the time either before or after the expiration thereof. A party to the arbitration waives the objection that an award was not made within the time required unless he gives the arbitrators . . . .
Subsequently, Baar and the others instituted civil actions against Tigerman and the AAA, alleging breach of contract, negligence, unjust enrichment and various other causes of action. The plaintiffs sought $148,000 in compensatory damages and $1,000,000 in punitive damages. The trial court sustained the defendants’ demurrers and held that Tigerman and the AAA were protected by arbitral immunity. The California Court of Appeal reversed, refusing to shield Tigerman with quasi-judicial immunity for breaching his contract to render a timely decision, and held the AAA potentially liable for its administrative actions.

II. THE DOCTRINE OF QUASI-JUDICIAL IMMUNITY AS IT RELATES TO ARBITRATION

The concept of judicial immunity, from which quasi-judicial immunity evolved, has been in existence for centuries and is “deeply rooted” in the common law. It first became

written notice of his objection prior to the service of a signed copy of the award on him.

(emphasis added.)

16. Baar, 140 Cal. App. 3d at 982 n.5, 189 Cal. Rptr. at 836 n.5. Additional causes of action included: breach of fiduciary duty, breach of implied covenant of good faith, detrimental reliance, injurious falsehood and violations of constitutional rights. Id.


18. See Amicus Curiae Brief in Support of Appellant at 2, Baar v. Tigerman, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983) (citing the holding of the superior court: “Defendants have immunity, whether award was late or, as here, where award was not issued.”).


20. Id. The immunity of the sponsoring organization, the AAA, will not be addressed in this note because any reasoning which would apply in holding the arbitrator immune or liable would also apply to the sponsoring organization. In Corey v. New York Stock Exch., 691 F.2d 1205 (6th Cir. 1982) the United States Court of Appeals for the Sixth Circuit held:

Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusionary. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association. Id. at 1211 (cited with approval in Baar v. Tigerman, 140 Cal. App. 3d 979, 986, 189 Cal. Rptr. 834, 839 (1983)). See also Rubenstein v. Otterbourg, 78 Misc. 2d 376, 357 N.Y.S.2d 62 (1973).

established in the United States in *Bradley v. Fisher* in which the Supreme Court held that immunity was necessary to secure the independence required for principled and fearless decision making. It has since been extended from judges to various other public officials and professionals in the form of "quasi-judicial" immunity. The primary impetus behind the decision to grant immunity to certain individuals is the belief that immunity is necessary to protect them from suits filed by "disgruntled litigants who [seek] to hold them liable for alleged misconduct in arriving at a decision." As the Court stated in *Bradley*, "[w]hen the controversy involves questions affecting large amounts of property or relates to a matter of general public concern . . . the disappointment occasioned by an adverse decision, often finds vent in imputations of [improper motives], and from the imperfection of human nature this is hardly a subject of wonder."

22. 80 U.S. (13 Wall) 335, 357 (1872).


26. 80 U.S. (13 Wall.) at 348. For a humorous example of a case arising out of the "imperfection of human nature," see Hohensee v. Goon Squad, 171 F. Supp. 562 (M.D. Pa. 1959), in which inmates of a penitentiary brought a ten million dollar *pro se* antitrust suit against various defendants, including certain prison officials, guards, and the judge who sentenced one of the inmates. The complaint was dismissed and the defendants held immune, their actions being "so closely associated with the judicial process as to make necessary [their] protection from harassment in order to protect the judicial process." Id. at 569 (quoting Cooper v. O'Connor, 99 F.2d 135, 141 (D.C. Cir. 1938)). See also Calzarano v. Liebowitz, 550 F. Supp. 1389 (S.D.N.Y. 1982) (one million dollar *pro se* action brought against an arbitrator who upheld the
Although it is not quite as deeply rooted in the common law as judicial immunity, the application of "quasi-judicial" immunity to arbitrators (arbitral immunity)\(^\text{27}\) is nonetheless well established.\(^\text{28}\) An oft-quoted phrase describing this immunity was set forth in 1884 by the Massachusetts Supreme Judicial Court in *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*:\(^\text{29}\)

An arbitrator is a quasi-judicial officer . . . exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of the opinion that the same immunity extends to him.\(^\text{30}\)

In the overwhelming majority of cases involving arbitral immunity, the decision-making conduct of the arbitrator is challenged and the shield of quasi-judicial immunity serves to protect him from allegations of fraud or corruption in making his decision.\(^\text{31}\) The cases involving arbitral immunity read like mirror images of each other. In each case, the plaintiff's discharge; the complaint, alleging that the arbitrator's conduct violated the eighth amendment's proscription against cruel and unusual punishment, was dismissed).

\(^{27}\) See, e.g., *Jones v. Brown*, 54 Iowa 747, 6 N.W. 140 (1880). In *Jones*, an arbitrator attempting to recover his ten dollar per day fee was confronted with a counterclaim seeking to hold him liable for fraud and corruption. The Iowa Supreme Court held that arbitrators "are in a certain sense a court" and are therefore clothed with the same immunity as the judiciary. *Id.* at _, 6 N.W. at 142. See Domke, *supra* note 3, for discussion of the doctrine of arbitral immunity in various countries.


\(^{29}\) *Id.* at 426.

party losing in arbitration has charged that the arbitrator colluded with the other side in order to defraud him. As a result, any party who believes that such misconduct has occurred can petition to have the arbitrator's award vacated. However, except in a few limited circumstances, the arbitrator's decision will stand. Thus, while it is clear that an arbitrator is immune from actions challenging his conduct or motives in making an award, it remains unclear whether the blanket of immunity protects him in the performance of other acts taken in his capacity as an arbitrator. The cases on this point are far fewer in number.

32. For an illustrative case see Babylon Milk & Cream Co. v. Horvitz, 151 N.Y.S.2d 221 (Sup. Ct. 1956), aff'd, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957), the first case in which arbitral immunity was granted to a labor arbitrator.

33. See, for example, Cal. Civ. Proc. Code § 1285 (West 1982) which provides that: "Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award." Accord, Wis. Stat. § 788.09 (1981-82).

34. See, for example, United States Arbitration Act, 9 U.S.C. § 10 (1976) which provides that a district court:

[M]ay make an order vacating an arbitration award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Accord Cal. Civ. Proc. Code § 1286.2 (West 1982); Wis. Stat § 788.10 (1981-82). See also Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 252 (9th Cir. 1973) (an arbitration award must be upheld unless it is shown that there was partiality on the part of the arbitrator, that the arbitrator exceeded his or her authority, or that the award was rendered in manifest disregard of the law).

35. See Domke, supra note 3, at 103:

The arbitrator who does not fulfill at all or not in due time the obligations which he had undertaken by acceptance of his appointment, is liable to the parties for all damages caused by his unlawful refusal or delay, irrespective of their right to request the termination of the arbitration proceedings.
In *E. C. Ernst, Inc. v. Manhattan Construction Co.*,[^36] the Court of Appeals for the Fifth Circuit held an architect acting in the position of an arbitrator liable for failure to render his decision on time.[^37] However, as the court in *Baar v. Tigerman*[^38] noted, *Ernst* is distinguishable on its facts and is therefore of little precedential value.[^39]

No case has ever directly addressed the issue of an arbitrator's quasi-judicial immunity for failure to render a timely decision. Other than *Ernst*,[^40] in which the court declined to extend immunity, the only case involving this issue is *Graphic Arts International Union, Local 508 v. Standard Register Co.*[^41] In *Standard Register* an arbitrator failed to render an award more than six years after the submission of the dispute to arbitration.[^42] The District Court for the Southern District of Ohio enjoined the arbitrator from collecting any fee for his services and submitted the question of compensatory and punitive damages to arbitration.[^43] However, the concept of arbitral immunity was never mentioned.

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[^37]: 551 F.2d at 1033.
[^39]: The architect's liability was more closely related to negligence in the performance of his duties as an architect. *Id.* at 983 n.6, 189 Cal. Rptr. at 837 n.6. *See infra* note 58.
[^40]: *See infra* note 58.
[^41]: 103 L.R.R.M. (BNA) 2212, *reh'g granted*, 103 L.R.R.M. (BNA) 2214 (S.D. Ohio 1979). However, the judgment and order of the district court were later set aside as being beyond the matters presented to the court. *Graphic Arts Int'l Union, Local 508 v. Standard Register Co.*, 103 L.R.R.M. (BNA) 2214 (S.D. Ohio 1979). In its original decision the court removed the arbitrator and enjoined him from collecting any fee for services rendered. However, only motions to dismiss the complaint were pending before the court. Therefore, the court's order enjoining the arbitrator from recovering his fees went beyond the matters presented before it. As a result, the original order and judgment were set aside. The court in its second decision did, however, deny the motion to dismiss filed by the defendant. *Id.* at 2215. Therefore, the court's original reasoning pertaining to the arbitrator's potential liability would still be valid.
[^42]: *Standard Register*, 103 L.R.R.M. (BNA) at 2212.
[^43]: *Id.* at 2214. The seemingly ludicrous result of submitting the question of an arbitrator's liability for compensatory and punitive damages to another arbitrator stems from the fact that the case involved a labor arbitration, in which somewhat different legal principles apply. Since the question of damages grew out of the terms of a collective bargaining agreement, the court, following the admonition of the Supreme Court in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), submitted it to arbitration.
Because there are few cases on point regarding this issue, it is necessary to further examine the doctrine of quasi-judicial immunity and to determine what factors courts consider in making a decision to blanket an individual with quasi-judicial immunity.

Any discussion concerning the scope of immunity must necessarily begin with Butz v. Economou. In Butz the Supreme Court stated that the proper test to apply in determining whether absolute immunity extends to any person is the "functional comparability" of his judgment to that of a judge. In other words, an individual will be granted absolute immunity if "quasi-judicial" functions are performed by that individual. Regarding the scope of immunity and the determination of whether certain officials in the executive branch enjoyed quasi-judicial immunity, the Supreme Court stated that "[t]he cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location." A grant of immunity, therefore, depends not on the source of the decision making power in question, but rather on the nature of that power.

Further guidelines for determining the scope of quasi-judicial immunity can be found in Stump v. Sparkman. In Sparkman, the Supreme Court faced a situation in which a judge had wrongfully approved a petition for the sterilization of a minor. The Court granted the judge immunity, stating that a judge will be subject to liability only when he acts in the "clear absence of all jurisdiction." Further, a judge is only absolutely immune from liability for acts per-

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45. Id. at 512 (citing Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976)).
47. Butz, 438 U.S. at 512.
50. Id. at 357. For acts taken in the "clear absence of all jurisdiction" see Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (judge held liable for damages suffered by a man whom the judge threw out of the courtroom and physically abused); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963), cert. denied, 379 U.S. 938 (1964) (judge interfered with judicial proceedings after he had disqualified himself); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971) (judge ordered a person sterilized without statutory authority).
formed in his "judicial capacity."\textsuperscript{51} The Supreme Court stated that the relevant factors for determining whether an act is a "judicial act" are: (1) the nature of the act itself, that is, whether it is a function normally performed by a judge, and (2) the expectations of the parties, in other words, whether they dealt with the judge in his judicial capacity.\textsuperscript{52} Since the above tests relate to the scope of judicial or quasi-judicial immunity and the determination of whether particular acts or individuals warrant immunity, they should prove helpful in determining whether to extend arbitral immunity to the act (or "non-act") of failing to render a timely decision.

III. THE Baar Opinion

In \textit{Baar v. Tigerman},\textsuperscript{53} a case of first impression, the California Court of Appeal held an arbitrator potentially liable for failure to render a timely decision. The court based its decision primarily on three grounds. First, the court recognized that quasi-judicial immunity was necessary to promote "fearless and independent decision making,"\textsuperscript{54} and to protect arbitrators from "disgruntled litigants who [seek] to hold [them] liable for alleged misconduct in arriving at a decision."\textsuperscript{55} It then reasoned that because these policies serve only to further the actual decision making process, they have no applicability when the failure to render an award is the conduct at issue. As a result, the court stated: "[r]espondents' contention that this court should extend immunity to an arbitrator who never renders an award fails to appreciate the nature of the arbitrator-party relationship and misperceives the policy underlying arbitral immunity."\textsuperscript{56} The court then cited \textit{E.C. Ernst, Inc. v. Manhattan Construc-

\textsuperscript{51} Sparkman, 435 U.S. at 360.
\textsuperscript{52} Id. at 362. For examples of "non-judicial acts" see Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979) (judge undertook a racially motivated campaign to discredit a black police officer); Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978) (judge ordered a coffee vendor handcuffed and brought before him merely because the vendor's coffee tasted bad).
\textsuperscript{53} 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983).
\textsuperscript{54} Id. at 982, 189 Cal. Rptr. at 836.
\textsuperscript{55} Id. at 983, 189 Cal. Rptr. at 837 (emphasis omitted).
\textsuperscript{56} Id. (emphasis in original).
tion Co.\textsuperscript{57} to support its conclusion, but qualified its reliance thereon.\textsuperscript{58}

The court further based its decision on what it perceived to be the distinctions between judicial proceedings and arbitration.\textsuperscript{59} The court cited these differences in an attempt to respond to \textit{Wyatt v. Arnot},\textsuperscript{60} which the defendants used to support their claim for immunity. In \textit{Wyatt}, the California Court of Appeal extended judicial immunity to a judge who failed to render a decision. After hearing a case the defendant, Judge Arnot, left the bench to assume a similar post in another jurisdiction. The judge never decided the case and the parties, forced to try the case before another judge, sought to hold Judge Arnot liable for the additional costs resulting from his failure to act.\textsuperscript{61} The court held that Judge Arnot could not be held liable for damages for his failure to render a decision.\textsuperscript{62} The \textit{Baar} court, however, distinguished \textit{Wyatt}, stating that "[b]ecause the judicial and arbitral roles are so different in many fundamental respects, \textit{Wyatt} is not helpful to Tigerman in this case."\textsuperscript{63} To support this conclusion the court listed "the many and significant differences between judicial proceedings and arbitrations."\textsuperscript{64}

\textsuperscript{57} 551 F.2d 1026 (5th Cir.), reh'g denied in part, 559 F.2d 268 (5th Cir. 1977), cert. denied, 434 U.S. 1067 (1978).

\textsuperscript{58} \textit{Baar}, 140 Cal. App. 3d at 983 n.6, 189 Cal. Rptr. at 837 n.6. 

\textsuperscript{59} \textit{Baar}, 140 Cal. App. 3d at 984, 189 Cal. Rptr. at 837-38.

\textsuperscript{60} 7 Cal. App. 221, 94 P. 86 (1907).

\textsuperscript{61} \textit{Id.} at __, 94 P. at 87-88.

\textsuperscript{62} \textit{Id.} at __, 94 P. at 89.

\textsuperscript{63} \textit{Baar}, 140 Cal. App. 3d at 984, 189 Cal. Rptr. at 838.

\textsuperscript{64} \textit{Id.} at 984, 189 Cal. Rptr. at 837. The court cited numerous differences, including the constitutional power base of the judicial system, the need for an independent judiciary as "essential to the preservation of a democracy," the fact that trials are public and arbitrations private, the precedential value of court decisions, and the fact that arbitration cannot determine the rights and obligations of anyone not a party to the contract and cannot decide any questions not presented by the
The final portion of the court's decision focused on the contractual nature of arbitration and the fact that Tigerman had a contractual duty to render a timely award. The court noted that "[a]rbitration is essentially a creature of contract" and that Tigerman's contractual obligations to the parties had to be upheld. The court of appeal also recognized that arbitration is a favorable alternative to litigation and that an arbitrator must be protected when acting in a quasi-judicial capacity. However, the court summarily dismissed these policies, giving greater weight to the policy favoring arbitration as a speedy means of settling disputes and the fact that a grant of immunity for failure to make an award would run "directly counter" to this policy. The court cited three cases from the 1800's to support its conclusion that the contractual relationship between the parties was the key to the resolution of the issue. As a result, the California Court of Appeal held that "[r]emembering that an arbitrator is not a judge and that arbitration is not a judicial proceeding . . . a cause of action at the least was stated in breach of contract . . . ."

IV. CRITIQUE

In reaching its decision that Tigerman could be held responsible for failure to render a timely decision, the California Court of Appeal failed to adequately address the concept of quasi-judicial immunity as it relates to arbitration. In addition, the court failed to give proper weight to the strong policy arguments which mandate that arbitration is to be encouraged as an alternative to litigation. Further, the court virtually ignored the possible implications that its relatively landmark decision could have on the arbitration process in

68. Id. at 985, 189 Cal. Rptr. at 838-39 (citing Bever v. Brown, 56 Iowa 565, 9 N.W. 911 (1881); Hornet v. Godfrey, 3 Luzerne Leg. Reg. R. 10 (Pa. 1883); Boone v. Reynolds, 1 Serg. & Rawle 231 (Pa. 1814)).
general. As a result, the court’s opinion is superficial and one-sided.

In the first portion of its decision, the court noted that quasi-judicial immunity historically extended to arbitrators in order to promote “fearless and independent decision making.”\(^7\) The court then reasoned that since there is no “principled and independent” decision making involved in failing to render an award, there is no need for quasi-judicial immunity.\(^7\) Although this is a valid distinction which must be recognized, the decision to decline or grant arbitral immunity to Tigerman should not have ended here. Regardless of the seeming lack of “judgment-related” duties that rendering a decision involves, the act of rendering a decision must itself be analyzed. The court of appeal did not determine whether quasi-judicial immunity extended to the act (or “non-act”)?\(^7\) of failing to render a decision. Rather, the court sidestepped the issue and compared only the failure to render an award with misconduct in arriving at a decision.\(^7\) By analyzing the issue in this manner, the court was able to come to the easy and seemingly logical conclusion that the arbitrator should be held liable. Much more analysis, however, is required before such a novel issue can be resolved. The court should have analyzed the act of rendering an award under the \textit{Butz v. Economou}\(^7\) and \textit{Stump v. Sparkman}\(^7\) tests to determine whether it was a quasi-judicial act entitled to the blanket of immunity.


\(^7\) Id. at 983, 189 Cal. Rptr. at 836.

\(^7\) The distinction between the failure to render an award and the conduct involved in reaching a decision can be equated with the distinction between misfeasance and nonfeasance. In early common law there was liability for misfeasance, or “active misconduct,” but not for nonfeasance, or “passive inaction.” W. PROSSER, \textit{LAW OF TORTS} § 56, at 338-39 (4th ed. 1971). Although such a distinction would run contrary to the result in the present case, under modern law liability commonly extends to situations where nonfeasance is involved. \textit{Id.} As the court in \textit{Baar} correctly pointed out, nonfeasance liability has been extended to “anyone who, for a consideration, has undertaken to perform a promise — or what we now call a contract,” 140 Cal. App. 3d at 986 n.8, 189 Cal. Rptr. at 839 n.8 (quoting W. PROSSER, \textit{supra}, § 56, at 339). The distinction between misfeasance and nonfeasance, therefore, has no application in this case.

\(^7\) Baar, 140 Cal. App. 3d at 983, 189 Cal. Rptr. at 837.


Following this reasoning, the "function comparability" of the arbitrator's judgment concerning the timeliness of rendering a decision should be compared with that of a judge under similar circumstances. Simply stated, the arbitral act of rendering a decision must be compared with the judicial act of rendering a decision. It is tempting to respond to this issue just as the court did, by stating that there is no judgment involved in the act of rendering an award. However, an examination of past case law indicates just the opposite, namely that the act of rendering an award is indeed a judicial act. The California Court of Appeal in *Wyatt v. Arnot* stated that "it is clear that the matter of the time when a judge may decide a case submitted to him for decision is as much a matter of judicial discretion and judgment as the matter of how he may decide it."77 Furthermore, in *Jones v. Brown*, the Iowa Supreme Court stated that "[t]he arbitrators, in determining the time and manner of making and filing their award, acted in the same capacity that they did in determining what their award should contain."79 According to this language, the judgment involved in the act of rendering an award is functionally comparable to a judge's and therefore entitled to immunity.

However, the analysis must be carried further. The *Sparkman* test must be applied to determine whether Tigerman's failure to decide was, in fact, a "judicial act."81 Under the *Sparkman* analysis, a two-pronged test must be applied: first, the nature of the act itself must be examined — here, whether the act of rendering an award is a function normally performed by a judge; and, second, the expectations of the parties must be considered — in this case, whether the parties dealt with the arbitrator in his arbitral capacity. Under these two tests it becomes evident that the act of rendering a decision is indeed a "judicial act." The act

76. 7 Cal. App. 221, 94 P. 86 (1907).
77. *Id.* at __, 94 P. at 89-90.
78. 54 Iowa 747, 6 N.W. 140 (1880).
79. *Id.* at __, 6 N.W. at 142. The court further stated that "[a]s well might it be claimed that a judge acts in a mere ministerial capacity in reducing an opinion to writing, and thus hold him liable civilly upon the ground that such act was not judicial." *Id.*
80. See supra text accompanying note 52.
of rendering an award is certainly a function normally performed by a judge and, clearly, the parties dealt with Tigerman in his arbitral (quasi-judicial) capacity. That an arbitrator acts in a capacity similar to that of a judge is a conclusion well supported by case law. As the Supreme Court stated as early as 1855, "[a]rbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity." By doing so the court severely weakened its analysis. It should have attacked the Wyatt case head-on, questioning its reasoning, the purposes behind immunity and its application to such conduct. Instead, the court attempted to distinguish the factually similar Wyatt case by noting the differences between the judicial process and arbitration. Thus, it committed the error of focusing on the loca-


84. 7 Cal. App. 221, 94 P. 86 (1907).

85. Baar, 140 Cal. App. 3d at 984, 189 Cal. Rptr. at 837. For a list of these distinctions see *supra* note 64.

86. Even if the distinctions listed by the court were relevant to its treatment of Wyatt, there are numerous similarities between arbitrations and judicial proceedings which cannot be ignored. See, for example, Corey v. New York Stock Exch., 691 F.2d 1205, 1210 (6th Cir. 1982), in which the Court of Appeals for the Sixth Circuit listed several of these similarities, including the fact that: arbitration is adversarial, the parties have a right to be represented by counsel, discovery is available and hearings are held at which arbitrators receive evidence and entertain arguments, the parties have the opportunity to present witnesses and other evidence and to cross-examine or impeach those of the adversary, and arbitrators issue written decisions deciding the claim. *See also* Cal. Civ. Proc. Code §§ 1282-1284.2 (West 1982) (statutory provisions governing arbitrations, including power of subpoena, administration of oaths and right to counsel).
tion of the power involved. Under Butz v. Economou,87 such a test is inappropriate. Immunity depends not on the source or location of the decision making power, but rather on the nature of that power.88 Therefore, the particular proceeding from which the failure to render an award evolves, be it arbitral or judicial, is irrelevant. The true focus should be on the nature of the conduct: whether a quasi-judicial act or function was performed. As a result, the Butz "functional comparability"89 test should be applied. Had the court examined the nature of the conduct rather than its location, it would have found itself bound by Wyatt, since Wyatt also involved the failure to render a decision.90 For this reason the court should have questioned the logic applied in Wyatt, rather than distinguish the forum in which the dispute was decided.

V. POLICY CONSIDERATIONS AND ARBITRAL IMMUNITY

Even considering the above analysis, it can still be argued that the purposes and policies behind quasi-judicial immunity just do not apply when failure to render a decision is the conduct being challenged. That is, a strong argument in favor of liability still exists, there being no real judgment involved in the act of rendering an award. What cannot be ignored, however, is the very strong national policy encouraging arbitration as an alternative to overcrowded court dockets.91

In the third portion of its opinion the court considered this policy. By simply stating that "the courts have looked

88. Butz, 438 U.S. at 512. See also Corey v. New York Stock Exch., 691 F.2d 1205, 1211 (6th Cir. 1982).
89. Butz, 438 U.S. at 512 (quoting Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976)).
90. See supra text accompanying notes 60-62.
91. See, for example, Burger, supra note 2, at 275-77, which discusses the "explosion" of litigation in recent years and strongly urging that arbitration be expanded and used more frequently as an alternative to litigation. See also Corey v. New York Stock Exch., 691 F.2d 1205, 1211 (6th Cir. 1982) ("[b]ecause federal policy encourages arbitration and arbitrators are essential actors in furtherance of that policy, it is appropriate that immunity be extended to arbitrators for acts within the scope of their duties and within their jurisdiction"); Rhine v. Union Carbide Corp., 343 F.2d 12, 16 (6th Cir. 1965) ("[u]nder federal law it is now a clearly established national policy to encourage the use of arbitration").
favorably upon arbitration as an alternative to litigation in the courts."92 The California Court of Appeal addressed the entire issue regarding the public policy behind arbitration. However, such a compelling policy should not be given such superficial attention. Indeed, as recently as March 11, 1983, the Sixth Circuit, in *UAW v. Greyhound Lines, Inc.*,93 stated that "[i]n light of the encouragement of arbitration and the necessity for arbitrators to facilitate this policy, 'it follows that the common law rule protecting arbitrators from suit ought not only be affirmed, but if need be, expanded.'"94

The court also failed to adequately address the potential "chilling effect" that a decision of liability could have on the overall process of arbitration.95 The possibility of an arbitrator being held liable for costs and attorney fees could make it extremely difficult for organizations such as the AAA to procure arbitrators.96 Potential liability for costs and attorney fees would place an unfair burden on the arbitrator, especially in complex commercial cases in which such expenses can be astronomical, and especially since a large number of commercial arbitrators volunteer their time and receive no compensation.97 This consideration was recognized in *Tamari v. Conrad*,98 in which the Seventh Circuit stated that "individuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between litigants and saddled with the burdens of defending a lawsuit."99 Furthermore, if an action based on

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93. 701 F.2d 1181 (6th Cir. 1983).
96. Id.
97. Id. *See also* G. Goldberg, *supra* note 1, at 36. Commercial Arbitration Rules § 51 provide:

Members [of the AAA] who serve as neutral arbitrators do so in most cases without fee. In prolonged or in special cases the parties may agree to pay a fee, or the AAA may determine that payment of a fee by the parties is appropriate and may establish a reasonable amount, taking into account the extent of service by the arbitrator and other relevant circumstances of the case.

98. 552 F.2d 778 (7th Cir. 1977).
99. Id. at 781. *See also* Domke, *supra* note 3, at 99.
breach of contract for failure to render a timely award is allowed, further erosion of the arbitration process could possibly result.100

Declining to extend immunity could also have an impact on the quality of an arbitrator's decision because the arbitrator may become concerned more with avoiding liability and getting his award out on time than with the substantive quality of it. As the California Court of Appeal stated in *Wyatt v. Arnot*,101 "a judge has a right to give a case such consideration as he feels may be necessary to reach a correct conclusion, or at least a decision satisfactory to himself."102 Responding to this "quality of decision" argument, the court of appeal in *Baar v. Tigerman*103 correctly pointed out that both the AAA and the California Legislature have established time limits for rendering awards.104 However, imposing liability on an arbitrator for untimely decision making could also have an adverse impact on the granting of extensions by the parties to the arbitration. Once a party knows that it can recoup not only the arbitrator's fees, but also attorney fees and costs, it stands to reason that such a party would be less likely to grant an extension. This is important, especially in complex commercial cases in which extension is often essential to resolution of the controversy. Finally, that an arbitrator could be held potentially liable for costs and attorney fees would necessarily result in every arbitrator having to purchase costly malpractice insurance. Such a burden would additionally discourage arbitrators from volunteering their services.

100. For example, in its petition to the California Supreme Court the AAA stated:

[Where does liability end? Assuming that after four years of arbitration [Tigerman] had rendered an award against one of the Appellants, could not that party have taken the position that four years of arbitration proceedings and the resultant award did not amount to performance of some alleged covenant on the part of the arbitrator and association to resolve the dispute in a speedy fashion?]


101. 7 Cal. App. 221, 94 P. 86 (1907).

102. *Id.* at __, 94 P. at 90.


104. *Id.* at 985, 189 Cal. Rptr. at 838. *See also supra* note 14.
Although the court ignored virtually all of the policies favoring arbitration and, therefore, a grant of immunity, it did highlight one of the most crucial policies behind the system of arbitration: because of its speed and certainty, arbitration is a preferred means of settling disputes. Consequently, the court of appeal correctly recognized that a grant of immunity for failure to make an award would run "directly counter to [this] policy" consideration. The court also properly recognized that arbitration is contractual in nature and that the courts must uphold the contractual obligations between parties. Implicit in this statement is the well-settled legal principle that compensatory damages are generally recoverable for breach of a contractual obligation. Therefore, an arbitrator who breaches his contract to render an award within thirty days should be held liable for the damages arising out of his breach.

The above considerations culminate in a direct conflict between equally compelling policies: on one side exist policies favoring the speedy resolution of disputes through arbitration and the high regard given to the contractual relationship between the parties; and on the other side exist policies strongly encouraging the use of the arbitration system and the immunity of the individuals involved therein, as well as the "chilling effect" that a denial of immunity could have on the entire system.

VI. CONCLUSION

What evolves from a consideration of these competing policies is the obvious need to avoid a result likely to have a destructive impact on the individual parties to the dispute, on the common law of contracts, and on the process of arbitration. It is apparent, therefore, that a compromise must be reached in which these opposing, but equally desirable, policies can achieve a state of equilibrium with each other.

105. See supra note 2. See also Poppleton, The Arbitrator's Role in Expediting the Large and Complex Commercial Case, 36 ARB. J. 6 (1981).
107. Id.
The solution to this problem is relatively simple and involves both legal and equitable concepts. Equitably, it is obvious that an arbitrator who has entered into a contract to resolve a dispute should not be compensated if he or she breaches that obligation and fails to render a decision. Fairness and justice demand as much. In addition, the legal obligation to render a decision must be enforced. However, it is equally obvious that an arbitrator should not be held liable for attorney fees and costs, which may no doubt add up to quite an extraordinary sum, merely because an arbitrary deadline has not been met. This would be particularly true in complex cases involving large amounts of evidence and lengthy hearings. Holding an arbitrator potentially liable for such costs would place an undue amount of pressure on the arbitrator, pressure that could affect the quality of his or her decision. Therefore, the solution to this problem would be to preclude the arbitrator from being compensated for services that have not been rendered.

Withholding compensation from an arbitrator who fails to make an award is supported by both case and statutory law. In Graphic Arts International Union, Local 508 v. Standard Register Co., the district court enjoined an arbitrator from collecting any fee for services, due to the arbitrator's failure to render an award. In addition, the California Constitution, which the court relied upon in its decision, provides that a judge may not receive his salary if any case before him remains pending and undeter-

109. The deadline is normally thirty days. See supra note 14.

110. Recognizing that in many commercial cases arbitrators volunteer their time and receive no compensation for their services, the argument that an arbitrator should not be held liable for damages is even stronger when the parties have not paid for the arbitrator's services. See supra note 97 and accompanying text.

111. 103 L.R.R.M. (BNA) 2212 (S.D. Ohio 1979). It must be remembered, however, that the judgment and order of the district court were later set aside as being beyond the matters presented to the court. See Graphic Arts Int'l Union, Local 508 v. Standard Register Co., 103 L.R.R.M. (BNA) 2214 (S.D. Ohio 1979). See also supra note 41.

112. Standard Register, 103 L.R.R.M. (BNA) at 2213. The court further stated that "when two parties in a collective bargaining agreement have agreed to submit their disputes to arbitration, there is implicit in that method of resolution a duty on the part of the arbitrator to issue an award and bring the arbitration proceedings to a conclusion." Id.

113. 7 Cal. App. 221, 228-29, 94 P. 86, 89 (1907).
mined for ninety days after it has been submitted for
decision. 114 Furthermore, in Bever v. Brown, 115 an action by
an arbitrator to recover his salary, the court allowed the par-
ties to assert as a defense the fact that the arbitrator's award
was valueless. 116

Thus, both by precluding an arbitrator from being com-
pensated for failing to perform a contractual obligation, and
by preventing him from being held liable for exorbitant fees
and costs, all policies are served and a collision between
them avoided. Disputes will still be settled in a "speedy and
certain" manner and the expanding field of arbitration will
not be imperiled. Arbitrators will be bound by their contrac-
tual obligations, but will not be subjected to the unreasona-
ble possibility of being faced with excessive damages. As a
result, all of the legal and equitable principles and policies
would remain at peace with each other in a desirable state of
equilibrium.

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114. Cal. Const. art. VI, § 19 provides: "A judge of a court of record may not
receive the salary for the judicial office held by the judge while any cause before the
judge remains pending and undetermined for 90 days after it has been submitted for
decision."

115. 56 Iowa 565, 9 N.W. 911 (1881).

116. Id. at __, 9 N.W. at 913. The court held "that the rule of judicial immunity
goes far enough when it protects the arbitrators from an action for damages, without
allowing them compensation for an act rendered useless by their willful misconduct."