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The Extent of the Arbitrator's Immunity from Civil Liability Compared to the Judge's Immunity (Comparative Study)

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Abstract:

This study aims at the legal dimensions of the legislative deficiency of the arbitrator's immunity from civil liability in the Jordanian Arbitration Law, which the legislator granted to the judge.

The researchers reached the need to amend the provisions of the Jordanian Arbitration Law to grant immunity to the arbitrator, especially since the work is similar to that of a judge.

The judicial immunity of the arbitrator is civil liability in comparison with the immunity of the judge

Jordanian and Egyptian lawmakers have imposed restrictions on the civil (commercial) arbitrator's responsibility for the mistakes he makes while performing his arbitral mission, This is to encourage arbitration, compared to the position of the arbitrator over the judge's function, hence granting the Jordanian legislator and the Egyptian legislator and the judgments of the commercial arbitrator judicial immunity similar to that enjoyed by the judge but much less than the immunity of the judge.

We therefore consider it appropriate to examine the arbitrator's immunity, beginning with a shedding light on the judges' immunity from civil responsibility, given the similarity in the task entrusted to both the judge and the arbitrator, which is to resolve disputes by a legally binding and enforceable judgment.

This requires us to present the principle of judicial immunity from civil liability, and the reasons that support and oppose such immunity, in order to determine the judicial immunity of arbitrators of civil liability.

Keywords: civil responsibility; immunity; arbitrator; judiciary.

JEL Classification: K15; K11; K40.

1. Judges immunity from civil liability (Amer, Immunity of the judge)

Judges are trustees to protect rights and freedoms, promote justice, enforce and develop laws on which society is built, and relationships between people, Therefore, their behavior and behavior within and outside the courts should be above suspicion and at the level of the secretariat deposited with them, This leads us to the choice of judges and that no one should be appointed to the office of the judiciary unless there are qualities of integrity, integrity, honesty, independence, impartiality and honor.

Judicial immunity is for judicial work and whoever does it, Therefore, the majority of the countries of the world tended to independence the judiciary from the legislative and executive powers to achieve the integrity of the judiciary.

It should be noted that immunity in general judicial and other does not mean that the system does not apply the right of granting immunity, the system applies to him and others, but is intended to apply the system to him procedures to ensure the safety of his work.

As a researcher, I will divide this requirement into two sections, through which I will clarify the general principle of judicial immunity, the system of litigation and cases of judges, and the reasons for or against the immunity of judges, as follows.

1.1. The general principle of judicial immunity from civil liability

The law entails public obligations and duties similar to other state employees, as the judge, like the public official, provides public service, Moreover, the judicial office they hold imposes special obligations and duties aimed at ensuring the accuracy of work, integrity and honor of the sacred and impartial profession of the judiciary. If he waives his obligation as a judge or fails to fulfill the right between the litigants, he or she will be held accountable (Amer, Immunity of Judge).

The principle of judicial immunity is based on relieving or limiting a judge from civil liability for errors committed during or in the exercise of his or her judicial function.

The wisdom lies in the judicial immunity of civil responsibility in reassuring judges in the performance of their duties, and surrounded them with a fence of protection, which makes them safe from the plot of the abusers who try to undermine their dignity and prestige by filing malicious suits just for defamation (Al-Sanea, Civil Liability of the Arbitrator, 60).

The states of the Anglo-Saxon system recognize the judge with absolute immunity from civil responsibility; Civil law states do not recognize the idea of absolute immunity for judges.

At the same time, it does not go the same way with regard to the civil responsibility of judges, Some have adopted a litigation system, some have introduced a system of state prosecution for responsibility arising from the actions of judges, while others have been silent on the reference to how judges are litigated, which means that they are subject to general rules of responsibility for injurious acts (Saabneh, Civil Liability of the Arbitrator, 167).

To clarify the picture, I have seen that the litigation system examines the liability arising from the actions of judges, as this system establishes to the judge a restricted immunity to the effect that, except in cases provided for by law, the judge cannot be held accountable for his or her mistakes in the exercise of his or her functions. In general, however, we will show at the end of this article that the Jordanian legislator and the Egyptian legislator have adopted the principle of civil accountability of the judge or not, with evidence and wisdom.

The Litigation System and its Cases

The judge does not ask for any mistake he makes while carrying out his work - according to the judges' litigation system – he only asks for certain errors identified by the legislator exclusively. Immunity of a judge, except in cases provided for by law, we shall briefly deal with each of these cases:

- (1) If the judge issued in his work fraud or fraud or professional error serious, no it can be remedied;
Fraud and fraud: A judge's deliberate deviation from the requirements of justice, whether at the investigative or judgment stage, for the sake of his personal interest, or for favoring or defending an adversary (Ayyad, Fundamentals of Judicial Science, 88).
Serious professional error means the mistake committed by a careful and careful judge in his work (El-Sharkawy, Civil and Commercial Procedures, 179).
The Egyptian Court of Cassation knew the serious professional error by saying: (Serious mistake means the mistake committed by the judge for falling into a flagrant mistake that would not have been given to him if he cared about his duties normal attention or negligence in his work excessively neglected) (Decision of the Egyptian Court of Cassation, p 1791).
The Egyptian Court of Cassation distinguished between fraud and serious error by saying: (fraud refers to the deviation of the judge in his work from what is required by law intent on this deviation, either to the exclusion of an adversary, or defiance in an adversary, or to achieve a special interest of the judge. The mistake made by the judge for making a blatant mistake would not have been taken if he cared about his duty's normal attention or negligence in his work (Decision of the Egyptian Court of Cassation, 514).
- (2) If the judge refuses to answer a petition submitted to him or adjudicates in a case Good for judgment;
The Jordanian legislator did not address the case of the judge's failure to answer a petition submitted to him or to adjudicate a valid case.

The second paragraph of article (494) of the Egyptian Civil and Commercial Procedures Law addressed this situation; this article defines this case (denial of justice) as: (refraining from the judge from answering a petition submitted to him or adjudicating a valid case when its role is fulfilled). Law, administration of justice and application of legal protection to cases brought before it (Hashem, Civil Justice Law, 261).

A judge is not excused if he refuses to rule or respond to a petition submitted to him as long as he has sources from which the verdict in the matter is submitted. The need for deliberation, thought and research, as it raises complex problems (Ayyad, the origins of the science of justice, 171).

- (3) The cases where the law stipulates the responsibility of the judge and the sentence. Compensation; In this case, there must be a provision in the law that establishes the responsibility of the judge for a particular reason, and that the text expressly determines that the penalty for this responsibility is to judge the judge with damages (Saabneh, Civil Liability of the Arbitrator, 171).

This is what is stipulated in Article (175) of the Egyptian Civil and Commercial Procedure Law, which states: (In all cases, the draft judgment containing its reasons shall be deposited by the President and the judges when pronouncing the judgment, otherwise the judgment shall be invalid. Compensation if she has a face), Note that the Jordanian legislator did not address this matter, but civil liability shall not apply to the Jordanian judge only if this damage is the result of a serious criminal offense committed by the judge and will explain this later.

The third paragraph of Article (494) of the Egyptian Civil and Commercial Procedure Law states that: (Judges and prosecutors may be litigated in other cases where the law stipulates that the judge is liable for damages), This article gives preference to the plaintiff in litigating civil judges, since there is no legal provision in Egyptian law that requires the plaintiff in the litigation before it is established to notify the Supreme Judicial Council of the defendant, even if he is a judge.

While the Jordanian legislator made the immunity of the Jordanian judge stronger than the immunity of the Egyptian judge, This is stated in Article (28 / a / 1) of the Independence of the Jordanian Judiciary Law No. 29 of 2014, which states: (In cases other than flagrante delicto, a judge may not be prosecuted, arrested or arrested except after obtaining the permission of the Council).

1.2. The Second Branch: Reasons Supporting or Opposing Judicial Immunity

In fact, there are many reasons that support the immunity of the judge, and join together to strengthen the principle of immunity of the judge from civil proceedings brought against him, and there are also those who oppose this immunity and his reasons, can be summarized in the following:

1.2.1. The Reasons That Support the Judicial Immunity of Judges from Civil Responsibility

1.2.1.1. To Achieve Independence and Freedom for Members of the Judiciary

The independence and protection of members of the judiciary are important reasons for the judicial immunity of judges from civil responsibility and for ensuring their freedom to adjudicate cases brought before them independently, Conversely, the determination of the judge's responsibility is a violation of his independence and an obstacle between him and his duties (Al-Shaer, Responsibility for the Judicial Authority, 163). Here, it is certain that the possibility of threatening civil liability claims by one of the litigants may cause the judge to hesitate before adjudicating cases for fear of liability (Al-Tamawi, the judiciary compensation and methods of appeal sentences, 55), The judge's precious time is then wasted to defend himself rather than adjudicate cases.

1.2.1.2. The Second Reason: Guarantees of Adversaries Against the Judiciary

There are certain conditions and qualifications that candidates must hold for the office of judges, and this is what most legislation decides to ensure the integrity and good performance of judges (Al-Sha'er, Responsibility for the Judicial Authority).

Moreover, the national legislator has surrounded the judicial work with a variety of guarantees, establishing procedures to ensure that judgments are not rushed, and avoiding mistakes, which is the sequence of litigation levels, Such safeguards and procedures effectively control judicial misconduct, protect the rights of individuals, and reduce the need to prosecute judges (al-Sanea, The Civil Liability of the Arbitrator, 65).

1.2.1.3. The Third Reason: To Avoid Reconsideration of Cases and to Protect the System of Appeal Against Judgments

The protection of the judicial process is vested in judicial immunity. If there is no judicial immunity, how can the judge protect the judicial work he performs, since there is a system of appeal against judgments, which is a sufficient guarantee for adversaries to obtain a fair judgment in the dispute, Holding a civil judge accountable for his mistakes is also considered a diminution of the appeal system and its loss of importance, because allowing the litigating parties to file a claim for damages against the judge for any error or negligence that he or she may have assumed during the performance of his or her job, means reviewing the case and wasting the validity of the verdict (al-Sanea, The Civil Liability of the Arbitrator, 65).

1.2.2. Second: The Reasons That Contradict the Judicial Immunity of Judges from Civil Liability

1.2.2.1. Reason 1: To Compensate the Victim for the Damages He Suffered as a Result of the Judgment of the Wrong Judge

Victims of wrongful judgments issued by judges have the right to seek compensation for the damages suffered by the judgments. A judge may, in the course of his or her function, make a mistake and judge the non-owner of the property, for example. , Or it is too late to appeal the verdict; the real owner loses his property and may be all he owns (Al-Sha'er, Responsibility for the Work of the Judiciary, 182).

We cannot doubt that the allocation of a judge to the privilege of judicial immunity is incompatible with the right of the victim to sue the judge and to claim compensation for the damage caused by the error or negligence issued by the judge during the performance of his job (al-Sanea, The Civil Liability of the Arbitrator, 66).

1.2.2.2. The Second Reason: To Deter Erroneous Judicial Actions and to Urge Judges to Take Caution While Exercising Their Functions

The judge is required to abide by his duties and respect its requirements in his work or to be responsible for the breach of these duties, as the idea of absolute judicial immunity of judges from civil responsibility encourages judicial recklessness, so how judges be cautious in the exercise of their duties, and to prevent the occurrence of mistakes The negligence and indifference that may characterize some judges

There is no doubt that the legislators' guarantees to ensure the impartiality of judges, to inform the judicial work of a set of procedures to ensure that there is no haste and avoid mistakes, and to organize the methods of appeal against judgments will reduce the mistakes committed by judges, but this does not negate the existence of these errors, requiring the necessary reparation (al-Sanea, The Civil Liability of the Arbitrator, 67).

And in order to do this, I see that there are a set of ideas that are somewhat incompatible with each other, Protecting the judiciary to achieve independence, freedom and impartiality, guarantees the opponents against it, avoids reconsideration of the lawsuit, and protects the appeal system from destruction and destruction.

On the other hand, respecting the right of the victim to claim compensation for damages caused by the wrong judgment and deterring wrongful judicial actions and urging judges to exercise caution while exercising their functions stands in one trench.

In my estimation as a researcher, the best solution is to achieve a balance between ideas and not sacrifice each other at the expense of the other, While the Jordanian legislator and the Egyptian legislator differed in assessing the judge's immunity, The Jordanian legislator granted stronger immunity to the judge than the Egyptian legislator, Especially in civil liability, The Egyptian legislator allowed the judge to be prosecuted civilly in the courts and the prosecution, and to accept it without consulting the Judicial Council for approval, This is what I mentioned earlier in Article (175) and (494/2) of the Egyptian Civil and Commercial Procedures Law.

While the Jordanian legislator has made the immunity of the judge much stronger, as he only asks for grave mistake and in the case of flagrante delicto and guilty, and does not ask a civilian only for the damage caused by a criminal offense, and the judge may not be arrested or arrested only in the crime and the order of the Council Judicial, Evidence of this is stated in the following two articles of the Jordanian Judicial Independence Law.

- Article 28 (a) stipulates that: (In cases other than flagrante delicto, a judge may not be prosecuted, arrested or arrested until after obtaining the permission of the Council).
- Article 33 stipulates that: (The disciplinary case shall end with the resignation of the judge and the acceptance by the Council or referral to retirement or placement). Despite the resignation of the judge or his retirement or deposit if he deems it justified).

2. Second Requirement: The Arbitrator's Immunity From Civil Liability

The arbitrator performs a function similar to that of the judge, which is to settle disputes brought by the litigants. This similarity in the task entrusted to them and in line with the general policy in support of arbitration, led some of them to extend the judicial immunity of the arbitrator being a judge of a special nature and the integrity of its arbitral proceedings so as not to be subject to influence by the parties to the dispute.

Concerning the immunity of the arbitrator, most national legislation, international arbitration rules and the regulations of the specialized centers went to grant the arbitrator immunity from prosecution in recognition of the agreement of the parties, beginning in the agreement or participation, and the opportunity to challenge the verdict against his sentence.

There is also some legislation that goes to not grant the arbitrator absolute immunity, where it must be held accountable for his mistakes,

What is the content of the judicial immunity of the arbitrator from civil liability? What are the reasons behind their support or rejection? This is what we will answer in this requirement through two main branches as follows:

The First branch: The nature of the judicial immunity of the arbitrator from civil liability

The second branch: Reasons supporting or opposing the judicial immunity of the arbitrator

2.1. The First Branch: The Nature of the Judicial Immunity of the Arbitrator From Civil Liability

The immunity of an arbitrator is a special immunity of the arbitration law in terms of its effective operation and humiliation, and not merely a social interface for all, Where the arbitrator who works in arbitration cases is under the control and supervision of the court competent to issue an executive on the judgment issued by an arbitrator chosen by the parties to the dispute, or accredited centers and others to adjudicate arbitration cases. The arbitrator performs a function similar to that of the judge, which is the resolution of the dispute brought to his attention by the conflicting adversaries.

This similarity in the task of the arbitrator and the judge is in line with the general policy in support of arbitration, and some have pushed to extend the content of the judicial immunity originally prescribed for Judges to the arbitrator.

The idea of the judicial immunity of the arbitrator from civil liability, which is the heresy of the Anglo-Saxon system, is based on the determination of its civil liability, so that the arbitrator may not be held accountable for any error committed during the course of his work, but not only ask for certain errors, as in Like the state judge (Abdel Rahman, The Role of the Arbitrator, 392).

The principle of judicial immunity for arbitrators was first adopted by the judge (Bovill) in an English case, in which he refused to establish a precedent on the liability of the arbitrator for damages suffered by the litigants as a result of his wrongful act Irresponsibility of the arbitrator (El-Helm, Arbitration contract concluded, 253).

The same approach was taken by the US judiciary in the case of Jones v. Brown (Brown, 54Lowa74,78, N.W140, 37AM.Re p.185), It is the first case brought before the US judiciary on the responsibility of the arbitrators, and the US Supreme Court in this case likened the arbitrator to the judge, and ruled that he may not be held accountable for the damage suffered by an opponent for his fraudulent actions, However, the court itself refused to extend judicial immunity in every case in which it was established that the task entrusted to the person was not a judicial task, such as mediation, counseling and expertise (Saabneh, Civil Liability of the Arbitrator, 185-186).

In this regard, the court itself ruled in another case the architect's responsibility, and considered that his job was not judicial, but limited to the preparation of plans. The Canadian Court of Cassation also overturned the judgment of the Quebec Court of Appeal, which considered those who were wrongly assessed the value of the goods to have been arbitrators, and confirmed that these persons are experts and not arbitrators to enjoy immunity (Saabneh, Civil Liability of the Arbitrator, 186).

I know that this is a comparison between Jordanian law and Egyptian law, but I wanted to talk a little bit about the law of the Anglo-Saxon countries. This is because we did not find any equivalent in the civil law countries. The job they perform is the judicial function.

The content of judicial immunity was therefore clearly that every person exercising a judicial function would not be held liable, Disagreement over the extent of this immunity, as shown when speaking in the position of law and the judiciary of the responsibility of the arbitrator.

In conclusion, the researcher finds that the Jordanian legislator and the Egyptian legislator did not address the principle of the judicial immunity of the arbitrator from civil responsibility, as the arbitrator is directly responsible before the parties to the conflict for the damage caused, but by reference to the general rules of the Civil Code.

2.2. The Second Branch: Reasons Supporting or Opposing The Judicial Immunity of the Arbitrator

To talk about the judicial immunity of the arbitrator from the civil liability arising from the mistakes of the arbitration, requires us to examine the reasons that need to allocate this immunity to the arbitrator, as this immunity has aroused a wide jurisprudence controversy, and multiple opinions in support or opposition, and we will make this requirement. The reasons that support the judicial immunity of the arbitrator from civil liability, and therefore the reasons that oppose it are as follows:

2.2.1. First, the Reasons for the Judicial Immunity of the Arbitrator from Civil Liability

2.2.1.1. The First Reason: The Arbitrator Exercised a Task Similar to That of a Judge

The work of the arbitrator is similar to that of the judge, and the two make a binding judgment to the parties to the dispute, so the idea of comparison between them is that their work is similar as if the same work. However, the work of the judge is permanent, and the work of the arbitrator is temporary until the dispute before it is settled. Therefore, the arbitrator must have the ability to settle the dispute independently without fear of liability and the possibility of being sued by one of the conflicting parties affected by the wrong arbitration award.

A typical expression of this idea was expressed by the California Court in one of its cases: 'The integrity of the arbitral process can be best achieved by treating the arbitrator as an independent decision-maker who is not threatened to defend himself before the court' (Saabneh, Civil Liability of the Arbitrator, 187).

2.2.1.2. The Second Reason: The Support of Arbitration by the Modern State

Arbitration is one of the best alternative ways to settle disputes away from the courts, because of the speed of proceedings, confidentiality and other privilege. At present, most countries in the world support this system for several reasons, including reducing the burden on the regular courts, and the economic benefits of arbitration to the state.

Holding civil arbitrators accountable for their mistakes while conducting their arbitral proceedings may result in the arbitrators refraining from accepting participation in dispute resolution rather than encouraging them (El-Helm, Arbitration Contract, 154).

2.2.2. Second: The Reasons That Oppose the Judicial Immunity of the Arbitrator from Civil Liability

2.2.2.1. The First Reason: The Fundamental Differences Between the Judge and The Arbitrator

There are fundamental differences between the arbitrator and the judge, although they are similar in some ways, and the fundamental differences distinguish each other from the other. In order not to prolong, these differences are mentioned in chapter I, the first section, the second requirement of this letter, so we refer this matter or subject to it to avoid or prevent repetition.

2.2.2.2. The Second Reason: The Fundamental Differences Between the Arbitral Process and the Judicial Process

The guarantees of judicial independence put an end to the actions of judges when they made wrong decisions, through the degrees of litigation, namely appeal and then discrimination. While the arbitral process is not subject to the same guarantee, note that the arbitrator is more influenced by the judge. The fact that his judgment is not subject to appeal in most legislation, especially in Jordanian and Egyptian law.

This is what was stipulated by the Jordanian legislator in Article (48) of the Arbitration Law, which states: (Arbitration judgments issued in accordance with the provisions of this Law shall not be subject to appeal in any of the methods provided for in the Civil Procedure Law.

Nullity of the arbitration award in accordance with the provisions set forth in Articles (49), (50) and (51) of this Law). In this sense, it is matched by the provisions of Article 52/1 of the Egyptian Arbitration Law.

Therefore, it is certain that the arbitral process is weaker than the judicial process, and that the arbitrator has a greater chance of making mistakes. In this sense, the arbitrator must not enjoy immunity, and if he must have immunity, he must be restricted (Saabneh, Civil Liability of the Arbitrator, Ibid, 189-190).

At the end of this research, my opinion as a researcher on all of the above

I am a proponent of limiting the judicial immunity of the arbitrator from civil liability, but also supporters of the total lifting of immunity from arbitrator from civil and criminal liability as well. And grant him restricted immunity for the purposes of conducting the arbitration proceedings within the hearings only, and until the award of the arbitral

award. Arbitration must be stopped from pursuing the arbitration proceedings and isolation and accountability legally.

Proponents of the arbitrator's immunity argued that his accountability might lead to the reluctance of commercial arbitrators to accept rather than encourage participation in dispute resolution. And I say that this is not true – in my personal opinion – because all the arbitrators are seeking arbitration cases, because they generate good amounts for them even if it is risky and accountable. Also, lifting or restraining the horse forces the arbitrator to exercise caution during the proceedings, and be very accurate before pronouncement. He has the certainty that any mistake will be held accountable, is not this better to come up with a correct and accurate arbitration result, and deterrent to any arbitrator entrusted himself tampering with the proceedings and the outcome of the arbitral award.

Finally, I found in my research on Jordanian and Egyptian law that the legislators failed to mention and address the judicial immunity of the arbitrator for civil liability. Thus, the provisions of Article (256) of the Jordanian Civil Code apply, which states: (Any harm to others is necessary for the perpetrator, even if he is not distinguished to guarantee the damage), and Article (163) of the Egyptian Civil Law, which states that: (Every mistake caused harm to others. The perpetrator must be compensated). The error involves two pillars, one physical, the infringement and the other moral, perception.

As a result, there is no comparison between the immunity of the judge and the immunity of the arbitrator in general, the judge in general is immune and is at home as long as a judge and his immunity is not absolute, and the arbitrator is immune during arbitration sessions only.

Conclusion

The subject of this research is to determine the extent of the arbitrator's immunity from civil liability compared to the immunity of the judge. We explained the immunity of state judges from civil liability and then compared them with the arbitrator's immunity from this responsibility in Jordanian and Egyptian law.

Accordingly, after we completed this work. Our most important results can be summarized. The recommendations we propose are as follows:

Results

- Arbitration means that parties to a dispute have recourse to individuals other than State judges to adjudicate an existing dispute on terms and conditions they consider themselves. Arbitration is not a purely judicial act, but rather a type of private judiciary that runs parallel to the State's judiciary and is an adjunct in resolving disputes between litigants.
- The arbitrator has no judicial immunity except during the arbitration hearings and is subject to civil liability for his arbitration errors.
- The Jordanian legislator expressly states that a judge shall only ask a civilian for the damage caused by a criminal offense. While the Egyptian legislator stipulates that the judge is civilly responsible for any harm caused to an adversary, but the state is the adversary and not the judge in person.

Recommendations

We hope that the Jordanian and Egyptian legislators will make the following recommendations to clarify the issues that I found to be unregulated:

- We hope to determine the qualifications required in the arbitrator and the criteria for his selection accurately, and if an individual to be a jurist, and if the body (more than one arbitrator) must be headed by a jurist, because the work of the arbitrator is a judicial work, how can the non-lawful organization of arbitration procedures and adherence to the general rules of litigation, and this means to contain the mistakes of the arbitrators and reduce them.
- We hope the Jordanian legislator to amend the arbitration law and uncover the ambiguity of the things that have not been addressed, the most important of which is the civil liability of the arbitrator and the extent of his immunity from this responsibility.
- We recommend that Jordanian and Egyptian lawmakers establish a judicial immunity for the arbitrator from civil liability and within a clear legislative regulation coupled with certain restrictions when committing a mistake while performing his duty in litigation.
- We also wish those interested in the field of commercial arbitration, especially the centers specialized in arbitration to show the importance of arbitration and its advantages and speed of its proceedings, through holding seminars, lectures, workshops and courses to qualify arbitrators.

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