



# Adjudicator Immunity in a Civil Law Country

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## Definition of Immunity:

- Exemption from penalty, burden or duty.
- Special privilege.

(Black's Law Dictionary).

In a civil law country as France, a DB Member is NOT immune under that definition.



No exemption, no privilege.

- The DB Member has no less but no more immunity than a judge when making an act of determination or adjudication *per se*
- The DB Member has no immunity when non-performing or performing with willful misconduct.



# Hypo: A delinquent or underperforming DB Member What sanctions ?

## **1. Revocation**

- Revocation by joint decision of the parties (e.g. Article 10.2 of the ICC DB Rules);
  - In line with French Arbitration law (Art. 1462-2 of Civil Procedure Code)
- Or revocation for cause (e.g. bad faith/improper conduct) pursuant to a motion of one party to the institution or center administering the DB (if any);
- Or revocation for cause pursuant to a motion of one party to the judge having jurisdiction over the DB situs



## What sanctions ?(2)

### **2. Refund of Earned fees:**

- When fees were paid, they can be claimed back by the aggrieved party.

### **3. Resignation**

- A revocation motion, with or without a claim for refund of fees, may induce the DB Member to resign.
- Issue with notice if not provided by DB Agreement:  
Resignation effective immediately or not?



## What consequences?

- **For the aggrieved party or parties, which suffered a damage:**

Necessary to sue the DB Member on the grounds of civil liability principles of tort, i.e. a 3-pronged test has to be met:

- (i) prove the DB Member was derelict in his/her duties;
- (ii) prove a damage;
- (iii) show a causal link between the occurrence of the damage and the existence of the fault.



## What consequences? (2)

- **For the delinquent DB Member:**

Advisable to: (i) take steps to protect personal assets from seizure or attachment; and  
(ii) take on insurance when accepting appointment to DB.



## Limitation of liability

- In most civil law jurisdictions, it is possible to limit the DB Member's liability in the DB Agreement, but the effectiveness of such limitation is doubtful if wrongful intent or gross negligence can be demonstrated.



## Exclusion of liability

- Would total exclusion of liability by contract work?  
Again possible in principle (e.g. Article 33 of ICC DB Rules) but no assurance of effectiveness:  
Such clause could be carved out as unconscionable.

THANK YOU! ANY QUESTIONS?