Liability Insurance in Arbitration: The Emerging Spanish Market and the Impact of Mandatory Insurance Regimes

Kluwer Arbitration Blog
January 8, 2014

María Pilar Perales Viscasillas (Universidad Carlos III de Madrid)

Please refer to this post as: María Pilar Perales Viscasillas, 'Liability Insurance in Arbitration: The Emerging Spanish Market and the Impact of Mandatory Insurance Regimes', Kluwer Arbitration Blog, January 8 2014, http://arbitrationblog.kluwerarbitration.com/2014/01/08/liability-insurance-in-arbitration-the-emerging-spanish-market-and-the-impact-of-mandatory-insurance-regimes/

Under the direction of the Swiss Arbitration Association ("ASA"), a recent questionnaire asked 82 of the world's most prestigious arbitral institutions, among other questions, whether they had insurance for professional liability claims. There are very few empirical studies in this area, but the survey indicated that only few institutions made an effort to answer; and for the 22 of institutions that did respond, the responses came from major international arbitration institutions. The data collected was noteworthy. Over half of the institutions responding identified that they had insurance for liability claims against the institution. The study also identified that arbitral institutions rarely provided liability insurance to their arbitrators, and when they did so, it was only after a specific request.[fn]Simone HOFBAUER/Michael BURKART/Lara BANDER/Mehtap TARI, *Survey on Scrutiny of Arbitral Institutions*. In Phillip Habegger, Daniel Hochstrasser, Gabrielle Nater-Bass and Urs Weber-Stecher (editors), Arbitral Institutions Under Scrutiny: ASA Special Series No. 40, JurisNet, LLC, 2013, pp.25-26.[/fn]

There are at least two conclusions: most institutions do not have an insurance coverage to address potential claims related to liability and, irrespective of coverage available to institutions, it is up to arbitrators to obtain their own liability insurance policies for professional liability related to their conduct as international arbitrators. The first conclusion is confirmed by the General Counsel of the ICC, Emmanuel Jolivet, who explains that most of the arbitration institutions in France and around the world do not have an insurance policy.[fn]Emmanuel JOLIVET, *La responsabilité des centres d'arbitrage et leur assurance*. Revue générale du droit des assurances, n° 2012-01, p.7 (http://www.lextenso.fr/).[/fn]

The ASA study, however, was not directed to arbitrators, which means there is no empirical data about whether arbitrators contract for indemnity insurance. Some scholars suggest that arbitrators do not have liability insurance; instead, arbitrators may rely on the immunity rules provided by arbitral laws and arbitral institutions.[fn]See, e.g., Coulson and Hjerner, in Julian D. M. Lew, (Editor), *The Immunity of Arbitrators*. The School of International Arbitration and Lloyd´s of London Press Ltd (LLP), 1990.[/fn]

The absence of liability insurance may be a function of the bases for professional liability in international commercial arbitration. An analysis of various arbitration laws demonstrates that qualified immunity is the most common approach to the potential liability of arbitrators and arbitral

institutions, which means arbitrators and institutions are immune from negligent acts or omissions during the arbitration unless there is bad faith or gross negligence.[fn]See, inter alia: Susan D. FRANCK, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*. New York Law School Journal of International and Comparative Law, 2000, nº20, pp.10 et seq.[/fn] Such qualified systems derived from a concept of immunity of arbitrators that is unusual in many civil legal systems, which generally focuses on whether liability derives from the contractual relationship among the parties, arbitrators and the arbitral institutions. In the civil law tradition, potential liability derives from the relevant contractual arrangements and modifications to the legal standard of liability identified through applicable institutional or ad hoc arbitration rules and other principles of the applicable law.

While there is divergence in the liability and immunity rules of institutions, the tendency is for a total exclusion of liability. The divergent approaches to liability of arbitrators and institutions create a highly complex situation that is further complicated by the UNICTRAL Model Law on International Commercial Arbitration's silence on the issue of liability. It is therefore necessary to take a closer look at national laws to consider the potential scope of the liability and immunity of international arbitrators and institutions.

The Spanish Arbitration Act (2003), modified by Law 11/2011 (the Spanish Act), is a unique example of how states make normative choices in favor of a contractual approach towards liability. Specifically, article 21.1 of the Spanish Act imposes a mandatory obligation for arbitrators to obtain insurance.

Although the specific design of the mandatory insurance requirements is subject to a detailed legislative act to be passed, including for example the amount of liability insurance arbitrators must have, the Spanish Act considers that arbitral institutions should provide insurance directly to arbitrators arbitrating pursuant to the institutional rules. Therefore, it is only in *ad hoc* arbitrations where the arbitrators must have civil liability insurance or an equivalent guarantee. The Spanish Act also has an exemption for state entities and arbitral systems that are part of the public administrations. This means, for example, that arbitral institutions engaging in consumer arbitration are not subject to the obligations to have mandatory liability insurance on behalf of their arbitrators; and thus it is for the arbitrators to comply with the obligation.

The Spanish Act is also unique as it generates a direct cause of action for injured party against the arbitral institution, regardless of any compensation available against the arbitrators. Contrary to one might think of, the Spanish liability regime is a qualified one: arbitrators and arbitral institutions are only liable in cases of *bad faith*, *recklessness* or *fraud* —and not simply a standard based upon negligence, which was a partial basis for arbitrator liability imposed under an older Spanish law. It is not therefore a surprise that even before the 2011 amendment of the Spanish Act, that (1) arbitral institutions usually had an insurance policy that also covered their arbitrators; and (2) arbitrators conducting *ad hoc* proceedings were responsible for obtaining their own professional liability insurance.

There will inevitably be a complex set of issues raised from a legal and theoretical perspective of the new mandatory insurance requirement. Those issues might include the interpretation of the liability regime, the nature of arbitration, and the nature of contractual relationships among parties, arbitrators and the arbitral centers. In the meantime, this post contains a few observations about the behavior of the insurance market.

The Spanish insurance sector reacted quickly to the new mandatory insurance requirements. Spanish insurers attempted to design a special insurance policy for arbitrators. After a few months, however, the market shifted towards a different approach, namely some of the Bar Associations began to extend its insurance liability policy as to cover arbitration activities. This has been the path followed

by the Madrid Bar Association which has been able to provide coverage to lawyers without increasing the premium price. Also, leading insurers in Spain with a strong presence in Latin America – like MAPFRE — have extended their private liability professional insurance policies to cover arbitration, again with no increase of the premium price. Curiously, other professional bodies regulating non-lawyers have not yet taken a similar action despite the fact that Spanish Act also opens the range of professionals who can serve as arbitrators.

With the new innovations of the Spanish Act, there is certainly room for improvement in the insurance conditions offered by the insurers–particularly in terms of the amount, territorial scope and temporal scope of coverage–so there can be appropriate competition among insurance providers on the different conditions and premium prices offered to both arbitrators and arbitral institutions.[fn]See: Pilar PERALES VISCASILLAS, *El Seguro de Responsabilidad Civil en el arbitraje*. Instituto de Ciencias del Seguro-Fundación Mapfre, 2013, nº197.[/fn] It is worthwhile mentioning that the professional insurance policies offered by the Madrid bar association, as well as the one offered by MAPFRE were modified to include a lawyer's provision mediation services after the new Spanish Mediation Act (Law 5/2012) that also imposed mandatory insurance coverage on mediators.

What remains to be seen is whether other states will follow the Spanish example by enacting arbitration laws. At a minimum the Spanish Act generates, at least in Spain, an interesting debate on the liability regime, the status of arbitrators and arbitral institutions, and the value of competition for coverage related to professional liability.

Without a doubt, the arbitration insurance market in Spain is a growing sector that might serve as an example for other markets. The Spanish experiment in this area will undoubtedly identify a variety of challenges in obtaining professional liability insurance policies, but difficulties alone can no longer be used as an excuse for not having appropriate insurance coverage.