Kluwer Arbitration Blog

To Insure or Not to Insure: Should Arbitrators Be Obliged to Insure Their Civil Liability?

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Arbitrators' civil liability is not a topic that everyone within the arbitration community enjoys discussing. Therefore, it is not surprising that the approach to the concept of liability differs within the arbitration community. In cases where someone may face civil liability, the possibility to insure such risk arises. This blog post, therefore, will deal with the question of whether arbitrators should mandatorily insure their civil liability and whether it should be regulated by law.[1)]

Different Concepts Concerning Arbitrator's Liability

There are three concepts concerning arbitrator's liability: absolute immunity, absolute liability, and limited or qualified liability. Under the first approach, which found its place in common law countries, firstly, arbitrators should not be found liable for their acts or omissions as arbitrators because the duties they perform are closely related and similar to the ones performed by judges who enjoy absolute immunity. The absolute liability doctrine is cardinally different. Supporters of this approach claim that arbitrators should be held liable as any other service providers and their liability could only be limited by the contract, not by the arbitrator's status.

The limited liability doctrine tries to reconcile the two other approaches. According to this doctrine, since an arbitrator is not analogous to the state judge but neither a pure service provider due to the functions performed, arbitrator's status is somewhere in between or *sui generis*. Therefore, arbitrators should not be liable for ordinary negligence but could not avoid liability in case of bad faith, *i.e.* when they act intentionally or are grossly negligent, for example, when arbitrator intentionally fails to disclose the conflict of interest and, therefore, the award is later annulled.

It is most widely accepted that an arbitrator's civil liability should be limited. By way of example, Section 29 of the English Arbitration Act states that an arbitrator should be found liable only in cases of bad faith. Similar provisions exist in arbitration laws in Spain (Article 21 of Arbitration Act of Spain), Portugal (Article 9(4) of Portuguese Voluntary Arbitration Law), Italy (Article 813ter of Code of Civil Procedure of Italy), New Zealand (Article 13 of New Zealand Arbitration Act 1996), Australia (Article 28 of Australia's International Arbitration Act 1974), Hong (Article 104 of Hong Kong Arbitration Ordinance), Sri Lanka (Article 45 of Sri Lanka Arbitration Act), and others. Although regulation in these countries differs, the goal remains the same – to ensure

that arbitrators would only be liable in case of their bad faith, understanding the latter as arbitrator's intent or gross negligence. Most arbitration rules, for example, LCIA (Article 31 of LCIA Arbitration Rules), ICC (Article 41 of ICC Arbitration Rules), SCC (Article 52 of SCC Arbitration Rules), DIS (Article 4 of DIS Arbitration Rules), SCAI (Article 32 of Swiss Rules of International Arbitration), HKIAC (Article 46 of HKIAC Arbitration Rules), Vilnius Court of Commercial Arbitration (Article 47 of Arbitration Rules of Vilnius Court of Commercial Arbitration), contain the same or very similar provision, under which arbitrators are not held liable in case of ordinary negligence.

Status quo on Professional Liability Insurance for Arbitrators

Although not widely discussed, liability insurance is an important topic for arbitrators' community. When the Swiss arbitration association rendered a survey in 2013, 50% of arbitration institutions claimed to have liability insurance for claims against the institution itself. As regards arbitrator's insurance, arbitration institutions replied that they insure arbitrators rarely and mostly when they require themselves.[2)] This seems somewhat odd knowing that earlier an ICC working group on arbitrator's status concluded that arbitrators should enter into a contract on liability insurance.[3)]

Hence, although the ICC Working Group concluded in 1996 that arbitrators should insure themselves, the survey rendered by Swiss arbitration association in 2013 revealed that arbitrators rarely request insurance. In other words, most arbitrators arbitrate without any liability insurance, meaning that if an arbitrator is faced with a civil liability claim, he/she alone would need to cover the damages. The amount of damages theoretically might be so large that an arbitrator would eventually risk facing bankruptcy. So, it is the parties to arbitration that should be interested in arbitrator's liability insurance in the first place as it is designed to protect arbitrators from potential creditors. Secondly, the states should also be interested in the issue because it may lead to distrust of arbitration in general.

However, if one were to look at different arbitration laws, one would notice that there is nothing on arbitrators` liability insurance. Indeed, to the author's knowledge, only Spain explicitly regulates arbitrator's insurance questions. Article 21(1) of the Spanish Arbitration Act provides that arbitrators shall be required to take out insurance to cover civil liability or to make an equivalent guarantee, for the amount established by regulation. This obligation was included in the law together with the 2011 amendments of the Spanish Arbitration Act. As it was noted in another article on the Kluwer Arbitration Blog, the Spanish insurance sector reacted quickly, and Spanish insurers attempted to design a special insurance policy for arbitrators.

Although amendments in Spain were adopted eight years ago, other countries either in Europe or elsewhere in the world did not follow Spain's example and there are no indications that any country is preparing to do that. As a result, in a situation where only Spain adopted a relevant regulation, the question arises if there is a need to discuss compulsory liability insurance at all?

It may be asked whether the professional liability insurance for lawyers would apply to arbitrators. Although it might depend on different national rules, generally the answer would be answered to the negative. Lawyers work in the field of representing clients before courts, state institutions, *i.e.*, the main activity of lawyers is acting on behalf of someone else and this is the activity that is insured by professional liability insurance. Professional civil liability insurance of lawyers,

therefore, is directed to protect lawyers for their main activities and not any activity performed by a lawyer. Arbitrating, on the other hand, is not an activity that would *ipso facto* be considered every lawyer's activity. At the same time, auditors, architects, economists, lecturers and others may also be appointed as arbitrators. Therefore, even if professional insurance for lawyers applied to arbitrators, it would not be provided to all professions and the problem would not be resolved.

It might seem surprising that the issue of the insurance of arbitrator's liability is not regulated by laws, particularly, when the ICC Working Group concluded that arbitrators should insure themselves. However, more careful analysis shows that it should not be too surprising. In fact, most of arbitration laws do not regulate arbitrator's liability at all. For example, even the UNCITRAL Model Law does not provide any guidance on arbitrator's liability. So, it should not be surprising that national arbitration laws do not regulate the issue of insurance if the issue of liability itself is not regulated.

Should Arbitrators Be Obliged to Have a Professional Liability Insurance?

There are opinions in academia suggesting that professional liability insurance for arbitrators would be useful.[4)] Furthermore, insurance is required in other professions.[5)]

However, as mentioned above, it is most widely accepted that arbitrator's civil liability should be limited, *i.e*. even without the insurance, arbitrator's liability should be applied only when arbitrator acts conducted in bad faith (acts conducted intentionally or grossly negligently). Therefore, an obligation to insure civil liability when the liability is *ipso facto* limited may be treated as a redundant requirement. Indeed, arbitrators would then need to insure their liability only for acts committed in bad faith, while normally insurers only insure risks of ordinary negligence. Therefore, the issue arises as to whether liability insurance is at all possible in arbitration.

Insurance would also mean additional expenses which ultimately should be covered by the parties to arbitration paying higher arbitrators' fees. Scholars support this conclusion.[6)] Also, a rather small amount of insured parties may lead to higher insurance payments for arbitrators and again, ultimately, the parties.

On the other hand, in Brown's opinion, insurance would ensure fair process with a competent arbitrator.[7)] Yet, it is not explained what the correlation between insurance and competence is. On the contrary, knowing that any failure will be covered by insurance, arbitrators may start acting less prudently as they would not do without the insurance.

Conclusion

Therefore, the conclusion of the ICC working group that arbitrators should insure their civil liability,[8)] cannot be supported. Of course, if the arbitrator would feel more comfortable with insurance, the voluntary insurance can be suggested if applicable law allows for same. Yet, compulsory liability insurance would not achieve the purposes it would seek. Even if an arbitrator may be faced with the civil liability claim, those situations should be rare and most attempts to get

arbitrators liable should fail because the standard of liability is high enough. Therefore, it should not be recommended for national law-makers to follow Spain's example and to implement compulsory arbitrator's liability insurance in national legislation.

References

?1 This blog post is based on the author's PhD thesis and is intended to provide some guidelines concerning the issue – Varapnickas, Tadas. *Arbitrator's civil liability and its boundaries*. Vilnius: Vilniaus universiteto leidykla, 2018. This PhD thesis was defended at Vilnius University on December 3, 2018. A summary of the thesis is available in English here.

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