Loretta Malintoppi
Independent arbitrator, 39 Essex Court Chambers

Don’t shoot the Sheriff

The Threat of Legal Claims against Arbitrators and Arbitral Institutions
The Threat of Civil Liability

Accountability and Respect of their Duties
(notably for gross negligences / actions in bad faith)

Importance of the Law of the Seat

Arbitrators as “collateral damage”
& the perils of “due process paranoia”
Should Arbitrators & Arbitral Institutions Enjoy Full Judicial Immunity?

Yes

- Equal to Judges?
- Ensuring finality of awards and dispute

No

- Professional service providers (like lawyers)
- Alleged benefits of the threat of civil liability
Arbitration Rules?
Full immunity from legal process

- Convention, Article 21(a)
- Administrative and Financial Regulations, Regulation 32

Waiver within the limits of applicable law & no limitation of liability in case of “intentional wrongdoing”
General limitation of liability of arbitrators for acts or omissions in connection with an arbitration towards “any person”
The limitation of liability does not apply when the act or omission is shown “to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party”

The limitation of liability does not apply when the act or omission was done “dishonestly”
Limitation of liability extends to:
• emergency arbitrators
• administrative secretaries
• tribunal-appointed experts
• arbitral institutions and their staff
• LCIA, SIAC, HKIAC, BANI and ICDR Rules:

- none of these persons should be under an obligation to make a statement about the arbitration

- no party should seek to make any of them appear as a witness in legal proceedings relating to the arbitration
The regimes established by arbitral rules recognize arbitral immunity only to the extent permitted, or not prohibited, by the relevant legislation.
National Laws?
• The UNCITRAL Model Law on International Commercial Arbitration is silent on the issue of immunity for arbitrators
• Section 25 of the Singapore International Arbitration Act:

an arbitrator is not liable for “(a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.”
Section 28 of the Australian Arbitration Act:

Arbitrators are not liable in respect to “anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator”.
• Section 29(1) of the UK Arbitration Act:

“An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.”
Section 23 of the Thai Arbitration Act: the civil liability of Arbitrators is limited to acts “performed wilfully or with gross negligence causing damage to either party.”
• Section 104(1) of the Hong Kong Arbitration Ordinance:

an Arbitrator is liable for acts committed in relation to his/her functions only if it is proved that the act was done or omitted to be done dishonestly.

• Section 105(1) of the Hong Kong Arbitration Ordinance:

Arbitral Institutions are also not liable in law for acts arising from the exercise of their functions unless such functions were exercised dishonestly.
Article 21 of the Spanish Arbitration Act:

if arbitrators fail to comply with their mission in good faith, they will be liable for any damages resulting from bad faith, recklessness or mens rea. A damaged party may file suit directly against the institution, “irrespective of any action for indemnity lodged against the arbitrators.”
• Section 594(4) of the Austrian Code of Civil Procedure:

“An arbitrator who does not fulfil his obligation resulting from the acceptance of his appointment at all or in a timely manner, shall be liable to the parties for all damages caused by his wrongful refusal or delay.”

• The Indonesian Arbitration Act states that arbitrators can only be held responsible for any action taken in carrying out their function unless bad faith can be proven (Article 21).
• **Section 25(1) of the UK Arbitration Act:**

the parties are free to agree with an arbitrator the consequences of his/her resignation as regards his/her entitlement to fees or expenses and any liability thereby incurred by the arbitrator.

• **Section 29(3) of the UK Arbitration Act:**

expressly provides that the statutory immunity of arbitrators does not extend to liability incurred as a result of resignation.
• Article 49.5 of the Vietnamese Law on Commercial Arbitration:

“If an arbitral tribunal orders a different form of interim relief or interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant, or to the party against whom the interim relief was applied or to a third party, then the party incurring loss shall have the right to institute court proceedings for compensation in accordance with the law on civil proceedings.”
Case Law?
France (Case Law)

• Focus on the dual character of arbitrators’ liability:

Judicial mission: liability can only be engaged if there is gross negligence or fraud

Contractual mission: civil liability in case of non compliance with the duties
United Kingdom (Case Law)

• Originally arbitrators were equated to judges

• Two interesting cases in the mid-1970s

• 1996 Arbitration Act - Qualified Arbitral Immunity exists save for 2 circumstances:
  (i) resignations without good cause
  (ii) acts or omissions made in bad faith
United States (Case Law)

• Very broad notion of arbitral immunity

• Immunity available to judges can be extended where (i) comparable role to that of a judge (ii) immunity is necessary to perform this role without fear or harassment and (iii) adequate safeguards exist to prevent abuse of immunity.
Proposals

Don’t Shoot the Sheriff
Proposals (1/2)

- Taking out professional indemnity insurance

- VVV’s proposal: arbitral institutions obtain insurance coverage for arbitrators conducting arbitrations under their rules and for the Institutions themselves
Proposals (2/2)

- Early dismissal of frivolous cases
- Specialization/expertise of national judges
- Confronting the challenges as a community