

Efficient Arbitrator – Call for Safety of Arbitrators

What is special about an arbitrator's life? One of the "special" factors of our life is risk. There are a variety of risks. Adventures, aircraft breakdowns, airport strikes, criminal dangers, lost luggage, secret service agents trying to stop an arbitrator: these are all things that I have personally experienced. Spies, paparazzi, a fire in court, mice running about under the table during the hearing in a certain exotic court and to the accompaniment of screaming secretaries: this seems to be a real part and parcel of an arbitrator's life.

Recent years have brought more sad stories. One arbitrator was killed in Africa. Shut down by a professional murderer, hired most probably by a person unhappy with the award he issued. Recently three arbitrators were sentenced in absentia in Qatar. They issued an award against the interests of an enterprise owned by the uncle of the Emir of Qatar, which caused harm to the Qatari royal family. I know of a case in international arbitration, where following the arbitrators' deliberations one of the arbitrators was arrested and imprisoned for "acting contrary to the interest of the State." That happened in the arbitrator's own country. The arbitration institution had to replace him, to get the arbitration completed. It is common knowledge that an arbitrator was kidnapped by secret service agents from his country of origin. He disappeared for many weeks. The incident occurred not in a jungle but at the Amsterdam international airport.

My colleagues have reported cases in which public courts issued anti-suit injunctions forbidding arbitrators entry to the place of arbitration. It sounds like a joke but it isn't: a few years ago, an Indonesian court imposed a fine of 1 million USD on every member of the arbitral tribunal per every day of continued arbitral proceedings.

Our position is defined to some extent by our sense of safety. Can we have efficient arbitrators if they don't feel safe? Do we have an efficient international arbitral tribunal composed of three members if one of them feels safer than the others only because his national law grants him better immunity than the national laws of his two colleagues? Is it correct that the arbitrator of one nationality enjoys full protection and the others do not?

There are countries; some of them highly democratic, where one cannot enforce a foreign arbitral award if it "runs contrary to the national interest of the State". Can the arbitrator who has rendered such an award feel safe?

The sheer number of dissenting opinions in BIT arbitrations is not amazing. It's hardly surprising that an arbitrator coming back to his home country losing the dispute files a dissenting opinion to forestall possible reprisals upon his return. After all, his name hits the headlines and the press does much to stir up strong emotions. Whenever great investment disputes are arbitrated, the press speculates on how much money a possible loss would cost the "average taxpayer." The "average taxpayer" in question may hold a grudge against the arbitrator who was on the arbitral tribunal rendering the award. Should the arbitrator be afraid to come back home the way a football referee dreads facing enraged fans?

Chartered Arbitrator, advocate admitted in Warsaw and Paris, former partner of Dentons, member of the ICC International Court of Arbitration (2003-2015), President of Court of Arbitration at the Polish Chamber of Commerce (2006-2009), member of the VIAC Advisory Board, arb@piotrnwaczyk.com

Whether the arbitrators are protected by any immunity is not a matter of international law. It is a matter of national law and the approach adopted by various countries differs significantly.

The arbitrators are “private persons”. They remain so even when they resolve a multi-million dollar dispute or make a decision that is crucial for the national economy of one of the parties. Sometimes the decision may be important for national defense or the safety of its energy sector, etc. Meanwhile, an arbitrator can be assaulted, insulted and have the case record stolen from him.

A judge in a court of law is protected by special laws. In every country, assault and battery or contempt of court are even more serious than assault and battery of a police officer, municipal security guard, court enforcement officer or even a “person appointed to assist the same”. However, assaulted, hit, or insulted while discharging his duties or in connection therewith, an arbitrator would have to search for and sue the perpetrators by himself in a civil or private action.

While there are countries whereby the arbitration law generally provide for immunity (e.g. England), there are countries where the law directly provide for liability of arbitrators in certain circumstances (e.g. Austria)². The Polish arbitration law regulated in Part V of the Civil Procedural Code follows the UNCITRAL Model Law upon which it was based. Unfortunately it does not provide explicitly any provisions in this respect.

In relation to liability for the wrong award, the prevailing view is that an arbitrator may be held liable only in the event the award was rendered in manifestly bad faith³. In addition, it is held that arbitrators bear general contractual liability towards the parties for acts and omissions resulting from *receptum arbitrii*.

The arbitrator’s personal safety is a matter of great importance. Many arbitrators have had funny, sometimes ridiculous, sometimes unpleasant adventures. One night, while at a certain Asian airport, I was confronted by three “sad-looking gentlemen” (as secret agents are referred to in Poland). They were intent on “talking to me.” They wanted to know why someone who had come all the way from Poland and paid so much for a first class ticket would want to stay for less than 24 hours. They did not tell me who they were. With anxiety, I recalled that I had documents regarding supplies of military equipment in my carry-on bag. I thought that if the “sad-looking gentlemen” order me to open the bag, I had better refuse. But what if they check the bag themselves? Would I make it to the plane on time if they see what is inside the bag? Would I even leave that country that night? What if they were agents from a neighboring country involved in a military conflict for a long time? I was assailed by all kinds of gloomy thoughts.

Suddenly, out of the corner of my eye I saw a well-known arbitrator standing in a crowd of passengers. There was nothing strange to it – well-known arbitrators are easy to meet at international airports. He smiled when he saw me, waved to me, and came up to greet me. “Please stay here until they let me go!” – I asked my colleague. It is so good to meet a colleague at a time like that! Finally, the “sad-looking gentlemen” let me go. They took a long time inspecting my business card with the “President of the Court of Arbitration at the Polish

² See: J. Lew, L.A. Mistelis, S.M. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 291-292.

³ See: T. Erecinski, K. Weitz „Sąd Arbitrażowy (Arbitration Court)”, Wyd. Prawnicze Lexis-Nexis, Warsaw 2008 p. 224.

Chamber of Commerce” on it. It helped. But dark thoughts about how that mysterious encounter could have played out differently have remained with me.

The mission of an arbitrator can be dangerous. Again, an immediate issue that springs to mind is that of the arbitrator’s immunity: do arbitrators have immunity and if so what?

Nearly every set of rules and regulations of an arbitration institution ensures a kind of immunity. The Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce (Paragraph 5.2) states that “The arbitrators, the Polish Chamber of Commerce, their staff and the members of the authorities of the Polish Chamber of Commerce and the Court of Arbitration shall not be liable for any loss arising as a result of acts or omissions connected with conduct of an arbitration proceeding, unless the loss was caused intentionally.” Similarly, the ICC Rules of Arbitration (Article 40 - Limitation of Liability) read: “The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.” So we do have a waiver.

And yet in *ad hoc* matters it is better to have solid professional insurance. Lawyers have it, especially partners of big law firms. However, it is worth looking into it whether it extends to arbitration or not. But non-lawyers, and remember - anybody can be an arbitrator, do not have such insurance cover. Thus, an academic lecturer-arbitrator or an engineer-arbitrator or an accountant-arbitrator can sometimes expose himself to greater risk. Albeit we are now talking about quite exceptional and particular cases, but losing parties have been known to make attempts to sue arbitrators. There are already pending cases in Poland concerning “liability” of arbitrators.

Most commonly, they are attempts to seek compensatory damages due to delays in arbitration. And so, beware of Franco-French and Italo-Italian arbitrations. I always refuse to undertake arbitration in France or Italy because after 6 months (in France) or 9 months (in Italy), if the arbitrator does not deliver an award, the parties hold it against him. They sue him not only for a refund of the remuneration he has received, but also for compensation for the fact that they could not “enjoy the arbitral award”, that is to say, make use of it.

Does the immunity granted by the arbitration rules of any institution cover the personal safety of the Arbitrator? Our Polish legislator has not given us any guarantee of personal immunity. Just to remind you: a common judge is protected. Every attack on a public official or even a person called to assist a public official is subject to protection. In other words, when a bailiff co-opts a passer-by to help, that passer-by is protected by special regulations of criminal law, but an arbitrator is not. If someone assaults an arbitrator, will he go unpunished? If someone rips a suitcase with case papers out of an arbitrator’s hand, what then? The arbitrator can then bring only a private suit in regard of assault. But what about that bag with papers? How much were those papers worth? The value of waste paper? And what if there were state secrets or professional secrets in that briefcase?

An arbitrator is not even protected in keeping arbitration confidentiality. While the deliberations of judges are classified as secret in almost all Criminal Procedures Codes, however, in the majority of Civil Procedures Codes they are merely classified as confidential. Ironically, Book V of the Polish Civil Procedures Code says nothing of the secrecy or confidentiality of an arbitral tribunal.

In short, an arbitrator may be summoned to court and be cross-examined as a witness on what really happened behind those closed doors. This is different to the treatment of a mediator. A mediator cannot be cross-examined because there is a so-called ban on cross-examining mediators as witnesses. Such ban is similar to the secrecy of confession, or a military secret encompassed by a “classified” or “confidential” clause. And an arbitrator who, after all, is also partially a mediator, when conducting a hybrid (half-and-half) ‘med-arb’ case, first as a mediator, then as an arbitrator, is not suddenly released from his vow of secrecy.

The arbitrator’s remuneration is not guaranteed in some jurisdictions. The prevailing view in Polish arbitration law is that the remuneration of arbitrators results from an agreement between the latter and the parties rather than from an arbitral award, though the arbitration rules may provide otherwise. But what happens if an agreement is not reached? Arbitrators may bring an action to a common court for their remuneration to be determined. A public judge will examine their amount of work and bear in mind the amount in dispute⁴. The question is when the judge can examine the amount of work of arbitrators, at the beginning or at the end of proceedings? In the latter case, arbitrators have to work for free, hoping that in the end they will be awarded fair remuneration by a public judge. Some of them may be jealous. They are badly paid. Why are they to grant our remuneration for one arbitration case higher than their monthly salary?

The court’s decision in this respect is subject to an appeal (Polish: *zazalenie*). The parties may file a complaint against the court’s decision in an action brought by the arbitrators. Fortunately, they may not file an action to set aside the award in case they only challenge the arbitrators’ fees. In Sweden this issue is determined in a different manner. The Swedish Arbitration Act provides that a party and the arbitrator may bring an action to the District Court against an award regarding payment of compensation to the arbitrators (Article 41).

Tax issues are another variety of risk. I do not wish to frighten the Reader here. I have already expressed my concerns in the article: “Is it moral to charge VAT on arbitration?”⁵

Tax advisors have for a long time been providing contradictory information/interpretations regarding Article 15 par. 3 pt. 3, pt. 4) of the Act on Personal Income Tax concerning the remuneration of Polish arbitrators participating in arbitration proceedings with “foreign partners”. The term “foreign partner” is not defined. Whose partner is he to be? The arbitrator’s? Or perhaps the Polish party’s? And what if a Polish arbitrator is nominated in a dispute in which neither party is Polish? We would then be dealing with proceedings “between” two foreign partners and not with a foreign partner of the Polish party.

One can have doubts about whether or not an arbitrator’s activities are subject to VAT, and if they are then when. Is justice a service? Is finding someone guilty and sentencing him to prison a service? Arbitration can be chosen in inheritance or family cases, such as the partition of joint matrimonial property. Does the service of amicably resolving an inheritance dispute or joint property division between family members or neighbors constitute commercial activity? Is Arbitration really a business like any others?

Each arbitrator could be criminally and fiscally liable for improperly completing a VAT tax return. All of us run this risk every month. You run this risk if you fail to complete a VAT tax

⁴ Article 1179 § 2 of the Polish Civil Procedural Code

⁵ *Is it moral to charge VAT on arbitration?* - Revista Romana del Arbitraj Nr 1/January 2015, p. 11-14, Bucharest, Romania,

return when you should, and the same risk if you do actually complete a tax return and pay VAT when you should not. Filling out a tax return wrongly works both ways and is subject to liability, irrespective of the “direction” of the wrongdoing. Even “unnecessary” payment of VAT can be prosecuted, e.g. in a situation where a party demands a VAT refund with interest after some time. That party could be a state institution, or even the State Treasury itself.

Being convicted in criminal or fiscal criminal proceedings for a deliberate wrongdoing bars a lawyer from practising the professions of an advocate, legal adviser, notary, judge, public prosecutor, tax advisor, court-receiver, bailiff, academic teacher, politician, police officer, customs officer, insurance agent and even tax officer. As a result, the country’s best arbitrators are sitting on a powder keg each month, courting disaster, at the mercy of shaky and changeable interpretations by civil servants who typically are not lawyers.

Freedom of speech can be an issue. I’ve heard about an LCIA arbitral award in which the word “fraud” appeared 40 times. English arbitrators were not afraid to describe the transaction as fraudulent and the contract as the result of fraud committed by specifically named people. I wonder if in some jurisdictions of our region the arbitrators would be equally courageous. In some of “our” countries you should avoid using words such as: swindle, fraud or humbug until the swindlers are finally sentenced by the criminal court of last instance. It may take years. In the jurisdictions where arbitrators are not protected by immunity, one can sue an arbitrator for an insult, defamation or abuse of his or her personal rights. In the meantime, the arbitration must work quickly and efficiently. As a result, in an international arbitral tribunal composed of three members of a different nationality some of them can feel safer than the others. Those protected by the immunity granted by their national regulations can enjoy full freedom of speech and use words that the others would not use.

International sanctions imposed on some countries may involve certain personal risks for arbitrators. European sanctions imposed on Russia do not present significant risks on arbitrators acting in Russian disputes. However, American sanctions imposed on Russia or Iran might produce different results. An arbitrator acting in a case where one of the parties or its majority shareholders is on the American “black list” may be prosecuted in the US for cooperating with a “public enemy”.

Why arbitrators in one country are treated better than in another? From time to time I quote the famous line from *The Animal Farm* by George Orwell: “All animals are equal but some of them are more equal than the others”. Is it fair that we – members of the same international arbitration community are treated differently in various jurisdictions? Are we like the animals living on the “animal farm” described by George Orwell? Do we want to agree that: “All arbitrators are equal but some of them are more equal (better protected) than the others?”

I think it is time to demand equal treatment for international arbitrators in all jurisdictions. UNCITRAL should look into the issue and start working on an international convention on the protection and immunity of international arbitrators. We all want to have efficient arbitrators. The arbitrators want to feel safe. There should be no differences in the level of safety. In conclusion, only an arbitrator who feels safe can be efficient, and we should seek measures to ensure such safety.