INSIDE ARBITRATION: EVENT REPORT - THE THREAT OF LEGAL CLAIMS AGAINST ARBITRATORS AND ARBITRAL INSTITUTIONS

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Legal Briefings

This year marked the tenth edition of the Herbert Smith Freehills – SMU Asian Arbitration Lecture Series. We were privileged to have Ms Loretta Malintoppi from 39 Essex Chambers deliver that lecture, focusing on an often overlooked but growing threat of potential civil liability of arbitrators and arbitral institutions.

There is no question that arbitrators and arbitral institutions should be held liable if they commit gross negligence or act in bad faith. Where they fail, they find themselves open to challenge. Indeed, there is a growing trend of claims being brought by parties who are dissatisfied with awards rendered and raise allegations of bad faith or violations of public policy by arbitrators as tools to invalidate those awards.

In that context, the question is whether arbitrators should also be subject to civil claims – and if so, on what basis and to what extent.

The issue is approached differently by different arbitral rules and different national laws. For example, the system of the International Centre for Settlement of Investment Disputes ("ICSID") has espoused full immunity from legal process for ICSID arbitrators and conciliators and members of the ICSID Secretariat for acts carried out in the exercise of their functions. Most other rules contain provisions limiting the liability of arbitrators and the institutions themselves for acts or omissions carried out in the conduct of arbitral Typically, these limitations do not apply in cases of intentional wrongdoing or dishonesty – providing further grounds for debate.

That said, most arbitral rules do not accord more protection than what is already afforded under the relevant national laws. The obvious consequence is that State courts can always ignore or dismiss the provisions of arbitral rules when applying national laws.

To that end, there is no uniform approach across national laws. Singapore and Australia, for example, set out a broad immunity regime from civil claims. Other jurisdictions accord immunity to arbitrators in the exercise of their functions, but not to actions or omissions done in bad faith – see for example, the UK Arbitration Act.

All this to say that arbitrators and arbitral institutions are facing an increasingly aggressive environment, with arbitrators in particular becoming collateral damage as they face expensive and lengthy proceedings over their alleged liability. The threat of such legal claims against arbitrators has fed due process paranoia and that continues to be one of the issues that users believe is preventing arbitral proceedings from being more efficient.

Both arbitral institutions and national laws must therefore be more robust in managing the issue. As that effort moves forward, a practical way to manage risk is for arbitrators to take out professional indemnity insurance. Another solution is for arbitral institutions to obtain insurance coverage for the arbitrators conducting arbitrations under their rules and for the institutions themselves. But most importantly – the risk must be mitigated by addressing the issue at its root : national courts must take a strong stance against frivolous cases brought with vindictive purposes against arbitrators, and dismiss them at an early stage.

The consensus in our panel discussion was that the risk that arbitrators may be defeated in legal proceedings brought by disappointed parties, sometimes in bad faith persists in various jurisdictions. That they occur at all – even such proceedings end in favour of the arbitrator – the result likely comes after years of judicial battles with inevitable financial aggravation and emotional suffering for the arbitrators, and at a cost to arbitration in general. More must be done now by counsel, arbitrators, institutions, national courts and legislature to cull this trend. As Ms Malintoppi ended,

"The house is not burning yet but this fire will not be unexpected when it comes and we should intervene when we can still prevent it"

The annual Herbert Smith Freehills-SMU Asian Arbitration Lecture Series was established in 2010 through funding from Herbert Smith Freehills, and promotes collaborative forms of dispute resolution and access to justice. It also aims to promote Singapore as a leading centre for dispute resolution in Asia, particularly in arbitration and mediation.

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KEY CONTACTS

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