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POTENTIAL FOR DEVELOPMENT OF ARBITRATOR PROFESSIONAL LIABILITY INSURANCE SERVICE IN THE REPUBLIC OF SERBIA

REVIEW ARTICLE

Abstract

From a comparative legal perspective, insurance companies have relatively recently begun to offer the service of arbitrator civic-legal liability insurance. Some legal systems have mandated insurance for all arbitrators. Additionally, various reputable arbitration institutions have taken a stance on whether they recommend arbitrators to be insured or not. However, there are diametrically opposed opinions in varous legal systems regarding whether the existence of such insurance service is allowed by positive regulations and public policy. In line with the situation at the global arbitration scene, it is necessary to examine whether there is a legal basis for such insurance service in the Serbian financial market and what are the prospects for its establishment.

Keywords: *arbitration, civic-legal liability insurance, professional insurance, arbitrators' insurance.*

I. Introduction

In order to establish whether arbitrators' insurance is a legal insurance service in the Serbian financial market, we need to determine that the legal prerequisites are fulfilled. First, we must define the nature of the civic liability of an arbitrator for actions taken during the arbitration process. Then, in the event of existance of such liability,

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it is necessary to establish the degree of negligence required for the attachment of such liability. Upon the establishment of the mentioned facts, attention should be directed to positive regulations in the fields of insurance law, tort law, and arbitration, which will indicate the degree of negligence by the insured (arbitrator) that creates legal conditions for third-party claims against the Insurer. This step is important because if the threshold of negligence in establishing the civic-legal liability of an arbitrator exceeds the threshold of negligence for which the sum insured sum is paid to a third party, such a service cannot thrive in the Serbian financial market.

Services for civic-legal liability insurance are offered to holders of liberal professions (civil engineers, doctors, lawyers, etc.). However, arbitrators, by one of their characteristics, differ from other liberal professions; namely, they perform a judicial function in part of the arbitration process. Therefore, this paper will present the difference between the regime of judicial function performed by an arbitrator and other actions taken by nature of the job and how that reflects on their civic-legal liability and the obligations of the Insurer.

II. Civic-legal liability of an arbitrator

Arbitrators have to be individuals with legal capacity. These conditions may be tightened by the arbitration agreement,[2] law,[3] or rulebooks of an arbitration institution.[4] For the purposes of professional arbitrators' insurance, it is most important to divide arbitrators into the following three categories: notaries public, lawyers,[5] and third parties. The reason behind this division is that notarial services and legal practice are the only professions explicitly permitted by law to act as arbitrators, yet they are obligated to be insured against professional liability. Since both laws address these issues in their own distinct ways, these two professions constitute two categories and should be separately considered.

For an arbitrator to even consider obtaining insurance against civic-legal liability, they must be eligible to be liable in a civic-legal sense. Arbitrators are specific in that they are subject to two regimes of civic-legal liability. One concerns the judicial function performed by the arbitrator, under which there is immunity during actions that

[2] Law on Arbitration – LA, *Official Gazette of the RS*, No. 46/2006, Article 19. These individuals do not necessarily have to be legal professionals, but can be persons with specific technical knowledge (e.g., engineers) who will serve as arbitrators.

[3] Law on Mediation in Labor Disputes – LMLD, *Official Gazette of the RS*, No. 125/2004, 104/2009, and 50/2018, Article 38; The Law on Sports – LS, *Official Gazette of the RS*, No. 10/2016, Article 54, para. 3.

[4] Rulebook on Procedure for Resolving Disputes Regarding Registration of National Internet Domain Names, *Official Gazette of the RS*, No. 31/11, 24/12, 67/14, and 61/16, Article 4, para. 2.

[5] Law on Legal Profession – LLP, *Official Gazette of the RS*, No. 31/2011 and 24/2012 – Decision of the Constitutional Court, Article 37. Law on Notaries Public – LNP, *Official Gazette of the RS*, No. 31/2011, 85/2012, 19/2013, 55/2014 – as amended, 39/2014 – as amended, 121/2013, 6/2015, and 106/2015, Article 59.

may cause damage (e.g., incorrect application of law).[6] In such cases, liability arises only if damage is caused intentionally, similar to the liability of a judge.[7] Continental judicial practice, specifically French[8] and Dutch,[9] has established that arbitrators will be liable only in cases of gross negligence, intent, or fraud in the performance of their judicial duty. There is also a narrower interpretation by the Supreme Court of Austria, which argues that in cases of the judicial role of arbitrators, liability arises for intent. This viewpoint has also been adopted by the Court of Appeal in Brussels,[10] whereas the liability under contract law applies to other aspects of enacting the role of arbitrators, not related to the application of law,[11] which is most consistent with the Article 7 of the Judges Act.[12]

However, there are duties and actions performed during the arbitration process for which the arbitrator is not liable as a judge but rather as a contractual party or expert. This regime of liability relies upon the arbitration agreement and the general obligations of an arbitrator.[13] Of course, arbitrators may inflict damage upon third parties while damaging their clients, and these third parties may also file claims for indmenity,[14] but for the sake of straightforwardness of this paper, we will not extensively address them.

A notary public, when performing their activities within their public powers as a notary public, is liable under tort law. However, while performing tasks that

[6] Jelena Perović Vujačić, "Obligations of Arbitrators in International Commercial Arbitration", *Review of the Kopaonik School of Natural Law*, No. 1/2019, pp. 158–159.

[7] Judges Act – JA, *Official Gazette of the RS*, No. 10/2023, Article 7.

[8] J. Perović Vujačić, pp. 158–162. Teresa Giovannini, "Chapter 36: Immunity of Arbitrators", *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide*, (editors Nayla Comair-Obeid and Stavros Brekoulakis), Alphen aan den Rijn, 2023, p. 443. Cour de cassation, chambre civile 2, 29.6.1960; TGI Paris, Bompard et Carcassonne, 13. 6. 1990, confirmed by CA Paris, 22.5.1991.

[9] *Qnow B.V. v. V* (chairperson), 30. 9.2 016, ECLI:NLHR:2016:2215 referring to the standard applied by the Supreme Court of the Netherlands in 2009 in the case of *ASB Greenwold v. NAI and Arbitrators*, 4. 12. 2009, ECLI:NL:PHR:2009:BJ7834. In the 2009 case, this standard was adopted by analog application of the Dutch equivalent of the Judges Act, which prescribes the same criterion as the aforementioned French case law.

[10] *A. v. E. V.*, Court of Appeal of Brussels, 2015/AR/208, 28. 11. 2017. The court took the position that arbitrators are liable in cases of intention and fraud, just like other judges. It was also stated that it was irrelevant that the arbitrator's function is based on a contract, since they have the same role as judges. In the arbitration proceedings themselves, the arbitrator was held responsible because they actively involved an expert in making the arbitral decision by accepting their views on the interpretation of the law and allowing the expert to exceed their own authority.

[11] *Mr. A – Chairman of arbitral tribunal v. German Company X,* Supreme Court of Austria (Oberster Gerichtshof) – 1 Ob 253/17, 28.4.1998, ICCA Yearbook Commercial Arbitration 2001 – Volume XXVI, 221–228.

[12] JA, Article 7.

[13] J. Perović Vujačić, pp. 158–162.

[14] Ramón Mullerat, *The liability of arbitrators: a survey of current practice*, International Bar Association – Commission on Arbitration, Chicago 2006, p. 8. These individuals can be an arbitral institution (e.g., violation of mandatory rules and goodwill loss) or individuals such as attorneys-at-law and experts (e.g., unauthorized disclosure of secrets and information that the arbitrator learned about them).

are not contrary to their profession, such as acting as an arbitrator, they are liable under contractual liability because they enter into a contractual relationship as private individuals, not as holders of public-legal authorities.[15] Lawyers are liable in the same way, because they are in a contractual relationship with the parties when performing legal services, which includes, among other things, acting as arbitrators.[16]

The final conclusion of this segment is that arbitrators will certainly be liable under contractual liability, consistent with the judicial practice of other continental legal systems,[17] and in the event of damage occurred during the exercise of their "quasi-judicial" function, they will be liable for gross negligence and intent. This is important because the Insured will be obligated to compensate for damages resulting from ordinary negligence as well as gross negligence, which is a peculiarity of civic-legal liability insurance, as long as such gross negligence does not imply a gross violation of professional standards.[18] However, the insurance against intent cannot be obtained under any circumstances as it contradicts public policy since such type of insurance is imperatively prohibited.[19]

III. Damage caused by activities of arbitrator

It is necessary to examine whether there are any activities of an arbitrator that can be performed with a sufficiently low degree of negligence that could later qualify as an insured event.

One of the ways to cause damage is by the untimely issuance of an arbitration award, which is a well-known practice in both continental legal systems and common law jurisdictions.[20] Although due dates prescribed by arbitration rules can

[15] LNP, Articles 4, 5, and 58. Marija Karanikić Mirić, "Odgovornost javnih beležnika u srpskom građanskom pravu", *Pravni život*, No. 10/2014, pp. 569–571.

[16] As for the mentioned third parties, these third parties can be legal professionals who are neither lawyers nor notaries, such as law professors. It should be noted that these individuals do not necessarily have to be legal professionals. They can also be experts in other fields who can be very useful in disputes requiring technical knowledge (e.g., a civil engineer as an arbitrator in a dispute arising from a construction contract). All third parties acting as arbitrators are liable under the regime of contractual liability as private individuals.

[17] Gustaf Möller, "The Finnish Supreme Court and the Liability of Arbitrators", *Journal of International Arbitration*, No. 1/2006, pp. 95–99. *Roulas v. Professor J. Tepora; Mr. A – Chairman of arbitral tribunal v. German Company X*.

[18] Nataša Petrović Tomić, *Osnovi prava osiguranja*, Belgrade, 2021, p. 203.

[19] Law on Contracts and Totrs, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of Serbia and Montenegro*, No. 1/2003 – Constitutional Charter, *Official Gazette of the RS*, No. 18/2020, Article 920.

[20] Ahmed Fathy Mohamed el Shourbagy, *Arbitrator and Arbitral Institutions: Liability and Insurance*, Rotterdam, 2021, p. 134. The author refers to cases before the Cour de cassation (2006) and the Court of Appeal of Paris (2015) in which arbitrators had to reimburse costs incurred due to rendering a decision after the

be extended with the approval of an arbitration institution,[21] we may conclude that in the case of unreasonable delay in issuing an arbitration award, arbitrators may be required to compensate the parties for the inflicted damages.[22] Moreover, the author believes that such damages may arise from ordinary negligence and gross negligence of the arbitrator, not exclusively from intent.

Maintaing the independence and impartiality as specified under the Article 21 of the LA as an objective and subjective component, represents one of the duties manifested through the obligation of the arbitrator to disclose relevant facts. In the event that the arbitrator fails to disclose the relevant facts,[23] there may be subsequent damage in the form of additional costs incurred by the parties as a result of arbitration delay. Damage can also arise from the subsequent annulment of the arbitration award or its non-recognition and non-enforcement.[24] Various courts have established the civic-legal liability for breach of duties similar to those in the Article 21 of the LA based on general rules of the law of contract because the breach of such duty is the direct cause of increased costs or damage.[25] This leaves room for the breach of such duty through gross negligence, and perhaps even ordinary negligence. Situations indicating that this duty may be breached by lower degrees of negligence include those where the arbitrator finds it difficult to assess whether certain facts are relevant. One example is when the relevant circumstances do not

deadline. The third case was before the California Court of Appeal (1983), where it was established that timely rendering of arbitral decisions is not a component of the "quasi-judicial" function of arbitrators, and therefore, they do not have immunity.

[21] Chamber of Commerce and Industry of Serbia, Rulebook on International Commercial Arbitration – STA, Article 41. Belgrade Arbitration Center, Rulebook of Belgrade Arbitration Center (Belgrade Rules) – BAC, Article 32.

[22] Jelena Vukadinović Marković, Ivana Radomirović, "Pravo na naknadu štete kao posledica povrede *receptum arbitri* – građanskopravna odgovornost arbitara", *Prouzrokovanje* štete*, naknada* štete *i osiguranje* (editors Zdravko Petrović, Vladimir Čolović and Dragan Obradović), Belgrade – Valjevo, 2022, p. 242; J. Perović, p. 143.

[23] Gašo Knežević, Vladimir Pavić, *Arbitraža i ADR*, Belgrade, 2009, pp. 92 – 94; J. Perović Vujačić, pp. 149–152.

[24] J. Vukadinović Marković, I. Radomirović, p. 242.

[25] G. Möller, pp. 95 – 99. *Roulas v. Professor J. Tepora*. Interestingly, the Supreme Court of Finland asserts that if an arbitrator informs the parties of the reason for recusation and is not recused, and the decision is nevertheless annulled, they would not be held liable because there would be no causal chain. Furthermore, although the Helsinki Court of Appeal established the presence of culpa levis, which the Supreme Court of Finland did not dispute, it was found that as an expert, the arbitrator should have known that providing consulting services to banks owned by one of the parties in the arbitration proceedings could raise justified suspicions of the opposing party. *Mr. A – Chairman of arbitral tribunal v. German Company X.* A similar conclusion was reached by the Supreme Court of Austria in the aforementioned case, applying German law (BGB) and overturning the opinion of the Vienna Court of Appeal. The dispute arose because the presiding arbitrator failed to inform the parties that, at the request of the de facto owner of the Nuremberg company (which was in dispute with Company X), he had presided over the arbitration institution of that economic organization registered in Vienna.

fall within the *exempli causa* "orange" or "green" list that the IBA has adopted to prevent conflicts of interest among arbitrators.[26]

Another obligation of an arbitrator is to conscientiously and efficiently perform their duties.[27] Such obligation can be breached in two ways. The first is the arbitrator's voluntary withdrawal from the proceedings, albeit without justified reasons.[28] The question is whether the arbitrator can unreasonably withdraw and whether this falls within the realm of ordinary or gross negligence, allowing the Insurer to cover damages resulting from such circumstances.

The second way concerns the conduct of the arbitration process itself. Conscientiousness would involve adhering to all principles and rules of the arbitration procedure, meeting the parties demands, and ensuring the proper application of substantive law. This also includes the principle of equal treatment of the parties, where both parties have the opportunity to express their views and arguments on equal terms.[29] The hazard here arises not only from causing harm to the parties through poor conduct of the proceedings but also from the risk of annulment or non-recognition and non-enforcement due to inadequate decisions. Such circumstances would create additional costs for the parties in the arbitration dispute, for which the arbitrator would be liable.[30] The Supreme Court of the Netherlands has encountered such cases twice, applying the same standard but adopting different stances, depending on the reason for the subsequent annulment of the arbitration award.[31]

Damage can also occur is if the arbitrator breaches the principle of confidentiality by unauthorized disclosure of information to third parties that should not have access to the content or outcome of the proceedings or any information learned about the parties during the proceedings.[32] Such form of damage can occur intentionally or accidentally, due to the arbitrator's distraction in an informal atmosphere.

[26] IBA Council, *IBA Guidelines on Conflicts of Interest in International Arbitration*, International Bar Association, London, 2014, pp. 22–27.

[27] LA, Article 24 and 48; J. Perović Vujačić, pp. 136–139; Katarina Jovičić, "Pravna priroda odnosa između arbitara i stranaka: receptum arbitri", *Strani pravni život*, No. 1/2020, p. 24.

[28] LA, Article 25. G. Knežević, V. Pavić, p. 99; J. Vukadinović Marković, I. Radomirović, p. 242; J. Perović Vujačić, p. 148. Justified reason must arise from factual or legal circumstances.

[29] K. Jovičić, p. 24.

[30] J. Vukadinović Marković, I. Radomirović, p. 242; K. Jovičić, p. 24.

[31] *Qnow B.V. v. V* (chairperson), 30. 9. .2016, ECLI:NLHR:2016:2215. The Supreme Court of the Netherlands in the first case concluded that the presiding arbitrator is obliged to compensate for the damage because he failed to ensure that all arbitrators signed the arbitral award, thus rendering it unenforceable. *Greenwold v. NAI and Arbitrators,* 4. 12. 2009, ECLI:NL:PHR:2009:BJ7834. In the second case, the Arbitrators and NAI were sued for damages because they conducted the arbitration proceedings and rendered an arbitral award without the existence of an arbitration agreement, leading to the subsequent annulment of the arbitral award. However, the Supreme Court of the Netherlands found that this fact alone was not sufficient to establish liability.

[32] J. Vukadinović Marković, I. Radomirović, p. 242; K. Jovičić, p. 23; J. Perović Vujačić, p. 154.

It is reasonable to conclude that there are actions by which the arbitrator, through ordinary or gross negligence, can cause damage to the parties in the arbitration proceedings, which they would later have to compensate for. Therefore, from the standpoint of basic civic legal principles, the preconditions for the existence of professional liability insurance for arbitrators in the Republic of Serbia are met.

IV. Regulatory framework of professional liability insurance for arbitrators

1. Scope of mandatory professional insurance

To locate the regulatory framework, one needs to recall the initial division into lawyers, notaries public, and third parties. Notaries public and lawyers have a legal obligation to maintain an insurance coverage against civic-legal liability.[33] However, the regimes of their professional insurance differ.

The issue arises due to the fact that because notarial insurance does not cover acting as an arbitrator, as it falls outside their scope of activity.[34] The Notary Public Act in Article 4 clearly defines the scope of notarial activities and does not mention the performance of arbitrator tasks. However, in the subsequent Article 5, which lists exceptions that are not incompatible with notarial activities, it includes the performance of arbitrator tasks[35] among others. Therefore, if a notary public acting as an arbitrator wanted to be insured against damages caused in their role as an arbitrator, they would need to obtain insurance separately.

The position of lawyers is significantly better, as professional insurance for lawyers is comprehensive. Within the definition of the activities of lawyers or provision of legal assistance, Article 3, paragraph 1, item 5 of the LPA explicitly includes "mediation for the purpose of concluding a legal transaction or peaceful resolution of disputes and controversial relations." Therefore, if we were to conclude that this mandatory insurance covers damage arising from the provision of legal assistance, it would ensue that it also covers damage arising from the performance of arbitrators tasks.[36]

Therefore, during the performance of arbitrator duties, all individuals except lawyers are not insured. Certain legal systems, such as the one in Spain, have introduced mandatory insurance for registered arbitrators,[37] and the ICC has recommended all

[33] LLP, Article 37, paragraph 1; LNP, Article 59, paragraph 1.
[34] M. Karanikić Mirić, p. 571.
[35] LNP, Article 4, Article 5, paragraph 2, item 4.
[36] LLP, Article 3, paragraph 1, item 5.
37 Spanish Arbitration Act of 2003 (Ley de Arbitraje; hereinafter referred to in footnotes as LA), Article 21, paragraph 1. Mandatory insurance was introduced in 2013.

arbitrators to obtain professional liability insurance.[38] In addition to the ICC, the LCIA and the NAI also provide insurance to their arbitrators.[39] The development of this practice is most noticeable in Spain, where various bar associations have included the performance of arbitrator tasks in the coverage for lawyers, and the arbitration institutions take out the insurance coverage for their arbitrators, while in the case of *ad hoc* arbitrations, arbitrators themselves conclude contracts for professional liability insurance or similar forms of guarantee.[40]

2. Procedure for claiming from insurers

When an arbitrator provokes damages to a client, it is crucial to address the matter of how the client will collect indemnity from the former's insurer upon insured occurrence. An insured occurrence is deemed an event causing damage to a third party, and from that moment on, the third party can submit a claim for indmenity or payment from the Insurer[41] within a subjective period of three, and/or an objective period of five years.

The claimant has to first determine the amount of the damage it has sustained. This amount is relatively easy to determine, as the damage often manifests as additional costs for conducting arbitration. Thereafter the claimant can approach the Insurer and demand indmenity for the damage sustained due to an event caused by the Insured, that is, the arbitrator. Of course, if the Insurer accepts the claim, they will only pay the claimant up to the sum insured.[42] For example, in the case of the Belgrade Bar Association, this sum equals €20,000,[43] which may be insufficient, especially in cases of high-value disputes, proportionally impacting the costs of the procedure, which, if increased by the arbitrator's actions, equate to the amount of the damage. Therefore, it is recommended that the arbitrator voluntarily enter into an insurance contract to cover potentially higher amounts of damage that they might have to compensate.

The Insurer accepts or denies the claim based on the likelihood of the Insured's actual liability and whether such liability may be proved. Another option is

[38] ICC Commission on International Arbitration, "Final Report on the Status of the Arbitrator", *ICC International Court of Arbitration Bulletin*, Vol. 7, No. 1/1996, p. 32.

[39] A. el Shourbagy, p. 190.

[40] María Pilar Perales Viscasillas, Liability Insurance in Arbitration: The Emerging Spanish Market and the Impact of Mandatory Insurance Regimes, 2014, *https://arbitrationblog.kluwerarbitration.com/2014/01/08/liability-insurance-in-arbitration-the-emerging-spanish-market-and-the-impact-of-mandatory-insurance-regimes/*, accessed on: 15. 12. 2023.

[41] N. Petrović Tomić, pp. 211-213. On the other hand, in common law systems, the claims-made system is often applied, where the insured event is considered to have occurred when the injured party files a lawsuit.

[42] Law on Contracts and Torts, Article 941, paragraph 1.

[43] Belgrade Bar Association, Professional Liability Insurance, 2021, *https://akbgd.org.rs/sr/osiguranje-od-profesionalne-odgovornosti/*, accessed on December 15, 2023.

for the claimant to directly approach the arbitrator, but there is a risk of the Insured's insolvency.[44] If the claimant opts for litigation, they must be prepared that both the Insurer and the Insured will be on the defendant's side as jointly interested parties based on the connection between the insurance subject matter and the subject matter of the dispute. If they are not formally jointly interesed parties, they are highly probable to be somehow involved in the proceedings, on the defendant's side.[45]

3. Specifics in case of arbitral tribunal

For the purpose of valid regulation of this institute, it is necessary to determine how the mentioned principles apply to the rights of the claimant in the case of existence of an arbitral tribunal composed of an odd number of arbitrators, usually three.[46]

The author believes that based on the Articles 206 and 208 of the Law on Contracts and Torts, they should be jointly liable, except under exceptional circumstances when it can be clearly established that one or more members of the arbitral tribunal did not participate in the decision-making process regarding a specific decision, and therefore did not contribute to the damage. If the claimant is compensated by a particular arbitrator or their insurer, such arbitrator shall be entitled to demand recourse from the other arbitrators or their insurers. Although such arbitrator does not represent a third-party claimant but rather one of the tortfeasors, it is necessary to recall that the function of joint liability is to protect the creditor, not to provide a tool for joint debtors to avoid recourse from other debtors.[47] Therefore, any objection that the arbitrator seeking recourse is not a third-party claimant would be unfounded.

An exception where co-arbitrators should not be liable is found in the case of damage caused by the chair of the arbitral tribunal. The Law on Arbitration stipulates that they preside over the tribunal, which typically means preparing the draft arbitral award, communicating the award, etc.,[48] without clearly defining their powers. However, their authority can be expanded by the arbitration agreement and the rules of the arbitral institution. The rules of the Belgrade Arbitration Center allow the arbitral tribunal to authorise their chair to independently make decisions managing the procedure.[49] Therefore, in some cases, the damage caused by the arbitral tribunal may be attributed to the chair of the tribunal. Accordingly, they would be individu liable, and the other members of the arbitral tribunal would not share the liability, as they did not participate in making those decisions.

[44] N. Petrović Tomić, p. 203.
[45] N. Petrović Tomić, p. 207.
[46] LA, Article 16.
[47] Law on Contracts and Torts, Articles 206, 208.
[48] G. Knežević, V. Pavić, p. 154.
[49] BAC, Article 29, para. 3.

Another exception that may be more common concerns an arbitrator who votes against the tribunal's decision, but regardless of their vote, the procedural act or final award stands. Therefore, it will be noted that the arbitrator voted against. Under certain circumstances, they may even refuse to sign the award. Additionally, they may draft a separate opinion, which, upon their request, can be provided to the arbitration parties.[50] In this way, the arbitrator distances themselves from liability towards the parties, as they have done everything in their power to prevent such a legal act from being made. Moreover, in the case of drafting a separate opinion, that arbitrator has done everything possible to draw attention to their colleagues why they believe that the arbitral award made was incorrect.

Since there is no chain of causation between such member of the arbitral tribunal and the damage inflicted on the parties, the member should not, under any circumstances, bear civic-legal liability. Accordingly, the claimant should not approach the Insurer of such mamber with a claim for damages. An interesting scenario may arise if the arbitral tribunal has a collective agreement with the Insurer. This raises new questions on how their level of negligence affects the sum insured and future premium levels.

We believe that finding an answer to whether such circumstances should affect the sum insured as more challenging and beyond the scope of this paper. However, we are certain that such member of the arbitral tribunal should not sustain any consequences in the future in terms of increased insurance premiums due to the occurrence of the insured event resulting from the actions of their co-insured.

V. Current state on international arbitration scene

The legal prerequisites for insuring arbitrators undoubtedly exist, but it is necessary to determine sustainability of such a service on the Serbian financial market. According to the findings from the Swiss Arbitration Association, more than 50% of arbitration institutions takes out an insurance coverage and offers it to arbitrators upon the latters' request, but few actually do request it. One of the reasons is that, in common law systems, arbitrators have immunity similar to judges. They consider that actions for which they are not held liable, similar to judges, cannot cause siginificant damage, so they do not take out an insurance coverage. Additionally, one of the problems is that this insurance service is not available on all markets.[51]

Furterhmore, insurers consider this to be an unexplored market, and in many countries, there is not a large clientele, i.e., the number of arbitrators. Many insurers

[50] LA, Articles 51, 52.

[51] Tadas Varapnickas, To Insure or Not to Insure: Should Arbitrators Be Obliged to Insure Their Civil Liability? 2019, *https://arbitrationblog.kluwerarbitration.com/2019/11/08/to-insure-or-not-to-insure-should-arbitrators-be-obliged-to-insure-their-civil-liability/*, accessed on: 15. 12. 2023. Maria Pilar Perales Viscasillas, "Arbitration insurance: an emerging market in Spain", *Revisita del Club Español de Arbitraje*, No. 20/2014, p. 74.

do not know much about arbitration and therefore are technically unprepared to develop a policy for them, let alone participate in such disputes. Even if they were to develop a policy, insuring arbitrators in high-value arbitrations might sometimes require reinsurance. Moreover, it is difficult to assess under which rules the next arbitration will be conducted and how that will affect the risk of the arbitrator, i.e., the Insured.[52] Yet, the ICC has succeeded in drafting a general insurance policy for its arbitrators, which has been applied twice in practice. They insure their arbitrators during the arbitration proceedure itself.[53] Nonetheless, some insurers prefer to conclude annual contracts with arbitrators. When assessing risk, they take into account the number of arbitrations per year, experience, the value of the dispute, the type of dispute, the industry to which the dispute relates as well as the stance of the arbitration institution and the country as to whose law applies to immunity of the arbitrator.[54]

One argument against introducing this institute is that by mandating compulsory insurance, the arbitrators would be burdened and discouraged. Advocates for compulsory insurance for arbitrators respond to this argument by stating that many other professionals need to be insured, without stressing that fact as a problem for their profession.[55] Yet another matter under consideration is whether insurance would create moral hazard among arbitrators. Again, the same could happen if arbitrators had too high immunity.[56] The author believes that there is not a significant risk of moral hazard, being convinced that an arbitrator whose awards often inflict damages to parties and thus makes the parties dissatisfied would not be able to remain competitive and that the market will sanction their behavior accordingly.

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[52] M. Pilar Perales Viscasillas, p. 74. Howard M. Holtzmann *et al*., "Matters Not Addressed in the Final Text of the 2006 Amendments to the UNCITRAL Model Law", *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (editors Howard M. Holtzmann et al.), Alphen aan den Rijn, 2015, pp. 674, 695–696. Different regimes of civil liability for arbitrators are the reason why the UNCITRAL Model Law 2006 did not address this issue. The UNCITRAL Secretariat observed that common law countries grant arbitrators immunity similar to judicial immunity, while civil law countries treat them in accordance with contractual liability rules.

[53] A. el Shourbagy, p. 221, 227–229. In the case of *Landmark Venture Inc. v. Stephanie Cohen and The International Chamber of Commerce*, 25.11.2014, U.S. District Court Southern District of New York, 13 Civ. 9044 (JGK), the ICC insurer was willing to intervene in the dispute, but the lawsuit was not successful, while in another case, which the ICC president did not name in the interview, three London arbitrators used ICC insurance because it suited them more than the professional indemnity insurance they had maintained, after being sued.

[54] A. el Shourbagy, p. 227. Interestingly, some insurers do not cover arbitration in common law countries, especially in the USA, so arbitrators in those cases must obtain additional coverage.

[55] A. el Shourbagy, p. 189. The same discussion arose in the British *House of Lords* during the amendment of the English Arbitration Act. Lord David Hacking raised this argument for mandatory arbitrator insurance; however, mandatory arbitrator insurance was not included in the new law.

[56] R. Mullerat, p. 10.

VI. Conclusion

Further to above said, the author takes the stance that there is a need to have a harmonized regime for all arbitrators, when it comes to insurance coverage. Currently, it seems unfair and unacceptable that only tha ttorneys-at-law have insurance to cover their activities performed as arbitrators, while other individuals remain unprotected. Therefore, it is necessary to consider the idea of mandatory professional liability insurance for arbitrators and thereby standardize their status regardless of their core professions. Before introducing such an institute, it is vital to conduct research to show how often arbitrators cause damage and to assess whether introducing such institute is reasonable. If it turns out to be justified, it is necessary to adopt this norm in communication with the arbitration professional community, arbitration institutions, insurance companies, and associations, as well as with the competent regulator (NBS). Finally, in addition to collective dialogue, the Serbian legislator should examine the decades-long development of the mandatory insurance market for arbitrators in those countries that have implemented it. Guided by this, the legislator could take the appropriate steps that best suit the legal and economic environment of the Republic of Serbia.

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