

Kluwer Arbitration Blog

Compensation for a Dismissed Arbitrator?

Günther J. Horvath (Freshfields Bruckhaus Deringer LLP) · Tuesday, August 5th, 2014 · Freshfields Bruckhaus Deringer

The Austrian Supreme Court (OGH) confirmed that an arbitrator who is dismissed during the arbitration by a state court because of conflict of interest before the award is rendered may recover compensation for (useful) services rendered until dismissal (Austrian Supreme Court, Der Oberste Gerichtshof, OGH, 17 February 2014, 4 Ob 197/13v).

The president of an arbitral tribunal was dismissed by a state court before the award was rendered due to his conduct during the proceedings. Thereafter, the claimant in the arbitration filed a claim in state court (Commercial Court Vienna) requesting damages and declaratory relief. The claimant sought compensation from the former president of the arbitral tribunal for any damages arising out of his conduct and requested, *inter alia*, the repayment of claimant's contribution towards his compensation in arbitration, EUR 150,000, (50 % of the total compensation paid to the president before his removal).

The Court of First Instance (Commercial Court Vienna) dismissed claimant's requests on the grounds that terms of reference restricted liability of the arbitrator to gross negligent and/or intentional acts. The Commercial Court Vienna held that the arbitrator in question was not acting with gross negligence or intent and denied tort liability of the arbitrator. With regard to the request for repayment of claimant's contribution towards the arbitrator's compensation it held that the services rendered by the arbitrator until dismissal justify the payment of the compensation.

The Court of Appeals (Higher Regional Court Vienna) confirmed that the arbitrator in question was not acting with gross negligence or intent and denied tort liability of the arbitrator. It held that the arbitration per se has not been frustrated and that claimant did not specify additional expenses arising out of the dismissal of the arbitrator. It granted, however, the repayment claim, stating that due to his dismissal the arbitrator in question cannot perform his contractual duty to render an award and therefore has no compensation claim. The Court of Appeals permitted an appeal to the Austrian Supreme Court because no case law with regard to the compensation for a dismissed arbitrator existed (classified as a *legal issue of fundamental importance*).

Both parties subsequently appealed to the Austrian Supreme Court. The OGH rejected claimant's appeal for formal reasons and accepted the arbitrator's appeal on the merits.

In its appeal to the OGH, the claimant merely addressed its claim for damages and did not address reimbursement of compensation paid to the president of the tribunal. Thus, the OGH examined whether the findings of the courts of lower instance with regard to the claims for damage of

claimant were reasonable.

The OGH held that the liability of an arbitrator due to conduct must be determined separately from whether reasonable doubts as to the arbitrator's impartiality existed because of the arbitrator's behaviour in the arbitration (the second question had already been decided in another state court proceeding, whereby the arbitrator was dismissed by the Commercial Court Vienna). In general the tort liability of the arbitrator for a breach of procedure presupposes in itself that the award is successfully challenged due to the procedural breach.

In the case at hand, the terms of reference restricted liability of the arbitrator to gross negligent and/or intentional acts. Claimant did not challenge this contractual restriction of liability, however, argued that the arbitrator acted with gross negligence. The OGH held that the assessment of the courts of lower instance in question, according to which the arbitrator was not acting with gross negligence or intent, and thus denying plaintiff's requests for declaratory relief and damages on the basis of the contractual limitation of liability of the arbitrator, is reasonable. As claimant did not refer in its appeal a legal issue of fundamental importance, the appeal was rejected by the OGH. Whether the general principle regarding tort liability of an arbitrator is also applicable if the arbitrator is dismissed before the award is rendered was left open.

With regard to the appeal of the arbitrator, which referred to the request for repayment of the compensation, the OGH (on the merits) held that the compensation of an arbitrator does not expire because of any shortcomings of the arbitral proceeding and is not dependent on whether the award is successfully challenged.

Since the terms of reference were silent on arbitrators' fees in the event that one arbitrator was removed before rendering the award, the Court interpreted the contract by means of "*supplementary interpretation*" and held that the compensation claim of the arbitrator could not be dismissed in its entirety. The OGH held that the dismissed arbitrators' compensation must be reduced with respect to the proportionate share of the rendered service. In the case at hand, the court held that the compensation paid to defendant was justified due to the services rendered before removal as an arbitrator. The Court did not address whether its decision would differ if the new tribunal was unable to make use of the service rendered by the arbitrator (e.g. repetition of the proceedings).

Comment

Under Austrian law the terms of reference are covered by specific procedural rules in the Austrian Civil Procedure Code (*ZPO*), the provisions relating to contracts for specific work in the Austrian Civil Code (*ABGB*, §§ 1165 et seq.), and power-of-attorneys (§§ 1002 et seq.).

According to § 1168a ABGB the contractor has a duty to warn the respective buyer, e.g. if the material provided by the buyer is clearly unsuitable for the work and as a result the work cannot be finished. If the contractor fails to do so, he loses his claim for compensation. This general duty to warn the other contracting party is applied *mutatis mutandis* to terms of reference in arbitration, especially with regard to the disclosure of possible grounds of impartiality.

In the case at hand, the arbitrator in question was not biased prior to the proceedings. Thus, he did not breach his obligation to disclose any facts or circumstances which might give reasonable doubts as to his impartiality prior to the proceeding and therefore complied with the duty to warn the other contracting party. A breach of this duty to disclose any possible grounds of impartiality

would have led to the expiration of the (full) compensation claim. It remains to be seen, whether compensation in part is granted if a new tribunal is unable to make use of the service rendered by the dismissed arbitrator (e.g. repetition of the proceedings).

Although the arbitrator's behaviour vis-à-vis the Claimant in the arbitration gave rise to reasonable doubts as to his impartiality, the OGH did not find that these doubts gave rise to an inference of gross negligence or intentional behaviour. Instead, it generally held that gross negligence is only present if the arbitrator in question acted in stark contradiction to the applicable procedural rules by "strikingly violating" his duties as an arbitrator – actions which must therefore lead to a dismissal due to partiality. It remains to be seen whether this approach will be adopted by other chambers of the Supreme Court. One must not forget, however, that the OGH only examined the findings of the courts of lower instance in this respect with regard to reasonability. Whether the general principle regarding tort liability of an arbitrator is also applicable if the arbitrator is dismissed before the award is rendered was left open by the Supreme Court.

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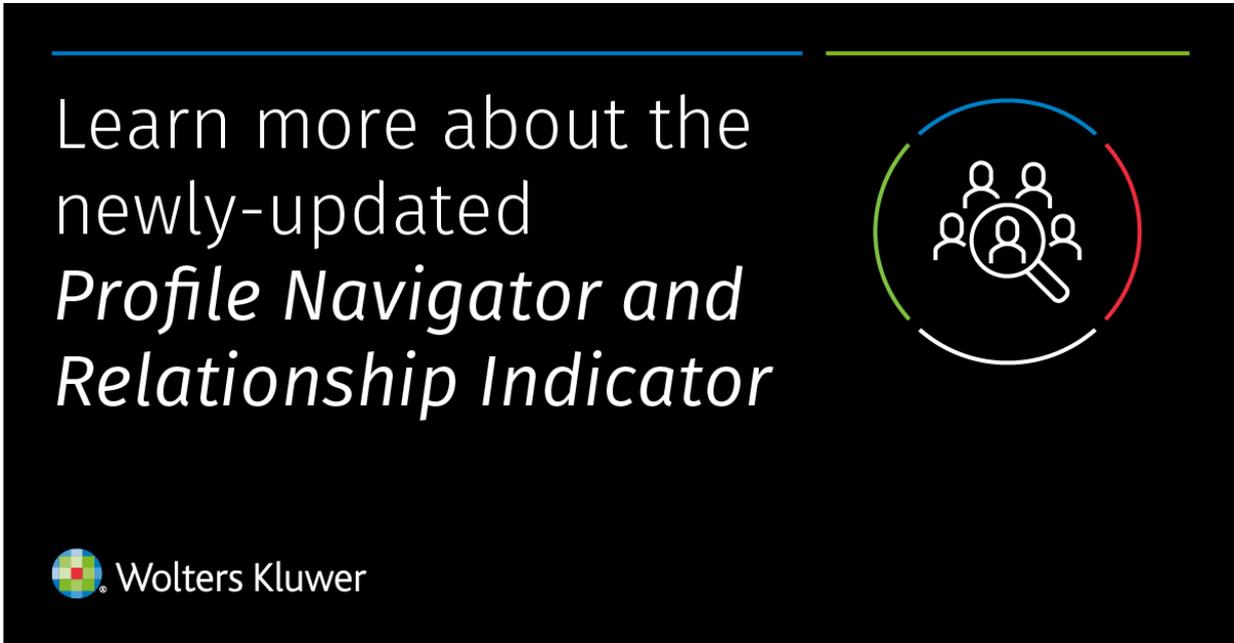
Judges: Dr. Schenk, Dr. Vogel, Dr. Jensik, Dr. Musger and Dr. Schwarzenbacher.

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