I dissent – can I? A Closer Look at the Higher Regional Court of Frankfurt's decision of 16 January 2020 from a German-Italian Perspective

Kluwer Arbitration Blog
March 20, 2021

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Please refer to this post as: Martina Magnarelli, Gregorio Pettazzi, and Federico Parise Kuhnle, 'I dissent – can I? A Closer Look at the Higher Regional Court of Frankfurt's decision of 16 January 2020 from a German-Italian Perspective', Kluwer Arbitration Blog, March 20 2021, http://arbitrationblog.kluwerarbitration.com/2021/03/20/i-dissent-can-i-a-closer-look-at-the-higher-regional-court-of-frankfurts-decision-of-16-january-2020-from-a-german-italian-perspective/

The Higher Regional Court of Frankfurt (***OLG Frankfurt***) delivered a decision on 16 January 2020 (***Judgment***) that has sparked interesting reactions to an already open debate in Germany on dissenting opinions (see previously on this Blog, here and here).

But this decision also allows for a comparison of how German and Italian arbitration law, both members of the civil law family, deal with this phenomenon that is predominantly established in common law jurisdictions.

Thus, when the three authors became regional coordinators of the newly established German Chapter of AIA-ArbIt-40 (the Italian under 40 arbitration association), reviewing this Judgment from a comparative perspective seemed the

logical next step.

I. The Decision of the OLG Frankfurt

On 7 June 2018, a decade-long ICC arbitration between Company X's insolvency administrator (***Claimant***) and its former parent, Company Y (***Respondent***, jointly with Claimant, the ***Parties***), ended with an award dismissing the Claimant's request. The dispute had revolved around the value of a contribution in kind Y made into X. However, on 1 June 2018, one of the arbitrators of the Frankfurt-seated arbitral tribunal (***Tribunal***) issued a dissenting opinion expressing disagreement with the Tribunal's assessment of an expert report.

On 5 October 2018, the Claimant filed a motion to set aside the award with the OLG Frankfurt. The Claimant argued that the Tribunal failed to assess his legal position actively in the award, thus violating his right to be heard and breaching German domestic public policy. The dissenting opinion apparently did not play a considerable role in the Parties' pleadings. Only the Respondent used it to prove that the Tribunal sufficiently assessed Claimant's position (paras 101, 111 of the Judgment).

On 16 January 2020, the OLG Frankfurt set aside the award for reasons unrelated to the dissenting opinion. But the OLG Frankfurt stated in an *obiter dictum* that the disclosure of the dissenting opinion may qualify as a ground for setting aside an award. According to the OLG, such disclosure would breach the confidentiality of the Tribunal's deliberations that aims at protecting the arbitrators' independence and impartiality. Such a breach could qualify as a violation of Germany's domestic public policy (para. 206).

On 26 November 2020, the German Federal Court of Justice (***BGH***) rejected the insolvency administrator's appeal (*Rechtsbeschwerde*) against the OLG Frankfurt's decision. The BGH explicitly stated that the dissenting opinion question left open by the OLG Frankfurt did not require any decision (BGH, para 41).

II. Dissenting Opinions Under German Law

The OLG Frankfurt's decision is an isolated case addressing the dissenting opinion

issue only briefly in an *obiter dictum*. Moreover, it only concerns domestic arbitrations and domestic public policy. Unlike in common law jurisdictions and before international courts, dissenting opinions are rare creatures within the German legal system. Indeed, the principle of the secrecy of deliberations under section 43 German Judiciary Act (***DRiG***) binds all judges with the exception of the judges of the Federal Constitutional Court (*See also* Mirjam Escher, 16/4 SchiedsVZ). The underlying rationale of this principle lies in the necessity to safeguard (i) the judges' independence, (ii) the consistency of decisions, and (iii) to avoid undue external influence, e.g., from the media.

There is thus an open debate on whether arbitrators can write a dissenting opinion without creating a ground for annulment, especially in domestic arbitrations. Some argue that the principle of the secrecy of deliberations applies by analogy to arbitration proceedings, although not all of the arguments above can be transferred *en bloc* due to arbitration's confidential nature and the non-publicity of most arbitral awards. The critics stress that dissenters may show deference to the arguments of the party who appointed them (jeopardizing impartiality). They also fear that such dissenters could suggest grounds for challenging the award and become *serial* dissenters to increase their visibility.

But the majority contends that dissenting opinions are permissible insofar as the arbitration agreement does not exclude them (See Detlev Kühner/Gustav Flecke-Giammarco, in *Arbitration in Germany: The Model Law in Practice*; Fabian von Schlabrendorff/Anke Sessler, *Ibid*; Escher, *op. cit*; and Sheppard/Kapeliuk-Klinger, The Roles of Psycology in International Arbitration). Advocates of dissenting opinions argue that they foster intellectual honesty and encourage the majority to strengthen the decision's persuasiveness. They also assert that dissenting opinions only concern different views on the facts and the law without disclosing internal deliberations and exclude any external pressure by being delivered at the end of the procedure (Bartels, 12/3 Schieds VZ; Schroeder/Asschenfeldt, *Zur (Un-)Zulässigkeit einer Dissenting Opinion in Schiedssprüchen nach deutschem Schiedsverfahrensrecht*; Anke Sessler/Christine Ruß, 18/5 SchiedsVZ; and von Schlabrendorff/Sessler, *op. cit.*). Some authors have already criticised the decision of the OLG Frankfurt, considering the attractiveness of Germany as an arbitral seat (*See also* Daniel Hochstrasser/Predrag Sumaric, 19/1 SchiedsVZ).

From a broader perspective, dissenting opinions are commonly admitted in international arbitration proceedings, even in continental Europe (Gary B Born,

International Commercial Arbitration; Hochstrasser/Sumaric, *op. cit.*). Nevertheless, most national legislations and institutional rules, including the Arbitration Rules of the German Arbitration Institute (***DIS Rules***), do not specifically address this topic (*Ibid*). The ICC Rules refer under Article 32 to a "majority decision" and it is practice for the ICC International Court of Arbitration (***ICC Court***) to receive a copy of the dissenting opinion during the scrutiny process. If the ICC Court considers that the dissenting arbitrator raises a valid point, it draws on it the majority's attention. Absent enforceability issues in specific jurisdictions, the ICC Court discloses dissenting opinions to the parties. The DIS also encloses the dissenting opinion to the award if the arbitral tribunal's majority does not object (Sheppard/ Kapeliuk-Klinger, *op. cit.*; Sessler/ Ruß, *op. cit.*; Richard Happ, in *The DIS Arbitration Rules – An Article-by-Article Commentary*; and Kühner/Flecke-Giammarco, *op. cit.*).

III. Dissenting Opinions Under Italian Law

The Italian-law approach to arbitrators' dissenting opinions appears to be less controversial, despite the applicable provisions being comparable to the German ones to a certain extent.

Under Italian law, dissenting opinions are not allowed in domestic courts. Similar to section 43 DRiG, Article 276 of the Italian Code of Civil Procedure (***Cpc***) establishes that the court's deliberations shall remain secret. There have been several reform proposals to allow at least Constitutional Court judges to deliver separate and dissenting opinions, but none of these have been (so far) successful. The predominant view considers judgments as monoliths rather than the sum of separate, perhaps conflicting, opinions from different judges.

This rests on the perceived role of the judicial function: providing *the* interpretation of the law. The authority of the judiciary is in fact reinforced by the tenet — some might say utopia — of the *only* solution, according to which there is only one correct answer to any question of a legal nature. The influence of Napoleon's legal positivism ("the judge is the mouth of the law") is obvious.

One may wonder if Article 276 Cpc could apply by analogy to arbitral proceedings, thereby precluding arbitrators from manifesting their dissent. Such application would lead to result in line with the one of the OLG Frankfurt. But this is not the case. Scholars and courts alike reject such analogical application. In their view, the

requirement of secret deliberations under Article 276 Cpc does not constitute an intrinsic feature of any judicial process. It should thus not automatically apply to arbitration proceedings.[fn]Francesco Luiso, "*In tema di ricusazione degli arbitri e di dissenting opinion*", Rivista dell'Arbitrato (1992) p. 471; Cassation Court, Decision No. 8592/1998.[/fn] What is more, Article 823 Cpc, which deals specifically with the arbitral tribunal's deliberation process, does not refer to the secrecy of deliberations.

Thus, the default rule in arbitrations seated in Italy is the admissibility of dissenting opinions. This was recently confirmed by the Court of Appeal of Naples, which held that the existence and disclosure of a dissenting opinion does not constitute a ground for annulment of a domestic arbitral award. The Italian Cassation Court has so far not specifically addressed the issue. For arbitration proceedings governed by the arbitration rules of the Milan Chamber of Arbitration (***CAM***), the rules neither allow nor prohibit the disclosure of dissenting opinions.

Regardless of the above, the parties are at liberty to exclude the disclosure of dissenting opinions.

IV. Conclusion

It remains to be seen whether German and Italian case law will eventually diverge on dissenting opinions. For now, the OLG Frankfurt suggests a certain position for German domestic arbitrations, but only in an *obiter dictum*. It does not solve the dilemma already dividing German scholars. Only a decision on point, preferably from the BGH, could do so. As to Italian courts and scholars, so far, their view in favor of dissenting opinions is in line with international practice.