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Fees of the Successfully Challenged Arbitrator?

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In its decision of 17.2.2014, the Austrian Supreme Court decided on a claimant's request for reimbursement of the portion of the fees advanced to the arbitrator whom it had successfully challenged during ongoing proceedings and on his liability for frustrated costs caused by the challenge and the appointment of a new arbitrator. Further, the claimant demanded reimbursement of the costs of the challenge proceedings. The challenge itself was not subject of the decision of the Supreme Court.

In the case before the court, the chairman of the tribunal had corresponded with an expert before the latter's appointment and had been successfully challenged for this and other reasons.

The Supreme Court decided that the arbitrator was entitled to half of his fees. As he had only received a quarter in advance the claimant's claim on this point was rejected. Further, the claim for damages was rejected also.

The reasoning of the Supreme Court is summary was the following: At the time the decision of the court in first instance was rendered no parts of the proceedings had needed to be repeated before the tribunal comprising the newly appointed chairman. Hence, the services provided by the challenged arbitrator up until his challenge were not worthless for the parties. Hence, the arbitrator was entitled to a share of the lump sum which had been agreed on for the entire proceedings. On the same factual basis the Supreme Court also rejected the claim for the frustrated expenses. As no part of the proceedings required repetition, there was no loss and hence no claim. With regard to the claim for the costs of the challenge proceedings, the Supreme Court relied on a clause in the arbitrator's contract limiting his liability to gross negligence and intent, neither of which had been found in the present case.

The case would have been a good opportunity for an *obiter dictum* on the long discussed question of the arbitrator's liability in cases in which the award is not set aside. Under Austrian law the setting aside is a prerequisite for liability. This, however, may lead to unreasonable results in cases in which an arbitrator's culpable conduct leads to a successful challenge and frustrated costs. An exception to this rules exists if the arbitrator refuses to render an award at all. (Judgment of the Austrian Supreme Court, 6 June 2005 docket no. 9 Ob 126/04a) Hence, it would be arguable – though by no means clear – that the arbitrator may be liable for any loss caused by his successful challenge, though this would obviously require culpable action on his side. This question, however, was posed by the Supreme Court and left unanswered.

The decision, however, includes some interesting points with regard to the arbitrator's claim for his

fees in the case his successful challenge. The decision is hardly surprising with regard to the fact that the arbitrator was entitled to a portion of his fees. That the termination of an arbitrator's mandate does not automatically lead to the forfeiture of his claim for fees is widely accepted both in civil and common law. (Christoph Liebscher, in *Arbitration Law of Austria, Practice and Procedure* 640 (Riegler et al eds., 2007); Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* 244 (end ed., 1989)) Under Austrian law, the successful challenge terminates the arbitrator's contract *pro futuro*. The acts he took in the arbitration, however, remain valid and for these, so also the Supreme Court, he is entitled to a portion of his fees.

The Supreme Court took a pragmatic solution in the case at hand, which, however, leaves the most interesting parts of the question unanswered. It decided whether services of an arbitrator can be considered worthless only from the perspective of whether parts of the proceedings needed to be repeated and decided on this basis whether the arbitrator is entitled to fees for the proceedings up until his challenge. This approach, however, disregards that even if the proceedings need not be repeated, a large part of the services of the challenged arbitrator will be worthless.

In practice, the arbitrator will have spent a large part of his time in the preparation of the case, in particular the reading of the submissions and the studying of exhibits. Commonly before the writing of the award, this preparation will make up the largest part of the services rendered by an arbitrator. The time then spent on the drafting of procedural orders and other procedural matters before the hearing and the drafting of the award will usually be limited. If the arbitrator is successfully challenged and replaced, the new arbitrator will as a matter of course have to repeat this exercise and will be entitled to fees for this.

The few conceivable cases in which this is not the case, would include jurisdictional disputes and disputes on liability in case of a bifurcation which were decided before the challenge. In these cases, the second arbitrator will not – or not to the full extent – have to repeat the services of the first arbitrator and the latter's services are not rendered worthless.

In the absence of such cases, however, the second arbitrator will largely have to repeat the work of the first. Hence, whether the services of the first arbitrator were worthless due to the fact that the proceedings needed repeating or worthless because they had to be repeated by a new arbitrator is a rather arbitrary distinction. The worthlessness of the services rendered is merely more evident in the case that the proceedings require repetition. However, they are just as worthless if a second arbitrator has to invest time into repeating the preparation of the case.

The question that then arises is who is to bear the costs of the repetition of the preparation, the parties or the challenged arbitrator. The question of remuneration of the arbitrator cannot be based on the work he has done but on the benefit of this work received by the parties. Hence, if he has spent a certain amount of hours on the preparation of the case but this effort is not reflected in an award, it is useless for the parties and need not be remunerated. This approach, at least under Austrian law, would apply at least in cases of culpable acts or omissions of the arbitrator leading to his challenge.

In cases in which if the arbitrator's mandate is terminated for reasons for which neither the arbitrator nor the parties are responsible are more challenging. Such cases may include the challenge or a resignation based on conflicts of interest which only came into existence in the course of the proceedings or which were unknown (and not detectable) to the parties and the

arbitrator at the beginning of the proceedings. In such cases, Austrian civil law would suggest to determine whose sphere the ground derives from. If, e.g., one of the parties merges with a third party and thereby triggers a ground for resignation, it would seem reasonable to place the burden on that party. If the ground, such as in the case discussed here, lies with the arbitrator it would be reasonable to place the burden on him.

In the case at hand, the Supreme Court took a different approach, leaving the parties with presumably increased costs if the new arbitrator demanded fees for repeating certain services already performed by the challenged arbitrator. It also explicitly declined to address what would happen if the services rendered had become worthless (either in whole or in part) for the parties because the proceedings needed to be repeated before the newly appointed arbitrator.

it was the arbitrator's conduct during the proceedings which led to his successful challenge, there is no apparent reason why the parties should be obliged to bear the costs of the steps he had taken so far, if they could not be utilized in the following proceedings with the new arbitrator. However, the judgment is silent on this point so it may be that this was not subject of the dispute in this specific case.

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