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Arbitrators' Liability: Austrian Supreme Court Reconfirms Strict Standards

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One of the main advantages of arbitration vis-à-vis state court litigation, is that the parties are free to choose independent and highly specialised experts to decide their cases. Yet, if these experts negligently (or even deliberately) violate the duties that come with the acceptance of the appointment, the issue of liability arises. One may think of instances such as unjustified delays in the rendering of the arbitral award, the deliberate non-disclosure of information that excludes the respective individual from serving as arbitrator, or procedural conduct that gives rise to a setting aside of the arbitral award. The relevance of the issue seems even more striking considering that available remedies, such as the possibility to challenge and even remove the arbitrator from office or the setting aside of the award, do not encompass monetary compensation for damage effectively suffered by the parties. Despite its practical importance and the growing number of (legally trained) professionals in the field, relatively little attention has so far been paid to the issue of arbitrators' liability.

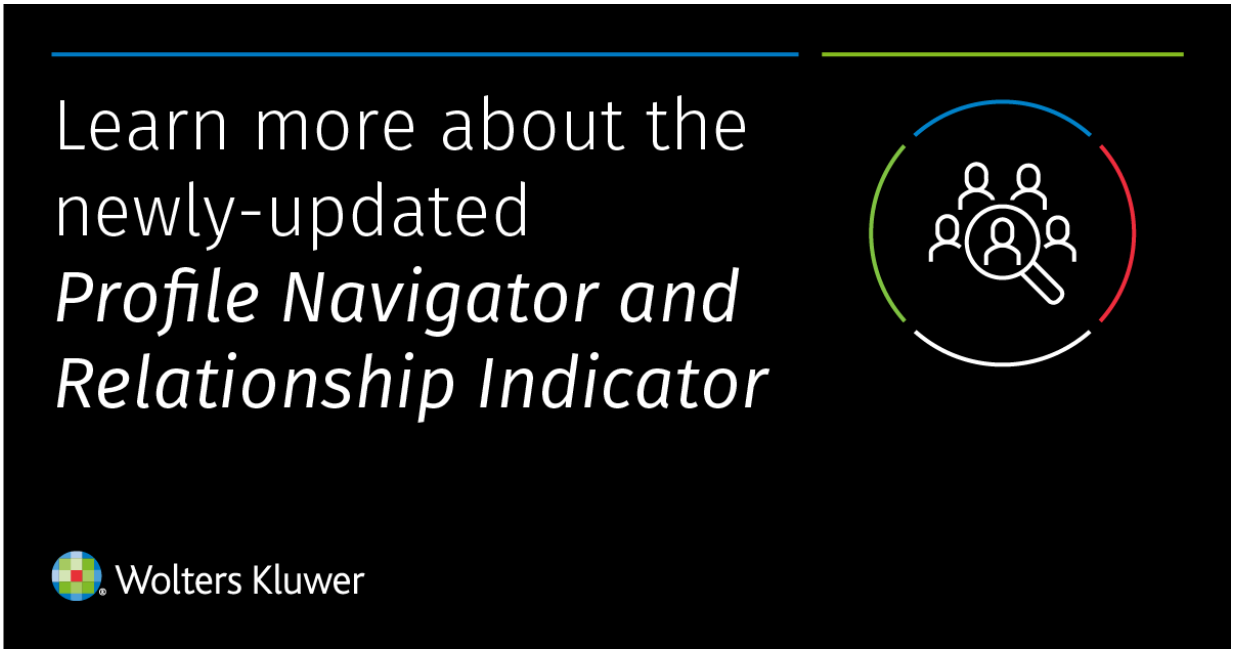
Most institutional arbitration rules provide for a limitation of the liability of arbitrators: Pursuant to Article 46 of the Rules of Arbitration of the Vienna International Arbitral Center (VIAC) the liability of arbitrators is excluded "*to the extent legally permissible*." Similarly, Article 40 of the Rules of Arbitration of the International Chamber of Commerce (ICC) states that arbitrators shall not be liable for any act or omission in connection with the arbitration, "*except to the extent such limitation of liability is permitted by applicable law*." Article 16 of the UNCITRAL Arbitration Rules provides that the parties "*save for intentional wrongdoing, waive to the fullest extent permitted under the applicable law any claim against the arbitrators […] based on any act or omission in connection with arbitration.*" In contrast to these provisions, Article 21(a) of the ICSID Convention goes beyond such restriction of liability and grants broad immunity to arbitrators from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity. Thus, when parties agree on certain institutional arbitration rules, they impliedly agree – except in the case of investment arbitration conducted under the rules of the ICSID – on the greatest possible limitation of the liability of their arbitrator(s).

From an Austrian law perspective, the most recent judgment on the subject matter issued by the Austrian Supreme Court stems from March 2016. In the case at hand the arbitrators' contract provided for liability of the arbitrators only in cases of gross negligence and if the award was successfully set aside on the basis of Section 611 of the Austrian Code of Civil Procedure. Confirming well-established jurisprudence, which has been largely welcomed by the Austrian arbitration community, the Supreme Court reconfirmed its previous finding that an arbitrator's

liability necessarily presupposes the successful setting aside of the arbitral award, unless the arbitrator plainly refused to issue an award or failed to comply with the duties resulting from the acceptance of the appointment altogether (see OGH, 22.03.2016, 5 Ob 30/16x). Thus, under Austrian law, the successful setting aside of the arbitral award generally constitutes a *conditio sine qua non* for the liability of arbitrators except where the express case of Section 594(4) of the Austrian Code of Civil Procedure applies (an arbitrator who does not fulfill the duties assumed by acceptance of the appointment, or does not fulfill them in a timely manner, shall be liable towards the parties for all damage caused by his culpable refusal or delay).

Courts in other countries have embraced even more restrictive approaches to the liability of arbitrators and have extended the principle of judicial immunity to arbitrators. US courts, for example, have explicitly granted judicial immunity to arbitrators (see Supreme Court of Iowa 1880, *Jones v. Brown* which appears to be one of the fist decisions in this regard). However, in some cases, even US courts have denied immunity, for example in instances of refusal to render a decision (see Californian Court of Appeal 2006, *Morgan Philips v. JAMS/Endispute*). The German Federal Court of Justice also applies the state judge privilege, i.e. the liability of an arbitrator never goes beyond that of a professional state judge. Consequently, the liability of arbitrators under German law is limited to instances of violations of duties that constitute a criminal offense (see BGH 6 October 1954, II ZR 149/53). Under English law arbitrators are also granted broad immunity: Section 29(1) of the English Arbitration Acts 1996, which codifies previous case law of the English courts, states that an arbitrator is "*not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.*"

From a practitioner's point of view, it is essential to take account of the differences between the national laws and the jurisprudence of the respective national courts when it comes to the issue of liability of arbitrators. With respect to Austrian law, the strict standards defined and recently reconfirmed by the Austrian Supreme Court are certainly to be welcomed, not least from an arbitrator's perspective. First, requiring the successful setting aside of an arbitral award serves the public interest that lies in avoiding discrepancies in the findings of the lower instance courts (deciding on the liability of arbitrators) and the Austrian Supreme Court (deciding on the setting aside of arbitral awards), especially in cases where the alleged breach of the arbitrator's duties corresponds with one of the grounds for setting aside under Section 611(2) of the Austrian Code of Civil Procedure. Second, the requirement of successful setting aside proceedings bolsters the final and binding effect of arbitral awards which would be undermined if parties were left with an opportunity to re-litigate their cases by holding arbitrators liable for allegedly flawed decisions.



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