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Frankfurt Court of Appeal Finds That Dissenting Opinion Violates Public Policy

Peter Bert (Taylor Wessing) · Sunday, June 21st, 2020

The Frankfurt Court of Appeals (*Oberlandesgericht*) has recently taken the view that the publication of a dissenting opinion by the minority arbitrator violates the procedural *ordre public*, thus constituting a reason to set aside the arbitral award pursuant to Section 1059 para. 2 no 2 b) of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO).[1)]

The concept of dissenting opinions, originating from and well established in common law systems, is foreign to German law. Here, dissenting opinions can only be found at the Federal Constitutional Court (*Bundesverfassungsgericht*), where they are expressly permitted in Section 30 of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*, BVerfGG) and in some constitutional courts on state level. In all other courts, the publication of dissents is inadmissible, as it would violate the confidentiality of the court's deliberations (*Beratungsgeheimnis*).

Whether the dissenting opinion is admissible in commercial arbitration is disputed amongst German legal commentators. There is a widely held opinion that dissenting opinions violate the confidentiality of deliberations in arbitral proceedings and pose a threat to the integrity of the arbitral proceedings as well as to the independence of the arbitrators.[2)]

Facts of the Case

In the tradition of German court reporting, the decision of the Frankfurt Court of Appeals has of course been anonymised prior to publication. However, the facts of the case provide sufficient detail so that, in light of various press reports, some of which even detail the composition of the arbitral tribunal, it is fair to assume that the underlying proceedings related to Agfa Photo.

Agfa Gevaert of Belgium divested its German consumer photo business at the end of 2005. It formed Agfa Photo, which it sold to a group of investors. Only six months later Agfa Photo went into insolvency. The underlying arbitral proceedings were just one of more than ten arbitration and court proceedings that the insolvency administrator and the investors commenced against Agfa Gevaert since 2005. In the arbitral proceedings at hand, the insolvency administrator had claimed more than EUR 410,000,000 in damages.

Following the failure of settlement talks between the parties, the insolvency administrator initiated

arbitral proceedings under the ICC Rules on 20 December 2007. The place of arbitration was Frankfurt am Main, hence from a German perspective, we are looking at a domestic arbitral award. The court's decision details the course of the lengthy and hard-fought proceedings, which only came to a – provisional – end more than 10 years later, when a final arbitral award signed by all arbitrators was issued on 31 May 2018. Crucially, however, Arbitrator B also submitted a dissenting opinion dated 1 June 2018, in which he objected in particular to an expert opinion and its evaluation by the arbitral tribunal.

Decision

The Frankfurt Court of Appeals concluded that the arbitral award had already had to be set aside on the grounds of an infringement of claimant's right to be heard (*rechtliches Gehör*). Although the arbitral tribunal had taken note of and reproduced claimant's legal position in the arbitral award, it had not provided its own assessment of these arguments in the award. It could therefore remain open whether a further ground for setting aside existed under Section 1059 para. 2 no. 2 b) ZPO, as one of the arbitrators had issued a dissenting opinion. The court issued the following obiter dictum:

> "However, in the opinion of the Senate, there is much to be said for the fact that the disclosure of a dissenting opinion is inadmissible in domestic arbitral proceedings, even taking into account the considerations pursuant to which parliament has refrained from making a provision in this regard (…), and violates the confidentiality of the tribunal's deliberations (…) which applies to domestic arbitral tribunals. The special importance of the confidentiality of deliberations for the protection of the independence and impartiality of the arbitrators would also suggest that the confidentiality of deliberation – even after the final deliberation and issuance of the award – is not at the disposal of the parties and/or the arbitrators and should be regarded as part of the procedural public policy (*ordre public*)."

Comment

When the German Bundestag discussed the reform of Germany's arbitration law in 1997, the legislators contemplated the need for an express provision dealing with dissenting opinions, but then decided it was not required. The explanatory memorandum to the draft of the new arbitration law, the 10th book of the ZPO, to which the Frankfurt court referred in the quote above reads as follows:

> "The (…) question whether a dissenting opinion can be attached to the arbitral award did not need to be expressly regulated; as under the laws currently applicable, this is predominantly considered permissible."

In view of this clear position of the legislator, the opinion of the Court of Appeals may come as a surprise. Of course, one has to give it credit for the fact that the court would certainly have

provided a substantially more detailed reasoning, if the dissenting opinion had been the main consideration on which its decision depended, rather than an obiter dictum.

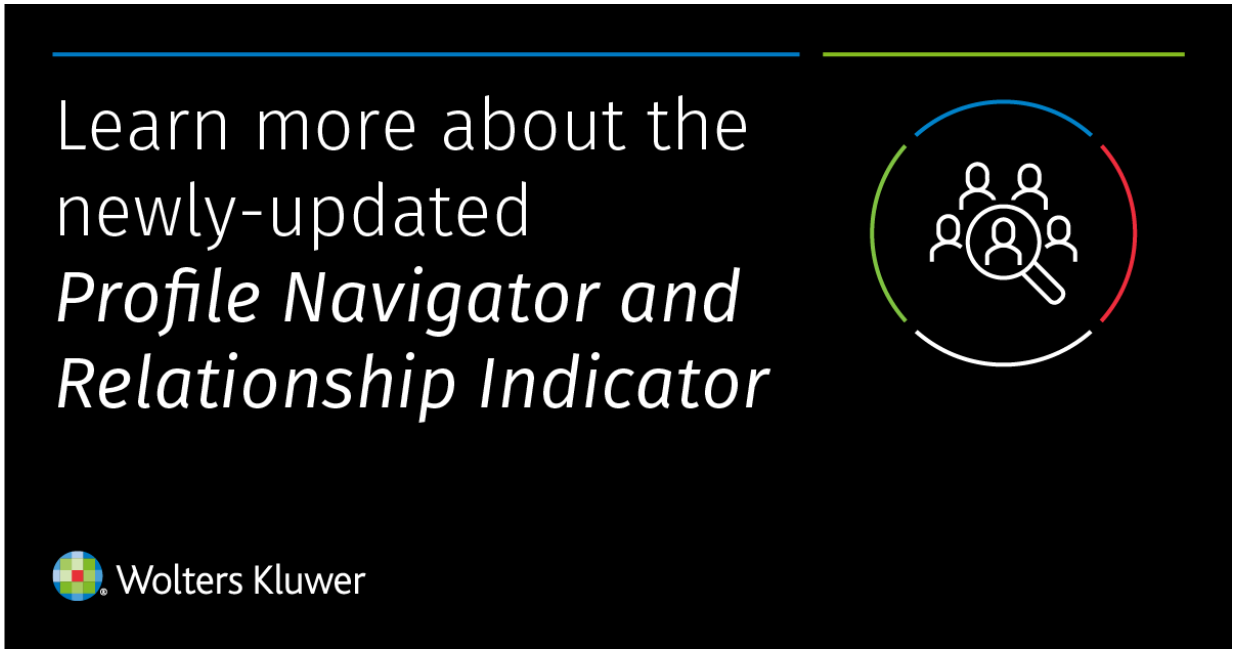
Even those German legal commentators who are highly critical of the dissenting opinion, however, see it as within the powers of the parties to agree differently, in recognition of the party autonomy: "The problem of the dissenting opinion lies in the confidentiality of deliberations, which also applies to arbitral tribunals. It is violated by the dissenting opinion. (…) However, the parties may release the parties from the obligation arising from confidentiality of deliberations and thus pave the way for a dissenting opinion."[3)]

As this matter was an ICC arbitration, there would have been a good case to argue that such an agreement between the parties existed, if only because by virtue of agreeing in the ICC Rules, as the ICC considers dissenting opinions to be admissible in principle. Like the arbitral award, dissenting opinions are to be submitted in draft form to the ICC Court of Arbitration for scrutiny under Art. 34 ICC Arbitration Rules.

But the Frankfurt Court of Appeals takes an extremely strict position in this respect as well: The confidentiality of deliberations is not at the disposal of the parties. Hence, even an agreement between the parties would not protect the arbitral award from being set aside if it was challenged on other grounds and submitted for review to a court.

Based on the history of the proceedings so far, most likely the Frankfurt decision was not yet the end of the story, that the Federal Supreme Court (*Bundesgerichtshof*) will have the final say. It remains to be seen whether the Federal Supreme Court uses the opportunity to tell us what they think about dissenting opinions, which the Supreme Court judges themselves are not allowed to publish, unlike their brethren in Washington and elsewhere, and the justices at the Federal Constitutional Court next door.

As a caveat, it should be noted that the court explicitly refers to domestic arbitral proceedings in its obiter. This may leave room for a distinction between the *ordre public interne* or *domestic ordre public* which in the Frankfurt court's opinion has been violated, and the *ordre public international*, where a different standard may be applicable. For the time being, in any event, parties, counsel and arbitrators in arbitral proceedings seated in Germany, and most certainly in those seated in Frankfurt, should be aware of the risk that a dissenting opinion creates.



References

?1 To the best of my knowledge, this is the first time that a German court has gone on the record on the issue of dissenting opinions in arbitration.

?2 See on this topic most recently Escher, SchiedsVZ 2018, 219 with first results of a survey of arbitrators on the actual use of dissenting opinions.

?3 Schütze, SchiedsVZ 2008, pp. 10, 13 f.; cf. also Zöller/Geimer, ZPO, 33th ed., 2019, § 1052, para. 5.

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