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Does Issuing a Dissenting Opinion to an Arbitral Award Constitute a Violation of the German Ordre Public?

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A one paragraph *obiter dictum* in an annulment decision rendered by the Frankfurt Higher Regional Court (the "Court") on 16 January 2020 (26 Sch 14/18) reignited an old debate: are dissenting opinions in German arbitration proceedings permissible?

From an international perspective, dissenting opinions in arbitral awards are by no means unusual. That is why it came as a surprise to many that the Court took a strong stance against written dissenting opinions in arbitral awards in German-seated arbitrations. According to the Court, issuing a written dissenting opinion undermines the secrecy of the arbitral tribunal's deliberations. The principle of secrecy of deliberations is regarded as an important principle of German law because it serves the impartiality and independence of the arbitrators. Thus, the Court indicated that a dissenting opinion may violate the procedural *ordre public* and expose a majority arbitral award to a risk of annulment.

This *obiter dictum* is the first time that a German court has taken an express position on the long-debated issue of the admissibility of dissenting opinions in German arbitration proceedings. Unfortunately, the Court was not definitive in its view and neither annulled or confirmed the award in question based on the issue of the dissenting opinion. This decision will add to pre-existing uncertainty surrounding this issue. Unless the Federal Court of Justice (*Bundesgerichtshof*) clarifies – and ideally rectifies – the position advanced by the Court, the Frankfurt decision has potential to harm Germany's position as an internationally recognized place of arbitration.

The Decision and Facts of the Dispute

The Court ruled on an annulment application against an award issued by a three-member arbitral tribunal under the 1998 ICC Rules of Arbitration. The place of arbitration was Frankfurt am Main, Germany. In its final award, the arbitral tribunal had dismissed all claims by way of a majority decision. The dismissal was based, in part, on the majority's confirmation of the company's valuation prepared by a tribunal-appointed valuation expert. One arbitrator submitted a dissenting opinion in which he objected to the valuation expert's opinion and to the arbitral tribunal's evaluation of that opinion.

The Court annulled the award, finding that one party was denied the right to be heard. Then, in a

single paragraph (almost as an afterthought), the Court discussed, but ultimately left open, the question of whether the award also had to be annulled because one arbitrator filed a dissent:

> "*However, in the court's opinion, there is much to be said for the* ***fact that the publication of a dissenting opinion is inadmissible in domestic arbitration proceedings****, even taking into account the considerations of the legislature that has refrained from regulating this matter, and* ***violates the secrecy of deliberation which also applies to domestic arbitral tribunals****. The particular importance of the secrecy of deliberation for the protection of the independence and impartiality of the arbitrators may also suggest that the secrecy of deliberation – even after the final deliberation and the issuing of the award – should not be put at the disposal of the parties and/or the arbitrators and* ***should be regarded as part of the procedural ordre public****.*" (internal citations omitted; emphasis added)

The annulment decision is subject to an appeal before the Federal Court of Justice.

The German Debate

In many jurisdictions, dissenting opinions in judgments are permitted. By contrast, in Germany, judges are prohibited from rendering dissenting opinions because they are bound to uphold the secrecy of deliberations. There is an exception in constitutional courts at the federal and state level.

Whether arbitrators in German-seated arbitration proceedings are also prohibited from rendering dissenting opinions is subject to an ongoing controversial debate among scholars and practitioners. While most agree that an arbitral tribunal's deliberations are secret, (German Federal Court of Justice, 11 December 2014, I ZB 23/14; German Federal Court of Justice, 23 January 1957, V ZR 132/55, NJW 1957, 592) there are diverging views as to whether, and to what extent, this renders dissenting opinions unlawful. Even among those who oppose dissenting opinions in arbitration proceedings, there is some disagreement as to the consequences of a member of an arbitral tribunal impermissibly filing a dissent. One school of thought is that this is a procedurally inconsequential violation of contractual duties; but another (older) is that it violates the German procedural *ordre public*, which may be fatal for the arbitral award as a whole. (For a discussion see, *e.g.*,H.P. Westermann, "Das dissenting vote im Schiedsverfahren" (2009) *SchiedsVZ*, 102; M. Escher, "Die Dissenting Opinion im deutschen Handelsschiedsverfahren – Fear of the unknown" (2018) *SchiedsVZ*, 219)

The Court seems to agree with those who believe that the existence of a dissenting opinion can violate the German *ordre public*. The Court's position thus deviates from the position of the German legislature which considered this debate settled when reforming the German arbitration law in 1997:

> "*The (…) question whether a dissenting opinion can be rendered with the arbitral award did not require any express regulation; under the current regime this is predominantly considered permissible.*" (BT-Drs. 13/5274, p. 56)

The traditional view among German scholars and practitioners – in line with the legislature's position – has been that parties can waive the secrecy of deliberations and thereby allow dissenting opinions. Some additionally consider the arbitrators' consent to be necessary for such waiver to be effective. (See R. Schütze, "Das Zustandekommen des Schiedsspruchs" (2008) *SchiedsVZ*, 10 (14); I. Sänger, *Zivilprozessordnung*, 8th ed., Münster, Nomos, 2019, § 1052 para. 3; H.P. Westermann, "Das dissenting vote im Schiedsverfahren" (2009) *SchiedsVZ*, 102 (105)) The Federal Court of Justice, in a 1957 decision, appears to have agreed with the possibility that the parties can waive the secrecy of the deliberations with the consent of the arbitrators, but ultimately left this question open. (German Federal Court of Justice, 23 January 1957, V ZR 132/55, NJW 1957, 592)

In its recent ruling, the Court acknowledged the legislature's view, but nonetheless disagreed and even considered a dissenting opinion a violation of the procedural *ordre public*, although it provided no explanation for this determination. And it did this despite the obvious consequence that every German arbitral award with a dissenting opinion would thus be subject to annulment, irrespective of whether the dissent was relevant to the outcome of the proceeding.

The decision implies that any waiver of secrecy by the parties is insignificant. The Court, by stating that the secrecy of deliberations is part of German procedural *ordre public*, deprives the parties and arbitrators of the power to waive the secrecy of deliberations and thus allow for dissenting opinions. It is inherent in the concept of *ordre public* that those things which fall within it cannot be waived by the parties since they embody the core values of the rule of law which are enforced *ex officio*. (S. Wilske, L. Markert, *Beck Online Kommentar ZPO*, 36. Ed., 1.3.2020, § 1059 para. 56)

The practical implications of the Court's *obiter dictum*

Arbitrators conducting German-seated arbitrations are now faced with the difficult question of how to navigate the uncertainties created by the Court.

Any party that is dissatisfied with the outcome of a German-seated arbitration will now seriously consider having the award annulled if a dissenting opinion exists. To a losing party, the Court's ruling is appealing – it considers the mere existence of the dissenting opinion a violation of the German *ordre public*, and this is a fact that a party can easily establish. Whether an annulment action based on a dissenting opinion will succeed will ultimately be decided by the German Federal Court of Justice. The Frankfurt decision is currently subject to an appeal, so the Federal Court of Justice may clarify the issue soon.

For now, and until the German Federal Court of Justice has definitively ruled on this issue, arbitrators should refrain from issuing dissenting opinions in German arbitrations. Parties should agree at the outset that the arbitrators are not permitted to issue dissenting opinions, even if an arbitrator disagrees with a majority view. With respect to arbitrations already in progress, the parties or the chairperson should proactively raise the issue in order to make all participants aware of this German particularity that international arbitrators may not be familiar with.

Not only the parties, but also the arbitrators, have an interest in avoiding dissenting opinions in German-seated arbitration. Arbitrators have a fiduciary duty to render an enforceable award that withstands scrutiny in set-aside proceedings. Issuing a dissenting opinion despite being on notice of the Frankfurt decision could subject the dissenting arbitrator to damages claims for the costs of

the arbitration if the award is annulled.

Any party to a German-based arbitration must discuss the Frankfurt decision with their (prospective) arbitrator(s) in order to ensure that the eventual award will not be subject to challenge on this ground. Having heard the presiding judge during the oral hearing leading up to the Frankfurt decision, we have little doubt that the Court will enforce its *obiter dictum* and annul an arbitral award accompanied by a dissenting opinion, if and when it is called upon to do so.

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