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Can eye rolling be a reason to challenge an arbitrator?

Introduction

In a decision of 23 July 2020 (Docket 18 ONc 3/20s), the Supreme Court dealt with the challenge of an arbitrator on the grounds that he had rolled his eyes during the pleading of a party's representative. The eye rolling, according to the applicants, "downright revealed" the arbitrator's bias. Said arbitrator did not explicitly contest the accusation of having rolled his eyes. Nonetheless, he claimed to be able to objectively give a legal assessment of the facts of the case.

In this decision, the Supreme Court:

- confirmed once again that strict standards for impartially bias apply;
- confirmed once again that the reasons for challenging state court judges serve as guidelines for challenging arbitrators; and
- held that an arbitrator's alleged eye rolling does not by itself constitute a reason to challenge the arbitrator, even if assumed to be true.

Arbitrators' impartiality and independence

The impartiality and independence of an arbitral tribunal is one of the core principles of arbitration proceedings. To some extent, impartiality and independence can be determined by objective criteria. However, in many cases, the assessment depends on the particular circumstances of the case. As a result, case law is an essential source of information for legal practitioners when assessing an arbitrator's potential bias.

Doubts regarding the impartiality or independence of an arbitrator often derive from their relationship with the arbitral parties, with their representative or with co-arbitrators, from their connection to the subject matter of the dispute or from potential one-sided conduct of the proceedings.

However, said doubts can also be created by improper behaviour on the arbitrator's part, be that verbal remarks or non-verbal reactions.

Case law

There are numerous court decisions on the impartiality and independence of arbitrators and state court judges which discuss verbal remarks (1). In this respect, the standards do not seem unreasonably high as judges (to a certain extent) are allowed to express anger, strictly rebuke legal counsel or raise their voice.

However, there are boundaries; a judge telling a counsel that she had "only ever seen such a strong emotional reaction in a baby whose milk bottle or pacifier was taken away" was – also in context with the accompanying circumstances – considered biased (2).

There is little case law on the topic of bias due to non-verbal reactions of arbitrators or state court judges. In one case, laughing about a counsel's question to a witness did not constitute a lack of impartiality (3). In another case, the Supreme Court held that in cases of spontaneous physical reactions (eg, a gesture or facial expression), a judge's behaviour can be interpreted as bias only if there are concrete indications for such an interpretation (4). According to the Supreme Administrative Court, facial expressions indicating that a judge does not believe the allegations can constitute bias only if it is evident that the judge will not reassess and possibly change their opinion (5).

Facts

The Supreme Court had to decide on the consequences of an arbitrator's alleged facial expression (eye rolling) in connection with a party's challenge of an arbitral tribunal under the rules of the Vienna International Arbitral Centre. The applicants based their challenge of all of the arbitral tribunal members and – subsidiarily, only of the co-arbitrator, Dr T – on several arguments, including Dr T's facial expressions during the hearing. This article focuses on the challenge of Dr T based on his facial expressions. The challenge was also based on the ordering of a videoconference hearing – a precedent-setting decision in this respect (for further details please see "Supreme Court scrutinises admissibility of videoconference hearings").

At the beginning of the hearing, the Los Angeles-based representative of the applicants, M, challenged the arbitral tribunal because the hearing had been scheduled to start at 6:00am in Los Angeles (which was 3:00pm at the seat of arbitration in Vienna). In his view, a summons for 6:00am was an act of insolence. Further, he accused the respondent's representative and another lawyer of having called on a witness not to appear because, as M claimed, this witness

was incapable of lying. He further claimed that "the lying will be done" by the representative and the lawyer.

The applicants' other representative, Dr J, subsequently objected to a hearing via videoconference (as she had already done in her previous written pleadings). Dr J then interrupted her pleading and pointed out that the co-arbitrator, Dr T, had rolled his eyes during her pleading. The applicants claimed that Dr T was biased.

The Supreme Court rejected the applicants' challenge of the arbitral tribunal and of Dr T as the applicants' allegations could not constitute a bias of the arbitral tribunal, even if assumed to be true.

Arguments

According to the applicants, the co-arbitrator's eye rolling was inappropriate and "downright revealed" a lack of impartiality, especially since Dr J had been speaking about the most elementary basic rules of a fair trial when Dr T had rolled his eyes. The arbitral tribunal did not dispute the lack of impartiality and did not take any actions. This, according to the applicants, proved once again that the entire arbitral tribunal was biased.

Even though no other hearing participants are said to have noticed any eye rolling, Dr T did not *per se* contest the allegations. By way of an explanation, as summarised by the Supreme Court, he claimed that he did not know what his eyes had been doing when Dr J had started to speak. However, her pleading was preceded by an "extensive lecture" by the Los Angeles-based representative of the applicants, M, during which he had verbally attacked parties to the proceedings several times in a manner that was inappropriate for court proceedings. Counsel Dr J had then again raised procedural issues on which both she and the arbitral tribunal had already taken clear positions in writing. Therefore, Dr T had been concerned that it might be a long time before everyone could deal with the matter itself. He did not rule out that these thoughts might have been reflected in his facial expressions, such as frowning or raised eyebrows. He had to give a legal assessment of the facts of the case, which he would do together with his fellow arbitrators. Even after a thorough examination of conscience, he could not discover any bias in himself.

The Vienna International Arbitral Centre rejected the applicants' challenge, stating that the possible eye rolling or facial expressions of Dr T alone were not a sufficient reason for a challenge and could not raise justified doubts about his independence or impartiality.

The applicants then turned to the Supreme Court, essentially repeating their arguments and emphasising that the behaviour of Dr T had made it clear that he did not respect the

procedural core principles that the applicants' representative was elaborating on at the time and had "downright revealed" his bias.

Decision

The Supreme Court first elaborated on the general principles of challenging an arbitrator under Austrian law. Pursuant to Section 588(2) of the Code of Civil Proceedings, arbitrators may be challenged only if:

- circumstances exist which give rise to justifiable doubts as to their impartiality or independence; or
- they do not meet the qualifications agreed by the parties.

The reasons for challenging state court judges serve as guidelines, although special consideration should be given to the particularities of arbitration.

The court further stated that the right of challenge must not give parties the opportunity to get rid of an unwanted judge. Nevertheless, the court emphasised that, in the interest of the judiciary's reputation, strict standards must be applied when assessing an arbitrator's impartiality. The Supreme Court highlighted that this is an objective standard. It is sufficient if there is reason to suspect a bias when the judge should actually be impartial. The same applies if, when viewed objectively, even the appearance of a bias could arise.

The court further pointed out that improper conduct of proceedings and procedural errors do not by themselves establish the appearance of bias. This assessment will differ only in cases of serious procedural violations or (permanent and significant) preferential or disadvantageous treatment.

As regards the alleged eye rolling of Dr T, the court held that even if the alleged facial expressions were to be interpreted as the arbitrator's negative reaction to the statements of Dr J, this would not yet indicate a bias that would make it impossible for the arbitrator to assess the dispute objectively. Also, given the absence of further indications of bias, such a reaction did not justify the conclusion that the arbitrator disregarded the most elementary basic rules of a fair trial and could or would not judge objectively and factually.

The court stated that even in combination with the alleged reasons for a lack of impartiality of all members of the arbitral tribunal (6), there was no fear of a bias. It could not be assumed that the arbitral tribunal would be guided by unobjective motives in the proceedings and in its decision. Thus, the court rejected the applicants' challenge.

Comment

With this decision, the Supreme Court has added to the case law on the impartiality and independence of arbitrators, particularly with respect to an allegation of bias based on non-verbal reactions.

Even though the standards on the assessment of impartiality and independence are strict, the Supreme Court rejected the challenge of the arbitrator in the case at hand. This decision is to be endorsed; the alleged eye rolling was a singular instance. Objectively viewed, there was no fear of a bias, which is why there was no necessity to draw consequences from it.

Considering that certain facial expressions of an arbitrator or a state court judge during a hearing can have many reasons (perhaps even completely unrelated to the hearing), it seems important to assess them in view of the facts of the case but not necessarily read a deeper meaning into them. After all, an occasional showing of emotion by, for example, frowning, raising eyebrows, smiling or even eye rolling is part of human nature and still a long way from being unable to assess a dispute objectively and factually.

For further information on this topic please contact Nikolaus Pitkowitz *at Graf & Pitkowitz by telephone (+43 1 401 17 0) or email (pitkowitz@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at. This article was also published as ILO Arbitration & ADR Newsletter.*

Endnotes

(1) Supreme Court 18 ONc 2/19t; Supreme Court 1 Ob 3/92; Vienna Regional Court 42 R 243/91; Innsbruck Higher Regional Court 1 R 37/15y; RIS-Justiz RS0046083 and RIS-Justiz RS0096970.

(2) Supreme Court 1 Ob 3/92.

(3) Supreme Court 3 Ob 538/93.

(4) Supreme Court 12 Os 97/94; RIS-Justiz RS0096992.

(5) Supreme Administrative Court 2006/19/0409.

(6) This article focuses on a co-arbitrator's facial expression as a reason for chal-lenge. However, the applicants challenged the entire arbitral tribunal on the grounds of maintaining the hearing date and conducting the hearing via videocon-ference.