

Belgian Court of Cassation rules on liability of arbitrators

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In *Case C-19.0153.N-C.19.0174.N/1*, the Belgian Court of Cassation upheld a lower court decision finding an arbitrator liable for committing serious faults in the conduct of arbitration proceedings.

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In its recently published decision of 13 January 2022, the Belgian Court of Cassation ruled on the liability of arbitrators.

Belgian law does not regulate the liability of arbitrators by explicit statutory provisions but is based on general principles of contract law as regards the arbitrators' duty to act diligently and to fulfil certain obligations when conducting the proceedings. Arbitrators' liability as regards errors in decision-making is more controversial and seems to be accepted in circumstances of fraud or similarly intentional (mis)conduct.

Here, a sole arbitrator was appointed to deal with a technical IT dispute. With the parties' approval, he appointed an expert for assistance with specific technical aspects of the case. The expert prepared notes, which were not shared with the parties. After the hearing, the expert was allowed to comment on the arbitrator's draft award.

The Court of Cassation upheld the Brussels Court of Appeals' decision that the above facts constituted exceptional circumstances, justifying holding the arbitrator liable. It held that the sole arbitrator had committed the following serious faults:

- He violated the parties' due process rights by not sharing the expert's report with them.
- He illegitimately delegated his decision-making powers to the expert.
- He violated the secrecy of deliberations by sharing the draft award with the expert.

These faults lead to the repudiation of the arbitrator's contract with the parties, obliging the arbitrator to return the received fees and, in principle, to pay compensation for the loss suffered by the aggrieved party. In this case, the court confirmed the aggrieved party's right to recover the fees paid to the arbitrator. However, the aggrieved party's claim for its legal fees and own costs and costs of annulling the award depended on a causal link with the arbitrator's fault, which was not found here. However, the fees related to the annulment proceedings will be subject to new scrutiny by another appellate court.

The Court of Cassation's decision is unique as it represents a rare example of case law on arbitrators' liability in Belgium. It provides clear guidance on the limits of arbitrator liability under Belgian law. While it is possible to seek reimbursement of fees paid to an arbitrator, the recovery of the fees paid to counsel and the party's own costs is more difficult. Therefore, the limitation of liability clauses (for example, as included in various arbitration rules) will likely enjoy increased attention.

Case: *C-19.0153.N-C.19.0174.N/1 (Court of Cassation) (13 January 2022)*.

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