CAS award in Sun Yang case annulled for arbitrator bias (Swiss Supreme Court)

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_318/2020*, the Swiss Supreme Court admitted a request for revision and annulled a CAS award against Chinese swimmer Sun Yang on the ground that there were justifiable doubts as to the impartiality of the presiding arbitrator. As a result, a new award will have to be rendered by a newly-constituted CAS panel.

Speedread

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In a recent French-language decision, the Swiss Supreme Court admitted an application for revision and annulled an award rendered against Chinese swimmer Sun Yang (Athlete) by the Court of Arbitration for Sport (CAS) on grounds of bias of the presiding arbitrator.

In September 2018, during an unannounced doping control, the Athlete refused to release his samples to the testing personnel, as he considered that they had not provided the necessary credentials and certifications. In January 2019, the anti-doping panel of the International Swimming Federation (FINA) cleared him of any anti-doping rule violation in that regard.

The World Anti-Doping Agency (WADA) appealed this decision before the CAS. On 28 February 2020, a CAS panel rendered a final award in which it found the Athlete guilty of violating the FINA Doping Control Rules and suspended him for a period of eight years.

On 15 June 2020, the Athlete filed a request for revision before the Swiss Supreme Court, seeking the annulment of the CAS Award and the disqualification of the presiding arbitrator. The Athlete submitted that on 15 May 2020, he had become aware of a number of tweets posted by the presiding arbitrator between 2018 and 2019 that contained unacceptable comments against Chinese nationals that gave rise to legitimate concerns as to the arbitrator's impartiality.

The Swiss Supreme Court granted the Athlete's request. It held that he had sufficiently met his duty to investigate the arbitrator's background during the arbitration proceedings and was therefore not precluded from relying on the tweets at this stage. Furthermore, the court considered that in view of all the relevant circumstances, the doubts as to the impartiality of the arbitrator were objectively justified. As a result, it annulled the CAS Award and disqualified the presiding arbitrator. A new award will therefore have to be rendered by a newly-constituted CAS panel (*Decision 4A_318/2020*) *(22 December 2020)*.).

Background

Before 1 January 2021, the Swiss Private International Law Act (PILA) did not contain any provisions on the revision of arbitral awards, but there was an established practice of the Supreme Court allowing for this type of recourse.

On 1 January 2021, the revised Chapter 12 of the PILA entered into force, which includes a new provision that explicitly deals with the revision of arbitral awards (article 190a). According to that provision, a party may apply for the revision of an award if, despite having exercised due diligence, it only discovered a ground to challenge an arbitrator after the arbitral proceedings were closed and no other legal remedy is available.

Facts

Sun Yang (Athlete) is a Chinese international-level swimmer, holding various Olympic and world championship titles. On the night of 4 September 2018, he was subject to an out-of-competition doping control ordered by the International Swimming Federation (FINA), as testing authority, the implementation of which was delegated to International Doping Tests and Management (IDTM), acting as sample collection authority.

The circumstances in which the Athlete's unannounced testing took place are at the heart of the dispute between the parties, and their versions of the events differ. In deciding this case, the Supreme Court was bound by the findings of fact of the Court of Arbitration for Sport (CAS) panel in the award that was the subject of the application for revision, which it summarised as follows: while the Athlete, at first, actively cooperated with the testing, in the course of the process of blood and urine collection he questioned the credentials of two of the sample collection personnel and considered that they had not presented sufficient certification. Therefore, he refused to provide a urine sample. He had already provided blood samples, but asked that they be returned to him. The samples had been placed in a sealed glass container, which had to be smashed in order to be opened. The Athlete kept the blood samples and handed over the broken container to the testing personnel. He also tore up the doping control form that he had previously signed. Based on these circumstances, FINA commenced proceedings against the Athlete for an anti-doping rule violation.

On 3 January 2019, the Athlete was cleared by the FINA Doping Panel. On 14 February 2019, the World Anti-Doping Agency (WADA) filed a statement of appeal before CAS against the FINA decision and requested that the Athlete be suspended for eight years.

The three-member CAS panel was chaired by Italian national, Franco Frattini.

On 28 February 2020, the panel rendered an award in which it found the Athlete guilty of a violation of article 2.5 of the FINA Doping Control Rules and suspended him for a period of eight years from the date of the award.

On 15 June 2020, the Athlete filed an application for revision before the Swiss Supreme Court, seeking the annulment of the CAS Award and the disqualification of the presiding arbitrator. In support of his application, the Athlete

indicated that he had learned, from an article published on a sports website on 15 May 2020 (that is, after the time limit had lapsed for an application to set aside the award), that the presiding arbitrator had posted a number of unacceptable tweets containing racist slurs towards Chinese nationals. This, according to the Athlete, seriously called into question the arbitrator's impartiality. The tweets, reproduced in full in the Supreme Court's decision, included language such as:

"... those bastard sadic [sic] chinese who brutally killed dogs and cats in Yulin."
"...this yellow face chinese monster smiling while torturing a small dog, deserves the worst of the hell".
"...those horrible sadics [sic] are CHINESE!"
"Old yellow-face sadic [sic] trying to kill and torture a small dog."
"Torturing innocent animal is a flag of Chinese Sadics [sic], inhumans".

Decision

The Supreme Court admitted the application for revision and annulled the award on the ground that there were objectively justified doubts as to the impartiality of the presiding arbitrator. In doing so, it applied the principles underlying the new article 190a(c) of the PILA. The court also disqualified the arbitrator, the effect of which will be that the CAS panel will have to be newly constituted without him.

Duty to investigate

The court first examined the question of whether the objections to the arbitrator's impartiality had been raised in time, as grounds for challenge must be raised immediately upon becoming known, otherwise they are forfeited.

WADA and CAS contended that the Athlete could and should have discovered the ground for challenge during the arbitration proceedings, since the tweets were posted between May 2018 and June 2019. In their opinion, the Athlete should have conducted online searches combining Mr. Frattini's name and the keyword "China", which would have been sufficient to discover some of the objectionable tweets. WADA and CAS further argued that the presiding arbitrator's Twitter account is public and freely accessible and that the Athlete could have been legitimately expected to examine "leading social networks such as Facebook, Twitter, Instagram".

The Supreme Court disagreed. It highlighted that the issue at that stage was not whether or not the Athlete could in theory have had access to the disputed tweets during the arbitration proceedings, but only whether or not he could be accused of not having exercised due care in researching circumstances that might call into question the arbitrators' impartiality.

Referring to its established case law, the court held that the parties have a duty to investigate the existence of possible grounds for challenge that could affect the composition of the arbitral tribunal. Parties cannot simply rely on the general declarations of independence and impartiality made by arbitrators, but must instead make certain enquiries of their own to ensure that the arbitrators offer sufficient guarantees of independence and impartiality.

The court held that, while it is difficult to define the exact contours of a party's duty to investigate, that duty is not unlimited. Although the parties can be expected to use the main computer search engines and to consult sources likely to provide elements revealing a possible risk of bias on the part of an arbitrator, they cannot be expected to undertake a systematic and thorough analysis of all the sources relating to a given arbitrator. Moreover, the court clarified that the mere fact that information is freely accessible on the internet does not in itself mean that a party who did not discover that information notwithstanding its research failed in its duty to investigate. In this respect, the circumstances of the concrete case will always be decisive.

Turning to the present case, the court held that the Athlete could theoretically have had access to the tweets during the arbitration proceedings. However, the Athlete could not be criticized for not having carried out a search that included the word "China", as he could not be expected to speculate from the outset that the arbitrator would have a bias due to his nationality.

The court further examined whether the Athlete could and should have browsed the "key social networks" and, in particular, the arbitrator's Twitter account. It came to the conclusion that, while there may be some specific circumstances where a party could be required to check an arbitrator's social media to see whether there are grounds for a challenge, it would be inappropriate to be too demanding of parties in that regard. Even if it were possible to agree on a definition of "key social networks", the duty to investigate could not be transformed into an obligation to conduct extensive enquiries, engaging considerable time and resources.

In this case, the court held that, while the Athlete admittedly should have consulted the arbitrator's Twitter account, the fact that he had failed to discover tweets published nearly ten months before the presiding arbitrator's appointment, which were drowned in a mass of posts on that arbitrator's Twitter account, could not be seen as a failure to comply with the duty to investigate. The court moreover clarified that a party cannot be required to continue its internet searches and to check the messages published on social media by the arbitrators throughout the arbitration proceedings.

The court found that the Athlete had sufficiently fulfilled his duty to investigate and rejected WADA's and CAS' objections.

Impartiality

The Supreme Court then examined whether the arguments put forward by the Athlete justified the disqualification of the arbitrator. With reference to its own established case law and to the European Court of Human Rights judgment of 2 October 2018 in *Mutu and Pechstein v Switzerland*, the court recalled that the mere appearance of bias is sufficient to disqualify an arbitrator, citing the adage "justice must not only be done: it must be seen to be done".

However, the mere subjective impressions of a party are not decisive in this respect. Rather, the doubts as to an arbitrator's impartiality must be objectively justifiable. In this regard, the court referred to the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), which provide that doubts are justifiable if a reasonable third party, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision (sections 2(b) and (c) IBA Guidelines).

The Athlete submitted that the tweets by the presiding arbitrator, even if they were posted in a context other than that of the arbitral proceedings concerning him, reveal a clear prejudice against Chinese nationals and objectively raise doubts as to the arbitrator's impartiality. According to him, the terms used by the arbitrator are degrading, abusive and discriminatory towards Chinese citizens.

In a written statement of 3 September 2020 submitted in the Supreme Court proceedings, the presiding arbitrator indicated that he had published the incriminated tweets in a very specific context, in reaction to the "massacre of animals committed each year in the city of Yulin in China on the occasion of the tragic traditional Dog Meat Festival". He admitted that he had reacted in a very emotional way. The arbitrator insisted, however, that his criticisms were in no way directed against the Chinese nation or the Chinese people in general and that the CAS Award, which was handed down unanimously, had not been influenced by any extraneous elements.

The Supreme Court considered that, while it is perfectly legitimate for arbitrators to express their convictions on social media, this does not mean that they can post anything they want without giving rise to doubts as to their impartiality. In this case, the presiding arbitrator obviously defended the cause of animal rights and his violent criticism was evidently not directed against all Chinese nationals. The Supreme Court found that, considered in the abstract, the fact that the presiding arbitrator had severely criticized the consumption of dog meat and denounced certain Chinese nationals who, according to him, were guilty of torturing animals, was not in itself indicative of a bias against all Chinese nationals.

According to the court, it was not so much the cause that the arbitrator was defending that was problematic in this case, but rather the terms that he had used to do so. The arbitrator did not hesitate to repeatedly employ extremely violent language and several messages were published while the case was being heard before the CAS. In particular, the court considered the words "yellow face", used twice by the arbitrator after his appointment as president of the CAS panel, to be undoubtedly the most questionable and that qualifying this expression as "awkward", as WADA had done in its submissions, was a euphemism to say the least.

The Supreme Court pointed out that such expressions, even if they were used in a particular context, have absolutely nothing to do with the alleged acts of animal cruelty and are, whatever the context, unacceptable. The fact that the arbitrator continued to make this type of remark after his appointment as chairman of a panel called upon to rule on the appeal filed against a Chinese national, rendered the Athlete's doubts as to the arbitrator's potential bias objectively justifiable.

Consequently, the Supreme Court admitted Sun Yang's application for revision, annulled the award and disqualified the arbitrator the effect of which will be that the CAS panel will have to be newly constituted without him.

Comment

This is one of only a handful of cases where the Supreme Court has granted a request for revision of an international arbitral award. Revision is a mechanism that is only available in exceptional circumstances, namely where a party discovers new material evidence or procedural fraud after the award has been rendered or where, as here, a party becomes aware, after the deadline for setting aside the award has lapsed, of a ground to disqualify an arbitrator that could not have been discovered during the arbitration. This is the first case where revision has been granted due to discovery of a ground to disqualify an arbitrator.

The decision provides welcome clarification of the parties' duty to investigate the independence and impartiality of arbitrators, especially when it comes to researching their presence and comments on social media. While parties may, depending on the circumstances, be expected to conduct some initial enquiries, they are not required to trawl through an arbitrator's entire online history or to go hunting for evidence of bias if there are no initial indications thereof. They are also not required to repeat online searches during the entire duration of an arbitration.

The court was careful to point out that arbitrators are free to express their opinion online, and that only the specific circumstances of a given case will be decisive in determining whether there is an appearance of bias. In this case, the extremity of the language in the tweets, and the fact that slurs were used which were unrelated to the actions that the arbitrator was protesting, tipped the scales for the Supreme Court. The bar would therefore appear to remain high for a challenge based on lack of impartiality to succeed.

Case

Decision 4A_318/2020 (22 December 2020) (Swiss Supreme Court).

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