INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS, SWISS FEDERAL COURT. J. OCTOBER 29TH, 2010

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Note - Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano (CONI), Agence Mondiale Antidopage (AMA) and Union Cycliste Internationale (UCI), 4A_234/2010, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 29 October 2010

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(*)

II. Comentário

Introduction

The parties to an arbitration give arbitrators considerable discretion to design the proceedings and decide on their dispute. Arbitrators hence are expected to develop and implement the framework that ensures equal treatment and fair awards. As arbitrators play so significant a role in the settlement of disputes, their independence and impartiality are of paramount importance to achieve their expected undertaking.

In the following paragraphs, we comment on the Swiss Federal Court's findings and decision in Alejandro Valverde Belmonte vs Comitato Olimpico Nazionale Italiano (CONI), World Anti-doping Agency (WADA) and the International Cycling Union (ICU) (hereinafter: Valverde's case). The findings and decision of the Swiss Federal Court in Valverde's case endorse the notion and scope of impartiality and independence advocated by the majority of the Swiss scholarship. It also confirms and clarifies the channels, grounds and power of the Swiss Federal Court to review a decision on the challenge of arbitrators.

1. Factual Background

The Petitioner for the set aside of the arbitration award before the Swiss Federal Court is Mr. Alejandro Valverde Belmonte, a professional Spanish cyclist ("the Petitioner"). The Respondents are the Comitato Olimpico Nazionale Italiano ("CONI"), the World Anti-
Valverde Belmonte
Defendant, Comitato Olimpico Nazionale Italiano (CONI) +
Agence Mondiale Antidopage (AMA) +
Union Cycliste Internationale (UCI)

Key words
Independence and Impartiality of Arbitrator.
Federal Court Appeal.
Challenge of Arbitrator.

Link(s) to Related Case(s)
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Source
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2. Discussion And Findings

2.1. The Power Of The Swiss Federal Court To Review Issues Of Fact In Setting Aside Proceedings

i). The decision of a private institution on an arbitrator's challenge cannot be appealed before the Federal Court

On December 30, 2009, the Petitioner filed a first application before the first civil law chamber of the Federal Court(1), in an attempt to set aside the ICAS's decision which dismissed the challenge to Prof. Haas' appointment as arbitrator during the course of

Doping Agency ("WADA") and the International Cycling Union ("UCI"). On May 11, 2009, the CONI’s Antidoping National Court forbade the Petitioner from participating in any sporting events organised by CONI or other national sports federations within the Italian territory for a period of two years, due to a violation of the Italian anti-doping rules ("NSA").

On June 26, 2009 the Petitioner filed an appeal with the Court of Arbitration for Sport ("CAS"). Further to the appeal, CONI appointed Ulrich Hass, a scholar in Zurich, on June 30, 2009. Prof. Hass accepted the invitation by letter dated July 9, 2009, but nevertheless disclosed some prior professional relationship with WADA. Since none of the parties filed a challenge against Prof. Hass, an arbitration panel, composed of Mr. Romano Subiotto QC (chairman), an attorney-at-law in Brussels and London, Mr. José Juan Pintó (arbiter appointed by the Petitioner), an attorney-at-law in Barcelona and Prof. Ulrich Hass, was constituted on August 3, 2009. Arbitrator Pintó later renounced to act as an arbitrator due to his unavailability and was replaced by Mr. Ruggero Stincardini, an attorney-at-law in Perouse.

On September 4, 2009 CONI filed an answer to the appeal, including a joinder with respect to the Union Cycliste Internationale (UCI) and the World Anti-Doping Agency (WADA). By a preliminary decision of October 12, 2009, the CAS panel invited those two legal entities to participate in the arbitration proceedings as co-Respondents. In a letter of October 16, 2009, the Petitioner challenged Prof. Hass' independence due to the admission of WADA as a co-Respondent in the proceedings. According to the Petitioner, Prof. Hass had participated in various meetings or conferences as a WADA representative. The Board of the International Council of Arbitration for Sport (ICAS) rendered a decision on November 23, 2009 dismissing the challenge, inasmuch as Prof. Haas had never represented either co-Respondent, but had solely been entrusted with two missions, as a neutral and independent expert. The ICAS ascertained that none of the grounds alleged by the Petitioner could result in doubts about the independence of Prof. Hass, both from an economic and emotional perspective.

On March 16, 2010, the CAS panel rendered a unanimous award confirming the decision of a two-year suspension as from May, 11 2009 to be taken against the Petitioner. On April 28, 2010, the Petitioner filed an application before the Swiss Federal Court to set aside the CAS award and remove arbitrator Hass.

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proceedings. On April 13, 2010, the Petitioner's application was held inadmissible by the Swiss Federal Court\(^2\). The dismissal confirmed well-established case law under which the decision on the challenge of an arbitrator rendered by a private institution, such as the Court of Arbitration of the ICC or the ICAS\(^3\), could not be directly brought before the Swiss Federal Court\(^4\).

In Swiss international arbitration, the application to set aside is only admissible against final awards under the grounds of articles 190-192 PIL, \textit{i.e.} for incorrect constitution of the arbitral tribunal, violation of jurisdiction rules, violation of the equal treatment or the right to be heard principles or incompatibility with Swiss public policy\(^5\). Under this rule, the Petitioner had no option but to wait until the final award was rendered to try to indirectly reverse the ICAS's decision on the challenge.

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\textbf{ii). The partiality and dependence of an arbitrator as an indirect ground for the set aside of awards}

A petition based on the improper constitution of the arbitral tribunal, within the wording of article 190(2)(a) PILA\(^6\), does not require the Petitioner to show that the award would have been different had the arbitral tribunal been properly constituted\(^7\), but rather, that the guarantees of the due arbitral process have been relinquished or not given the appropriate effect by the panel.

Due process is critical to the enforcement of an award under the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: NYC). Art. V(1)(b) of the NYC\(^8\) allows a court to refuse enforcement if the party against whom an award is invoked is unable to present its case due to a violation of mandatory due process guarantees. An arbitrator's lack of independence or impartiality compromises these due process rights and is a ground for denying enforcement under the NYC as well as other international arbitration conventions and any domestic due process laws in the country in which enforcement is sought\(^9\).

Therefore, the Arbitral Tribunal has the authority to assess the risk to independence and impartiality posed by an arbitrator's disclosures and to choose whether to confirm the arbitrator, thereby limiting the likelihood of judicial review. Many Arbitration Centers' Code of Ethics or signed declarations impose on an arbitrator a duty to disclose all circumstances and relationships that need to be disclosed in order not to keep anything hidden that might give rise \textit{page "156"} to doubts on independence and impartiality. Nevertheless, in this atmosphere of uncertainty as to the extension and limits to disclose any possible conflict, one question comes up: is the mere appearance of impartiality sufficient to compromise a candidate's suitability? Should s/he be as much above suspicion as Caesar's wife?

In an attempt to answer this question, the International Bar Association (IBA) appointed a Working Group that has created the IBA Guidelines on International Conflicts of Interest ("IBA Guidelines"), a common set of principles that address standards of disclosure upon appointment of arbitrators by reference to concrete situations. Although these guidelines are non-binding, they are
almost invariably used by tribunals as guidance. The IBA Guidelines contain two parts. Part I is entitled “General Standards Regarding Impartiality, Independence and Disclosure”. Part II is called “Practical Application of the General Standards”. Part I provides seven General Standards for dealing with conflicts of interests and obligations to disclose, as well as issues of waiver, scope and relationships. General Standard I is that every arbitrator must be and remain impartial and independent. General Standard II, which is entitled “Conflicts of Interests” sets forth the standards for determining whether a particular conflict would require the arbitrator to decline appointment. The first standard listed under General Standard II is subjective: an arbitrator must decline appointment if s/he has doubts as to her/his impartiality or independence. The second listed standard is objective. An arbitrator must decline appointment if a reasonable person would have justifiable doubts about the arbitrator's impartiality and independence. The objective standard for disqualification requires more than the mere possibility that the circumstances in question could create doubts about impartiality and independence. Rather, the circumstances must raise doubts that are justifiable about the arbitrator's neutrality. Justifiable doubts are those which would persuade a reasonable third party that the arbitrator might make a decision based on factors other than the merits of the case. List of particular situations are divided into three groups named according to the colors of the traffic light: red, orange and green\(^{10}\).

In the case at hand, the Federal Court held that Prof. Haas' relationship with WADA did not fall within paragraph 3.4.2 of the orange list contained in IBA guidelines on conflict of interest in international arbitration, which reads as follows: “The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner”.

Essentially, the orange list contains situations that the arbitrator must disclose. If, after disclosure, the parties do not make a timely objection, then they are deemed to have accepted the arbitrator and to have waived any potential conflict of interest based on the facts or circumstances disclosed.

\(^{iii).\) The power of the Swiss Federal Court to decide on the challenge of an arbitrator

To begin with, one should be reminded that the ICAS is a private entity incorporated under Swiss law. Under article S6 (4) and R34 of the Code of Sportsrelated Arbitration, the challenge of an arbitrator is of the exclusive competence of this private entity which may perform its function through its Board.

Secondly, requests to set aside an award filed with the Swiss Federal Court can only lead to either the outcome of confirmation or the annulment of the award; however, the Swiss Federal Court decided that there were exceptions to this rule, one of them being the power to remove an arbitrator\(^{11}\). Invoking reasons of legal certainty and procedural efficiency, the Swiss Federal Court ascertained that, if it would content itself with annulling the award sought to be annulled, after allowing the complaint based on article 190(2)(a) PIL, the new arbitral award would in principle have to be drafted by the same arbitration panel,
which would force the party that prevailed before the Swiss Federal Court to file a new challenge against the arbitrator sought to be removed in case the latter would not spontaneously quit. With this in mind, the Swiss Federal Court exposed its reasoning that the outcome of the arbitral proceedings would be accordingly delayed and the possibilities for delaying tactics could not be excluded in such a situation. Therefore, if the Swiss Federal Court had to admit the complaint filed by the Petitioner, it would issue a decision to remove the arbitrator Mr. Hass.

A first criticism lies in the lack of further explanation as to the power of the Swiss Federal Court, in a hypothesis of admitting the petition, to effectively remove an arbitrator *per se*, apart from the principles above-referenced.

Moreover, a single reference to the principles does not clarify the decision; the Court must justify the application of the principles by explaining its content and suitability to the case at hand. Otherwise, it might create an unstable environment for future decisions over similar issues. Albeit the judge has the discretion to decide, s/he has the burden of production of arguments to base its decision.

In fact, in the case at hand, many important principles of international commercial law and arbitration inherent to the legal debate were not even quoted by the Swiss Federal Court, such as the Kompetenz-Kompetenz principle, parties' autonomy, separability of the arbitration clause, and eventually, the law & economics argument that has been impliedly adopted by the decision\(^{(12)}\). That explanation would have livened up an exchange of points of views and distinct approaches regarding the development of the interactions between arbitration and the Swiss Courts and brought light to this decision, thereby giving an accurate understanding of its content and limits, and accordingly, providing guidance for future cases of the same nature.

Nonetheless, under a cost-efficient perspective, the rationale of the decision shows that impliedly – the *ratio decidendi* has not been fully explained – the Swiss Federal Court has correctly noted that, in the hypothesis of admitting the petition, its intervention in this arbitration (through the removal of the arbitrator) would result in positive effects to the arbitral case outcome itself by avoiding unreasonable delays, anti-suit injunctions and recalcitrant tactics.

**2.1.1. No differential treatment of Party appointed arbitrators and Awards by majority**

The Swiss Federal Court also decided on an issue that divides legal scholarship\(^{(13)}\) and that was so far unsettled in Swiss case law\(^{(14)}\): whether a party-appointed arbitrator must have the same degree of independence and impartiality as that which is required from the chairman of an arbitral tribunal or a sole arbitrator. The issue arose from CONI's contention that according to the most authoritative classic commentators, the requirement of impartiality does not apply to party-appointed arbitrators, but exclusively to the chairman of the arbitral tribunal or the sole arbitrator\(^{(15)}\). The Swiss Federal Court admitted that an absolute independence\(^{(16)}\) of all arbitrators is an ideal which will seldom correspond to reality\(^{(17)}\). The Swiss Federal Court went on declaring that whether one likes it or not, the appointment method of an arbitral tribunal's members creates an objective connection between the arbitrator and the party.
which appointed him\(^{(18)}\).

However, the Swiss Federal Court considered that the system known as the party-arbitrator system, in which the arbitrator appointed by each party would not be required to be as independent and impartial as the arbitrator called to preside over the arbitral tribunal, must be excluded. The idea that an arbitrator may only be counsel for “his party within the arbitral tribunal must resolutely be ruled out on pain of jeopardizing arbitration as such”\(^{(19)}\). The Swiss Federal Court concluded by stating that as a matter of principle, the independence and impartiality required from the members of an arbitral tribunal are required as much from the party-appointed arbitrators as from the chairman of the arbitral tribunal\(^{(20)}\).

As an aside, the Swiss Federal Court excluded that the Petitioner's obligation shows that the award would have been different had the arbitral tribunal been properly constituted.\(^{(21)}\) The question arose because WADA questioned whether under article 190(2)(a) PIL, the Petitioner may rely on an alleged bias of an arbitrator when the award was rendered unanimously by the three members. As correctly pointed out by the Swiss Federal Court, it should be considered that as a matter of principle and with no obligation to prove so, “the participation of a removable arbitrator in the making of the decision by the arbitral tribunal had a decisive effect on the outcome of the dispute, in spite of the fact that it was a unanimous award”\(^{(22)}\).

\section*{2.1.2. The specificities of the type of arbitration}

The Swiss Federal Court found that compliance with guarantees of independence and impartiality required from any arbitrator must be similarly examined in either sports arbitration or commercial arbitration\(^{(23)}\). However, the Swiss Federal Court stated that one must not lose sight of the characteristics of sports arbitration when examining whether a CAS panel is properly constituted. In particular, the Swiss Federal Court considered the fact that the arbitrators' choice is limited in the CAS's list, since arbitrators are required to have a legal formation and an acknowledged competence in sports. Hence, “CAS arbitrators may be lead to hobnob with sports organisations, specialised lawyers and other experts in sports law without such relationships necessarily compromising per se to their independence”\(^{(24)}\).

The Swiss Federal Court finding stands despite scholarship critics who consider that, because of the closed list of arbitrators, athletes do not have real choice with regards to the person they may appoint as arbitrator. This fact should require a more strict approach for sports arbitration than for commercial arbitration\(^{(25)}\). Instead, the Swiss Federal Court decided to confirm its previous decisions that saw in the closed list of sports arbitrators a mere necessity of TAS arbitration\(^{(26)}\).

\section*{3. The Swiss Federal Court's Decision On Valverde Case}

The Swiss Federal Court dismissed the petition to set aside the award on grounds of improper constitution of the arbitral tribunal, within the meaning of article 190(2)(a) PIL. To reach its decision, the Swiss Federal Court limited itself to examine whether the fact
that Prof. Haas was in charge, as a legal expert, of the group of nine independent persons chosen by WADA in order to observe the application of the anti-doping programme at the 2004 Athens Olympic Games, the fact that he was a member of the team of experts constituted under the aegis of WADA in order to revise the World Anti-doping Code in 2006/2007 and that he participated, in this context, in the SportAccord Conference in April 2007 to present the progress of the revision work, were sufficient to compromise his independence and impartiality (27).

Against this background, the Petitioner contended that Prof. Haas was paid for the services provided at WADA's request. Such services could continue in the future to create business expectations. This relationship between WADA and Prof. Haas, objectively examined, created in all reasonable people a legitimate doubt as to the impartiality of this arbitrator (28). The Petitioner drew an analogy between the case at hand and another decided by the Swiss Federal Court (29), in which a counsel accessorially acting as a judge was called to decide on a case opposing one of his important clients to a third party.

The Swiss Federal Court nevertheless decided that as it resulted from the description of the 2004 anti-doping programme, Prof. Haas carried out the mission with all independence towards WADA (30). In addition, it was not proven that Prof. Haas was paid something else other than his expenses for the performance of the mission under consideration. The fact that Prof. Haas was honoured to be chosen to be in charge of the independent observers team is not a circumstance which makes him dependent upon WADA (31). Regarding Prof. Haas' participation in the revision of the World Anti-doping Code in 2006/2007, the Swiss Federal Court considered that it was not proven at all that his expenses were paid for to an extent that was not to say comparable to that of a lawyer (32). The Swiss Federal Court maintained that the Petitioner's analogy was absurd since it was obvious that Prof. Haas' situation, whose full-time paid job is a university professor, is not comparable to that of a lawyer whose income consists of fees paid by his client (33). Incidentally, the Swiss Federal Court held that Prof. Haas' relationship with WADA did not fall within paragraph 3.4.2 of the orange list contained in IBA guidelines on conflict of interest in international arbitration (34), as one cannot compare Prof. Haas to an old partner or employee of WADA within the meaning page “162” of the provision cited (35). Thirdly, the Swiss Federal Court held that nothing in the facts showed that Prof. Haas was required to follow WADA's instructions whilst revising the Code, as an agent would be required to (36). Finally, if Prof. Haas participated in one or more conferences in 2007, it was not proven at all that he did so in the name and on the behalf of WADA, or as a WADA delegate (37).

Conclusion

The Swiss Federal Court's decision in Valverde's case has been in general terms welcomed by the international arbitration community (38). As commented, the decision brings up an economic analysis of arbitration. Although not providing further arguments to uphold its ultimate power, the Swiss Federal Court has correctly noted that, in the hypothesis of admitting the petition filed, its intervention in the arbitration via the removal of the appointed arbitrator would be beneficial to the arbitral case outcome under a
cost-efficient perspective, since it would avoid unreasonable delays, anti-suit injunctions and recalcitrant tactics. In addition, the Swiss Federal Court's decision draws interesting rules regarding the independence of arbitrators previously hired by one of the parties as experts in different matters. The Swiss Federal Court made clear that insofar as the expert had carried out his expertise with independence, the mere prior engagement without financial nature makes no proof of a lack of independence. Nevertheless, the decision will certainly raise new discussions regarding the standard to examine the independence and impartiality of CAS arbitrators.

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3 The ICAS is a private entity incorporated under Swiss law. Under article S6 (4) and R34 of the Code of Sportsrelated Arbitration, the challenge of an arbitrator is of the exclusive competence of this private entity which may perform its function through its Board.

4 Swiss Federal Court Decision of 13 April 2010 n° 4A_644/2009 referring to previous decision establishing the rule published in the Federal Court Bulletin with reference ATF 118 II 359 consid. 3b and subsequently confirming the rule the decisions with Nos. 4A_348/2009 of 6 January 2010 consid. 3.1 and 4A_256/2009 of 11 January 2010 consid. 3.1.2; see also RIGOZZI, A., L'arbitrage international en matière de sport, Helbing & Lichtenhahn, Bâle 2005, p. 495, no. 961.

5 See article 190 PIL: the procedure shall be subject to Article 77 of the Law on the Swiss Federal Court of June 17, 2005 according to 191 (2) PIL.

6 Art. 190 PIL.

[...]

2 It can be challenged only:

a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;

[...]


8 NYC, Article V:
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

[...]

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Impartiality generally means the arbitrator is not biased by any preconceived notions about the issue under dispute, or any reason to favor one party over another. The independence of arbitrators is a key part of the integrity of arbitrations administered by any Arbitration Center or Ad hoc arbitrations and also instills greater confidence in arbitration in general. The purpose of the independence requirement is to ensure that there are not connections or previous relations of financial nature between an arbitrator and the parties that would compromise the arbitrator's ability to be impartial in the course of the arbitration. See more, LEW, Julian D.M., MISTELIS, Loukas A., & KRÖLL, Stefan M, Comparative International Commercial Arbitration, Kluwer, 2003, p. 255-270.


Arbitration has been considered as the most efficient out-of-court dispute resolution method worldwide, inasmuch as, apart from the expertise of the decision-maker, who has practical experience in the business environment, there is flexibility of rules - procedural and substantive - covered or not by confidentiality, and it provides the parties with the opportunity to anticipate the cost of the contract. In this line of thought, the need to resort to judicial courts to enforce what had been decided in an arbitration forum, for instance, or rather the cost to reach the «promise», must also be weighted at the time of the contract, and accordingly, will inevitably impact the total costs. With regards to this issue, Steven Shavell calls a private adjudication as an “extra-state means of enforcement” of the contract. According to Shavell, arbitration is an example of “private adjudication”, mechanism that reduces the transaction costs since it provides broader access to the contractual information vis-à-vis court litigation, apart from the expertise of the arbitrator and the flexibility of the rules. See more SHAVELL, Steven, Economic Analysis of Contract Law, Harvard University Press, 2003, paper nº 403. Available at: <http://ssrn.com/abstract_id=382040>.

In this regard, in the words of the Swiss Federal Court, realistic or pragmatic scholars which consider illusory to require the same degree of impartiality and independence from all type of arbitrator, the Swiss Federal Court refer to Lalive, P., Sur l'impartialité de l'arbitre international en Suisse, in: Semaine Judiciaire 1990, p. 362 ff., 368 to 371; Lalive/Poudret/Reymond, Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, art. 180 PIL, para. 4; Bucher, Le nouvel arbitrage international en Suisse, 1998, paras. 168-170; Vischer, in Zürcher Kommentar zum IPRG, 2nd ed. 2004, art. 180 PIL, para. 8; Patocchi/Geisinger, Internationales Privatrecht, 2000, art. 180 PIL, para. 5.5; Peter/Besson, in: Commentaire bâlois, Internationales Privatrecht, 2nd ed. 2007, art.

14 In the commented decision, the Swiss Federal Court admitted that the issue was left open in many of its previous decisions. See Swiss Federal Court Decision of 29 October 2010, n° 4A_234/2010, published in the Swiss Federal Court Bulletin with reference ATF 136, III 605, 610, consid. 3.3.1.


16 For the Swiss Federal Court, the term independence covers the notion of impartiality as understood through Swiss case law, see Swiss Federal Court Decision of 29 October 2010, n° 4A_234/2010, published in the Swiss Federal Court Bulletin with reference ATF 136, III 605, 612, consid. 3.3.1.


26 See Swiss Federal Court Decision published in the Swiss...


34 “the arbitrator [who] has been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner”.


