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Swiss Federal Tribunal rejects multiple standards of independence and impartiality among arbitrators

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In a landmark decision dated 29 October 2010, published on 19 November 2010 (case 4A_234/2010), the Swiss Federal Tribunal dismissed a motion to set aside a Court of Arbitration for Sport (“CAS”) award based on the alleged impartiality of one of the co-arbitrators. The Court firstly clarified that the independence and impartiality expected from any arbitrator were the same, irrespective of his position within the arbitral panel. Furthermore, it stated that there was no justification to apply a more stringent standard of independence and impartiality to CAS arbitrators.

Background

By decision of 11 May 2009, the famous Spanish cyclist Alejandro Valverde was given a two-year doping ban by the Anti-Doping Tribunal of the Italian Olympic Committee (“CONI”). The racer appealed against the decision to the CAS. The CONI designated its arbitrator, Prof. Ulrich Haas, who indicated in its letter of acceptance that he had been involved in the revision of the World Anti-Doping Code in 2006-2007. In its response to the claimant’s appeal, the CONI requested the participation of the World Anti-Doping Agency (“WADA”) and of the International Cycling Union (“UCI”). The request was granted by a preliminary decision of 12 October 2009. WADA’s joinder to the proceedings led the petitioner to question the independence of Prof. Haas. As a result, each arbitrator was requested to supplement his declaration of independence. Prof. Haas added that he had acted as Chair of the WADA independent observer team designated for the Athens 2004 Olympics Games. The petitioner brought a challenge against Prof. Haas.* But the Board of the International Council of Arbitration for Sport (“ICAS”) dismissed the claimant’s challenge stating that there was no element that could have raised suspicions regarding the impartiality or independence of Prof. Haas. The dispute was then referred to the CAS panel which unanimously upheld the two-year ban imposed by the CONI Anti-Doping Tribunal. Alejandro Valverde challenged the award before the Swiss Federal Tribunal on the basis of the alleged irregular constitution of the Arbitral Tribunal (art. 190(2)(a) SPILA) and violation of his fundamental procedural rights (art. 190(2)(d) SPILA).

The decision

The Swiss Federal Tribunal started by deciding on two preliminary arguments invoked

by the petitioner. Firstly, it restated that, as an annulment court, its only mission is to examine whether the arguments raised to have the award set aside are founded. Therefore, the argument in connection with the constitution of the panel must be examined only in the light of the facts on which the ICAS Board based its decision. All further evidence adduced during the course of the arbitration could not be considered. Secondly, it did not see any major objection to the long-standing practice of the CAS, according to which observations on applications to challenge are drafted by the CAS Secretary General rather than by the arbitral panel that rendered the decision. However, the Court pointed out that it would be advisable for the ICAS Board to clarify this issue given the lack of codification of such practice.

The first issue examined by the Court has given rise to spirited debate between proponents of a “realistic” approach and those advocating a strict application of the standard of independence and impartiality. The question relates to the application of the standard within an arbitral panel: are all arbitrators bound by the same requirements, i.e. including party-appointed arbitrators? Whilst acknowledging that an absolute independence of all arbitral tribunal members would constitute an ideal that would rarely match reality, the Court strongly rejected the idea of “arbitrator-advocates”. The Court reasoned that such approach would indeed jeopardize the very fundamental of arbitration. In accordance with the foregoing, the Court enounced the principle that the independence and impartiality requirements are to be applied equally to all arbitral tribunal members.

Secondly, the Court examined the controversial issue of the application of a more stringent standard of impartiality and independence to CAS arbitrators in order to take into account the specificities of sports arbitration. The Court held that there was no reason to apply a different standard to CAS arbitrators. The specificities of sports arbitration, namely the limited choice of arbitrators engendered by the CAS closed list system and the requirements imposed to listed arbitrators (i.e. to have full legal training and recognized competence with regard to sport) must be taken into account. According to the Court, these peculiarities imply that CAS arbitrators may be led to have contacts with sports organizations, sports lawyers and other specialists. However, this is not sufficient ground to question their independence and impartiality and thus to apply a more stringent standard. The Court concluded by emphasizing that the independence and impartiality of an arbitrator will always depends on the concrete circumstances of each individual case. It would therefore be vain to seek to lay down immutable principles in this regard.

Finally, the Court decided another question, namely its own power to recuse an arbitrator (and not only to set aside the arbitral award). The Court admitted that its position as an annulment court did not prevent it from recusing an arbitrator, given the necessity of legal certainty and for the sake of procedural efficiency.

In the light of these clarifications, the Court analysed the decision at hand and found that the designation of Prof. Haas did not affect the regularity of the constitution of the CAS panel. The relief sought by the appellant was therefore denied, along with the alleged violation of his fundamental procedural rights.

Comment

The main conclusion to draw from this decision is the rejection of multiple standards of independence and impartiality among arbitrators: firstly, party-appointed arbitrators are to be treated the same way as chairmen and sole arbitrators; secondly, there is no reason to apply a more stringent standard to CAS arbitrators. As remarked by the Swiss Federal Tribunal, this is fully consistent with the modern approach advocated by the IBA Guidelines on Conflicts of Interest in International Arbitration and the provisions governing Swiss domestic arbitration enacted in the new Swiss Code of Civil Procedure (the new Code will come into force in January 2011). This will also strengthen the consistency of the Swiss international arbitration case law by avoiding the creation of an artificial “super independent and impartial” standard applicable only to CAS arbitrators.**

** The claimant filed a challenge against such decision before the Swiss Federal Tribunal. The Court dismissed it on the ground that the ICAS decision was not capable of appeal.*

*** In this regard, we point out the recent amendment of the CAS Regulations which prohibit the double-hat arbitrator/counsel role precisely to limit the risk of conflict of interests and to reduce the number of challenges of arbitrator during arbitral proceedings.*

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