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The Revision of Arbitral Awards on Independence and Impartiality-Related Grounds: Delimiting the Parties' "Duty of Curiosity" in the Age of Social Media

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Regardless of whether you are a sports enthusiast, the Swiss Federal Tribunal's recent revision of the CAS award in *WADA v. Sun Yang* is unlikely to have escaped your attention. In its judgment of 22 December 2020 (4A_318/2020), the Swiss Federal Tribunal referred the Chinese swimmer's case back to CAS, overturning an eight-year ban. A series of offensive comments made on social media prior to the original proceedings, yet discovered only after the publication of the award, led the Swiss Federal Tribunal to question the chairperson's impartiality, thus granting the petitioner's request for revision. In this connection, the Federal Tribunal reasoned that the attribution of specific practices to a specific ethnic group (animal cruelty to Chinese nationals in the case at hand), even when coupled with a degree of opposition to the same, would not in itself constitute a factor capable of casting doubt on an arbitrator's impartiality. However, the case at hand involved aggressive and plainly racist remarks, which far exceeded the boundaries of an emotionally charged empirical observation.

While some of the recent posts examining this case have briefly explored the substantive dimensions of the Swiss Federal Tribunal's findings on bias, this post aims particular attention at the parties' "duty of curiosity" about the social media footprint of proposed arbitrators. In an age when social media platforms channel a significant portion of the public discourse, serving as an easily accessible "repository of personal beliefs", the Swiss Federal Tribunal in *Sun Yang* did not find it reasonable to expect parties to run extensive social media background checks. Does this approach sit comfortably with the realities of today's social media-driven world and level of technological education?

The Standard of "Due Diligence"

Out of the forty-one revision requests filed before the Swiss Federal Tribunal, only three had until recently been successful. This low rate is largely owing to the fact that, under Swiss law, the revision of arbitral awards constitutes an "exceptional" legal remedy, reflecting a compromise between substantive justice and the need for legal certainty. For this reason, revision requires the requesting party to demonstrate a certain level of "due diligence" as it pertains to the discovery of the previously unknown facts, evidence or grounds of impartiality forming the basis of a given request.

In particular, under Article 190a of the Swiss Private International Law Act (PILA), the revision of an arbitral award is possible when (i) the requesting party subsequently discovers relevant facts or conclusive evidence that they were unable to invoke in the prior proceedings despite having acted with all due diligence; or (ii) the award is tainted by criminal conduct; or (iii) in spite of the party's exercise of due diligence, a ground for challenging an arbitrator is only discovered after the conclusion of the arbitral proceedings and there are no other means of recourse available.

Prior to 2021, the Swiss Federal Tribunal had questioned whether the *ex post* discovery of a violation of the provisions governing the composition of the arbitral tribunal could amount to a ground for revision. This ground is now expressly recognized under the new PILA, which came into force on 1 January 2021 and applies to all awards rendered before that date.

The Thresholds of "Curiosity" and "Possibility"

The Swiss Federal Tribunal has on many occasions clarified that the standard of due diligence entails a case-by-case assessment. Yet, as per the *Sun Yang* judgment, cases of revision based on new grounds for challenging an arbitrator all require a minimum level of expected diligence, termed as "curiosity".

Specifically, in paragraph 6.5 of its *Sun Yang* judgment, the Swiss Federal Tribunal notes that one must not "*be too demanding with regard to the parties, otherwise the duty of curiosity will be transformed into an obligation to carry out very extensive investigations, if not almost unlimited, requiring a considerable amount of time*". The Tribunal then reasons that "*a party cannot be required to continue its internet searches throughout the arbitration proceedings, nor a fortiori to scan the messages published on social networks by the arbitrators during the arbitration proceedings*".

This threshold differs from that of "possibility", which the Swiss Federal Tribunal has applied in revision cases involving newly discovered facts or evidence. The Tribunal did so most recently in judgment 4A_36/2020 of 21 October 2020, which involved an award ordering A to pay B damages and commission fees under a contract. A's revision request against the award alleged that, during a set of US discovery proceedings which had been initiated after the award, B's daughter had made certain contradictory statements. Had the facts to which these statements referred been known at the time of the award, the underlying contract would have been declared void.

The Swiss Federal Tribunal acknowledged the fact that the US proceedings which had resulted in the alleged discovery of previously unknown facts or evidence had been initiated after the award. Nevertheless, it emphasized that it would have been possible for A to obtain knowledge of said facts or evidence before or during the proceedings, and therefore assert the same in a timely manner. Indicatively, A could have sought to call B's daughter to testify as a witness. Absent such actions, A could not validly assert that it had exercised sufficient due diligence prior to the award.

The "Duty of Curiosity" in *WADA v. Sun Yang*

During the original CAS proceedings in *WADA v. Sun Yang*, Mr. Yang's counsel had performed a Google search with the arbitrator's full name, and hired a forensic expert who had not been able to

identify any suspicious online statements by the arbitrator in question. The CAS alleged that the disputed tweets had been on the arbitrator's Twitter profile since 2018, and that a retired journalist had been able to discover the same, indicating that they were widely accessible.

The Swiss Federal Tribunal addressed the above contentions under the notion of "curiosity", distancing itself from high threshold of "possibility". The Tribunal first reasoned that a party's duty of curiosity is not unlimited, for parties cannot be expected "*to engage in a systematic and in-depth analysis of all the sources relating to a specific arbitrator*." It further observed that:

> *while it is true that it is possible to easily access the data appearing on free access websites, thanks to a single click, this does not mean that the information in question is always easily identifiable […] [Even] if all information can be presumed to be freely accessible from a material point of view, it is not necessarily easily accessible from an intellectual point of view.*

The Swiss Federal Tribunal added that, while there was no doubt as to the material accessibility of the tweets in question, the use of the arbitrator's name and surname as keywords in an online search engine during the arbitration proceedings would not have necessarily revealed the disputed tweets. Further, the Tribunal observed that:

> *the applicant cannot be criticized for not having carried out research by also including the word 'China', because that would amount to admitting that the applicant should have speculated from the outset on a possible lack of impartiality […] on the sole criterion of nationality.*

The Swiss Federal Tribunal then sought to examine whether Twitter's status as "mainstream social media" would justify a high degree of curiosity. The Tribunal observed that:

> *even assuming that we can qualify, once and for all, some of them as 'mainstream social media', it would still be necessary to circumscribe the extent of the duty of curiosity over time. At a time when some people frequently use or even abuse certain social media, in particular by publishing countless messages on their Twitter account, it would be advisable, if necessary, not to be too demanding of the parties.*

Finally, the Tribunal took note of the specific circumstances of the case, and particularly the fact that the parties had a period of no more than seven days to file a challenge at the time of the chairperson's appointment. It then reasoned that:

> *while the person concerned should have consulted, if only briefly, the Twitter account of the arbitrator in question, we cannot […] consider, in the absence of any other alarming circumstance on the existence of a potential risk of bias, that the interested party would have failed in his duty of curiosity, by not detecting the presence of tweets published nearly ten months (May 28, 2018 and July 3, 2018)*

> *before the appointment of the arbitrator (May 1, 2019), moreover drowned in the mass of messages from a Twitter account of an arbitrator who seems very active in the social network in question.*

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In conclusion, the Swiss Federal Tribunal in *Sun Yang* navigated the delicate realities of today's social media-driven and increasingly conflict-oriented society with commendable level-headedness. The Tribunal took issue with the arbitrator's language and tone, which went beyond a mere empirical attribution of certain practices to a specific ethnic group, and did not find the party's mere ability to obtain awareness of the disputed tweets at the time of the proceedings compelling, insisting instead on the threshold of "curiosity". Taking account of the sheer volume of freely accessible online data, the emergence of new social media platforms, the amount of social media posts shared and comments made on a daily basis and the increasingly varied manifestations of racism and prejudice in today's world, the Tribunal did not see fit to demand an increased level of curiosity from parties investigating an arbitrator's potential bias as reflected in social media activity. Insofar as the revision of arbitral awards on impartiality-related grounds is concerned, the Swiss Federal Tribunal seems to have gotten it right; will arbitral institutions act in a similar manner when handling arbitrator challenges? The time to find out must be near.

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