Kluwer Arbitration Blog

Changing Paradigm of the Arbitrator's Duty to Remain Impartial in the Social Media Age?

Divij Jain · Monday, July 5th, 2021

Independence and impartiality of an arbitrator are *sine qua non* in an arbitration proceeding. It is for this reason that jurisdictions, all across the globe, have taken significant measures to elaborate on the circumstances that may raise justifiable doubts as to the independence and impartiality of an arbitrator. However, one sphere remained untapped, until recently.

Social media has ushered the freedom of speech and expression to new heights. However, this unrestricted freedom has caused trouble in the domain of arbitration. Tweets and posts made by an arbitrator have the potential to give rise to challenge proceedings as well as annulment proceedings owing to an apprehension of bias.

These fears were confirmed on 22 December 2020, when the Supreme Court of Switzerland ("**Court**"), in *Sun Yang v. Agence Mondiale Antidopage (AMA) and Fédération Internationale de Natation (FINA)* ("**Sun Yang case**"), annulled an arbitral award passed by the Court of Arbitration for Sport ("**CAS**"), owing to an apprehension of bias based on the arbitrator's comments on a leading social networking site. The judgment in this case has opened a myriad of issues surrounding an arbitrator's expression on social media vis-à-vis their ability to remain impartial while adjudicating a dispute.

While the Court also elaborated on the "duty of curiosity" of a party in order to avoid challenge proceedings initiated merely because the party received an unfavourable award (previously covered here), this post analyses the judgment of the Court with regard to the threshold to prove impartiality in cases involving disparaging social media posts and to highlight pertinent issues that may affect an arbitrator's conduct on social media.

The Decision in the Sun Yang Case: A Game-Changer

Sun Yang, a Chinese Olympic swimmer, was subjected to a surprise doping test by FINA. Wary of the credentials of the persons conducting the test, Sun Yang requested to verify their documents. After verifying the necessary documents, Sun Yang refused to provide the samples owing to lack of authority of the officials. Due to the refusal to provide samples, FINA took up the dispute internally and cleared Sun Yang of any liability. However, dissatisfied with the internal decision, the World Anti-Doping Agency filed a statement before the CAS. The three-bench tribunal of the

CAS found Sun Yang guilty of violating the doping test rules and handed him an eight-year suspension.

Later, Sun Yang sought annulment of the award owing to the lack of impartiality on part of the presiding arbitrator, who had posted racist smears against Chinese nationals in 2018 on his Twitter account. The following were posted between May 2018 and July 2019:

> *"those bastard sadic 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 are CHINESE!"*
>
> *"Old yellow-face sadic trying to kill and torture a small dog."*

The key issue before the Court was whether the social media posts raised justifiable doubts as to the impartiality of the arbitrator.

Respondent's key contention was that the arbitrator was an animal rights activist and these posts were made in the specific context of the Yulin festival and only against those who were engaging in the brutality of killing the canine species.

The Court first noted the threshold to determine impartiality and relied on past decisions to hold that a challenge can be successful if the circumstances give rise to objectively justifiable doubts as to impartiality. Relying on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"), the Court held that the doubts must be such that a reasonable third person would consider it likely that the arbitrator would be influenced by factors other than the merits of the case.

To strike a balance between the arbitrator's freedom of speech and expression as against its duty to remain impartial, the Court acknowledged that expressing one's opinion on matters personal to oneself does not, in itself, create any apprehension of bias. On the other hand, it held that the violent and racist terms used in the posts against Chinese nationals, even after the arbitration proceedings against a Chinese athlete had begun, raised objective grounds of apprehension of bias.

Social Media and Arbitrator's Impartiality: Opening a Pandora's Box

The decision in the Sun Yang case is the first of its kind in arbitration, in which doubts regarding impartiality have been raised based on an arbitrator's previous social media activities. There are a number of factors that courts and tribunals must ponder upon while deciding on similar cases. The Sun Yang case alone is not sufficient to answer all of these questions.

First, the clamp down on an arbitrator's social media has a severe impact on the privacy of such individual. The judgment in the Sun Yang case essentially encourages parties to dig into an arbitrator's social media activity. However, often, individuals have private or closed accounts, to which the parties might not have access. In these cases, the parties would seek the relevant court to

intervene and require the arbitrator to give access to their social media accounts since the duty of disclosure is a legal duty when the information sought to be disclosed can raise justifiable doubts as to the impartiality of an arbitrator. However, this would be in juxtaposition of the consent-based approach, rooted in legal instruments like the General Data Protection Regulation ("**GDPR**"), for processing personal data of an individual by any other individual or entity.

Second, in the Sun Yang case, the arbitrator had himself posted the tweet containing racist slurs, making it more of an open and shut case. However, it is often possible that a situation could arise in which an arbitrator did not post the content himself/herself but is instead reacting to it in a manner that shows support, for instance, liking and commenting on the post or temporarily promoting the post on their personal 'stories'. The decision in the Sun Yang case does not address these issues. Although the facts and circumstances of the case would guide the final decision of the court or tribunal, it is likely that liking and more significantly commenting on the post in a manner that suggests endorsement of such a view can amount to grounds that raise an apprehension of bias.

Third, freedom of speech and expression is fundamental to every individual in all modern jurisdictions. However, the decision in the Sun Yang case has a chilling effect on this essential freedom. It prevents individuals from engaging in free thought on platforms meant to promote expression of personal opinion even when they do not have the arbitrator's hat on. However, it has been observed that arbitrator's conduct on social media is bound to be regulated. The New York State Bar Association ("**NYSBA**") has published a guidance note which provides best practices to engage with and disclose an arbitrator's social media activity.

Fourth, apart from the language of the post, one also needs to take into account the time when the post was made. Determining bias on the basis of an arbitrator's personal convictions prior to the arbitration proceedings would amount to an unnecessary extension for seeking impartiality. Therefore, a year or half-a-decade old post cannot and should not form a basis to prove the existence of bias unless there is other corroborating evidence which proves that the arbitrator's preconceptions continue to exist and affect one party negatively during the course of the proceedings.

Thus, future decisions on similar issues must go beyond the rationale laid down by the Swiss Supreme Court in the Sun Yang case so as to carefully balance an arbitrator's right to privacy and freedom of speech on one hand as against the integral duty of an arbitrator to remain impartial.

Conclusion

Much like our lives, social media has also disrupted the scene in arbitration law. The decision in the Sun Yang case, only a tip of a potentially large iceberg, has set a dangerous precedent as it essentially encourages parties to undertake systematic study of an arbitrator's social media activity in order to successfully challenge them. Although it is understandable that in cases involving arbitrators who have and continue to post tweets with violent and racist undertones, an arbitral award can be set aside based on a reasonable apprehension of bias, the decision in the Sun Yang case has indeed opened a Pandora's box. Due to the rapidly evolving nature of technology, the issues surrounding arbitrator's duty to remain impartial vis-à-vis their social media activity will also become more sophisticated with time. Be that as it may, it is still pertinent for the courts and tribunals to ensure that the right to privacy and freedom of speech of an arbitrator are not curtailed

beyond reasonable limits especially when an individual does not have their arbitrator's hat on.

This entry was posted on Monday, July 5th, 2021 at 8:51 am and is filed under Independence and Impartiality, Social networks, Supreme Court, Switzerland
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