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# Has the SFT "Toughened" the Duty of Curiosity while "Softening" the Duty of Disclosure?

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In Decision 4A_520/2021 of 4 March 2022, the Swiss Federal Tribunal ("**SFT**") was requested to determine whether the chairperson of a panel in proceedings before the Court of Arbitration for Sport ("**CAS**") lacked independence or impartiality given his repeat appointments by FIFA. The SFT declared the challenge inadmissible under R34(1) CAS Code, yet still proceeded to examine the same on its merits on a purely *arguendo* basis. Upon presenting the factual background of the dispute (**A**), this post examines two aspects of the SFT's decision which may have a lasting, systemic impact on the principles of independence and impartiality under Swiss law, if not under the IBA Guidelines on Conflicts of Interest ("**IBA Guidelines**") more generally: the SFT's pronouncement that knowledge of a ground for challenge acquired by a party's lawyers in the context of separate proceedings can determine the *dies a quo* for assessing the party's fulfillment of its "duty of curiosity" (**B**); and the SFT's emphasis on the "specificities" of sports arbitration to arguably soften the duty to disclose repeat appointments (**C**).

### A. The Factual Background

The award challenged before the SFT concerned a life ban from participating in football-related activities and a fine of CHF 1,000,000.00, imposed by FIFA on a former football official ("the **Appellant**") in connection with his participation in the "FIFA-Gate" scandal. The Appellant had first challenged both sanctions before the CAS, which had reduced the ban to twenty years while upholding the fine. The Appellant then filed a motion to set aside the award based, *inter alia*, on the ground that the CAS panel had been "*irregularly constituted*" within the meaning of Article 190(2) of the Swiss Private International Law Act ("**PILA**"), as its president lacked independence and impartiality.

The president had initially disclosed the fact that he was simultaneously chairing another case involving FIFA. After the hearing, the Appellant requested further disclosures, which were eventually made on 16 October 2020. These disclosures revealed that the president had been involved in ten additional ongoing arbitrations involving FIFA, in two of which he had been appointed by FIFA itself. They moreover revealed that a colleague at the president's firm had recently advised FIFA on a GDPR-related matter.

The Appellant challenged the president before the ICAS Challenge Commission, which rejected

the motion primarily on the ground that the allegedly undisclosed information had in fact been disclosed to the Appellant's counsel on 2 October 2020, albeit in the context of entirely separate proceedings which did not involve the Appellant himself. The CAS therefore issued its award in its original composition, prompting the Appellant to request an annulment before the SFT.

### B. Knowledge Acquired by a Party's Lawyers in Unrelated Proceedings Can Determine the *Dies a Quo* for Assessing the "Duty of Curiosity"

Pursuant to Article 180(2) PILA, parties challenging an arbitrator on grounds of lack of independence or impartiality after the relevant deadline must demonstrate that, within that deadline, they had exercised "due diligence", i.e. that they had performed research into the arbitrator's independence and impartiality and displayed the requisite "curiosity" without identifying a cause for concern at the time. Before the SFT, FIFA claimed that the Appellant had not discharged his duty of curiosity since the relevant grounds were known to his counsel long before the deadline for filing a challenge under R34 CAS Code had expired.

Upon recalling that knowledge acquired by lawyers is directly attributable to their principal (4A_110/2012, c. 2.2.2), the SFT extended the 7-day limit for filing a challenge *ex* R34 CAS Code to the fulfillment of the Appellant's duty of curiosity, reasoning as follows:

> *the rules of good faith required the appellant, if not to request the challenge of the arbitrator concerned within the seven-day period set by art. R34 of the Code after having taken cognizance of this information,* ***at the very least, in order to fulfil his duty of curiosity, to formally request the CAS, within the said time limit****, to provide further details* (c. 5.4.2).

While, in *Sun Yang*, the SFT had arguably "softened" the duty of curiosity, this finding goes in the opposite direction: it creates a presumption of knowledge by a party of the existence of grounds for challenge, itself based on a presumption of knowledge of such grounds by the party's counsel due to disclosures in unrelated disputes. Following this finding, to ensure the observance of the time-limit for filing a challenge should grounds for one surface at a later point, rather than merely relying on internal cross-information systems, counsel are likely to increasingly resort to pre-emptive disclosure and clarification requests; this, in turn, is likely to have an impact on the speed and overall efficiency of arbitral proceedings.

### C. The "Particularities" of Sports Arbitration Warrant the "Softening" of the Duty of Disclosure

The key points of contention in Decision 4A_520/2021 were whether, for the purposes of the disclosure requirement of Section 3.1.3 of the IBA Guidelines, (i) joined cases should count as one and (ii) only appointments as party-appointed arbitrator should be considered. To recall, according to Section 3.1.3, situations where "[t]*he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties*" are considered as a "*previous service*" for one of the parties; they thus fall within the "*orange list*"

of issues which, depending on the circumstances, an arbitrator may be required to disclose.

FIFA's position was that, according to footnote 5 of the IBA Guidelines, if in certain areas, such as sports arbitration, it is customary for parties to frequently appoint the same arbitrator, then no disclosure of this fact is required, since all parties to the arbitration are presumed to be familiar with this practice. FIFA alluded in this connection to (i) the large volume of appointments it had made over the past three years, as a result of the large volume of CAS proceedings initiated against it, and (ii) the CAS' closed list of arbitrators.

Having already dismissed the Appellant's challenge as inadmissible, the SFT proceeded to rule on the above-summarized arguments on a purely *arguendo* basis. After summarily dismissing the contention that proceedings in which the challenged arbitrator had not been appointed by FIFA should count, and after declining to consider joined cases separately, the SFT turned to the issue of the non-disclosure of three appointments in three years, noting as follows:

> *there is no indication that this practice, although inappropriate and contrary to the requirements of the duty of disclosure, was the result of a deliberate attempt by the arbitrator to conceal certain information from the parties* (c. 5.5).

The SFT added that, while the president's non-disclosure could raise some "*questions*", "*sports arbitration instituted by CAS has particularities* […], *such as the closed list of arbitrators*" (c. 5.5). Since FIFA had participated in more than 400 CAS arbitrations during the relevant period, these "*questions*" did not raise legitimate doubts as to impartiality or independence in the absence of other "*corroborating circumstances*". This is an important pronouncement with a trend-setting potential, seeing as few national courts have made clear determinations on the precise function of the duty to disclose facts under the "orange list". It is, one, however, that prompts several concerns.

*First*, the SFT here reasons that, while the failure to disclose prior appointments exceeding the IBA threshold may constitute a violation of an arbitrator's duty of disclosure, no legal consequences should be attached to such a violation absent further corroborating circumstances of lack of independence or impartiality; critically, as to what constitutes a corroborating circumstance, the SFT sets a high standard, rejecting facts such as the untimeliness of the president's disclosures or GDPR-related work performed by the president's law firm for FIFA. In essence, the SFT appears to suggest that, to be considered "corroborating", the relevant circumstance must warrant a finding of bias *in itself*; in other words, that it must be decisive, as opposed to merely confirmatory. If this is indeed how the SFT's reasoning must be understood, the duty to disclose has now largely been rendered a dead letter.

*Second*, the SFT's pronouncement that the party challenging an arbitrator must demonstrate a "*deliberate attempt*" to conceal prior appointments is inconsistent with the objective nature of the threshold for a finding of lack of independence or impartiality. Plainly, the president's *subjective* intent to conceal his biases by withholding evidence of prior appointments could not possibly have been the point of focus, insofar as it is the *objective* appearance of bias that should determine whether doubts as to an arbitrator's independence or impartiality are legitimate.

*Third*, the SFT fails to identify and operationalize the alleged "particularities" of sports arbitration, alluding only to the practice of closed lists and without explaining how this factor actually precluded an appointment that would be in line with the "orange list". At the very least, the SFT

could have required the president and FIFA to offer *prima facie* plausible explanations in connection with the reasons for both the non-disclosure and the ineligibility of other arbitrators featuring on CAS' roster.

*Lastly*, footnote 5 of the IBA Guidelines clarifies that disclosure of repeat appointments may not be required "*where **all parties** in the arbitration should be familiar with such custom and practice*". The footnote thus sets two cumulative criteria: the *existence* of such a practice or custom and the parties' *familiarity* with the same. In its decision, the SFT disregards the latter criterion, applying footnote 5 without considering whether the Appellant, who was neither a sophisticated club nor a federation, was familiar with the practice of repeat appointments in sports arbitration. It is worth recalling in this connection that the SFT itself has advised that sports arbitration is effectively non-consensual (4P.172/2006, c. 4.3.2.2). If parties are often unaware of the existence of an arbitration agreement governing their conduct, they cannot be lightly presumed to be familiar with the practice of repeat appointments.

**Concluding Remarks**

In Decision 4A_520/2021, the SFT articulated a series of *obiter dicta* concerning the duty of disclosure under Swiss law and Section 3.1.3 of the IBA Guidelines. In so doing, it arguably prompted more questions than it answered, as regards (i) the timing, type and intensity of the due diligence a party's counsel must exercise as soon as an arbitrator is nominated by the other party, as well as (ii) footnote 5 of the IBA Guidelines, and particularly the extent to which the same can be relied upon to soften the duty of disclosure. Given the frequency of challenges in sports arbitration, the time to find out how the SFT would operationalize its *dicta* in a case involving a more compelling breach of the duty of disclosure must be near.

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