



Arbitration Newsletter Switzerland

The Federal Supreme Court and the Independence of the Arbitrator

The Facts of the Case

Recently, the Federal Supreme Court rendered an interesting decision (in French) on the independence of arbitrators¹.

A Swiss individual X entered into an agreement with the Turkish Football Association ("TFA") for the marketing of friendly matches to be played in the forefront of the World Championship 2006 in Germany. Subsequently X disagreed about how the television rights were handled by TFA and submitted a claim for damage under the ad-hoc rules of the CAS².

Each party nominated its arbitrator and the two arbitrators then nominated the chairman³. All three arbitrators signed a letter of acceptance and confirmed their independence⁴.

Proceedings took their course without any objections being raised by the parties against the arbitrators. The arbitral tribunal rendered its award on October 30, 2007, dismissed the claim of X and admitted the counterclaim of TFA. X filed an action for annulment against this award at the Federal Supreme Court and argued, amongst other, that the arbitral tribunal was not properly constituted⁵.

According to X he learned just by chance and only after the award was rendered about an association E⁶ of which a number of arbitrators and counsel regularly involved in CAS proceedings were members. He then made further investigations and learned that the chairman and the arbitrator appointed by TFA as well as the counsel of the TFA were all members of Rex Sport. At that time, it had 26 members from all over the world, out of which 20 members were practising lawyers and 8 of them were listed as arbitrators of CAS⁷.

The Reasoning of the Federal Supreme Court

The Federal Supreme Court dealt with the case in two steps, firstly it investigated whether X raised the argument of lacking independence of the two arbitrators in due time and, secondly, whether the facts as presented would actually disqualify the two arbitrators.

The fact that the information X was relying upon to question the independence of the two arbitrators were available on the internet brought the Federal Supreme Court to the conclusion that X was raising his objection belatedly⁸. It concluded: "[] The most

¹ 4A_506/2007 of March 20, 2008, between X and the Association Y (as regularly the decisions are made available in anonymised form only)

² R38 *et seq.* of the CAS Code

³ R40.2(3) of the CAS Code

⁴ R40.3 of the CAS Code

⁵ Art. 190 (2) (a) PILA

⁶ Combining information in the decision of the Federal Supreme Court and in the list of CAS arbitrators this leads to "Rex Sport Asociación des Asesores de Deporte", (subsequently "Rex Sport") with José J. Pintó, Bufete Pintó Ruiz, Barcelona as president. José J. Pintó served also as chairman in the case of X versus TAF.

⁷ S13 of the CAS Code

⁸ Rex Sport maintains a website (www.rexsport.org), accessible for members only. Nevertheless, X was apparently able to submit to the Federal Supreme Court information from this website.



elementary precaution should have caused him to investigate, whether the arbitrators sitting on his case would offer sufficient guarantee for their impartiality and independence. For that purpose he could not rely on their declaration of independence issued by each of the arbitrators under the ad-hoc rules"⁹.

The Federal Supreme Court continued that X should have made further investigation about Rex Sport and that he could have also directly approached the two arbitrators for further information as to their involvement. In any case, X should have from the very beginning actively verified the independence of the arbitrators. Having failed to do so in a timely manner, the Federal Supreme Court held that X was barred from raising his objection against the two arbitrators. Good faith requires that such concerns are raised immediately after having learned about the relevant facts¹⁰. This embraces also facts which could have been detected by exercise of due care¹¹.

The Federal Supreme Court then continued to investigate whether the joint membership of the two arbitrators in Rex Sport would give raise to objective doubts as to their independence. It consulted for that purpose the "IBA Rules¹² on Conflicts of Interest in International Arbitration" as issued in May 2004.

In doing so it noted that, though these guidelines do not have force of law, they are nevertheless a "precious tool contributing to the harmonisation and unification of the standards applied in international arbitration to rule on conflicts of interest"¹³. As the relationship with another arbitrator or with the counsel

for one of the parties through membership in the same professional association or social organisation is a situation explicitly referred to in the "Green List"¹⁴ the Federal Supreme Court saw no objective grounds to question the independence of two arbitrators in this particular case.

Finally it dealt with the factual argument brought forward by X against the alleged "clandestine" nature of Rex Sport. According to X, the purpose of this association is primarily to exchange mandates at the CAS between its members. The facts as presented by X (but not further disclosed in the decision of the Federal Supreme Court) were according to the Federal Supreme Court however not sufficient to prove that a member of Rex Sport would systematically choose other members as arbitrators. And even if the statistics apparently submitted by X were accurate they would still not establish justified doubts as to the independence of members of Rex Sport serving as arbitrators. Such would, according to the Federal Supreme Court, only be the case if an arbitrator would systematically support the position of its nominating party represented by another member of Rex Sport.

Consequently the Federal Supreme Court dismissed the action for annulment of X.

Conclusions

It seems that this is the first time that the Federal Supreme Court had to deal with the IBA Conflict Rules. The way it did, one can reasonably assume that the Federal Supreme Court will also in future consider these guidelines as a "precious tool" for its own decisions on the independence of an arbitrator. As demonstrated in this case the Federal Supreme Court will not only verify whether the position of the arbitrator in question falls under one of the situations described in the three lists, but it will also further investigate whether additional particular facts of the case need to be considered. In this respect the decision is to be welcomed; it confirms the relevance of the IBA Conflict Rules.

With regard to the care to be exercised in investigating the independence of an arbitrator this

⁹ "La plus élémentaire prudence lui commandait donc de procéder à des investigations pour s'assurer que les arbitres chargés de statuer sur sa requête offraient des garanties suffisantes d'indépendance et d'impartialité. Il ne pouvait se contenter à cet égard, de la déclaration générale d'indépendance faite par chaque arbitre sur la formule ad hoc." Consideration 3.2

¹⁰ as also specifically set forth in R34 of the CAS Code

¹¹ BGE 129 III 445, Consideration 4.2.2.1 on page 465

¹² hereinafter the "IBA Conflict Rules"

¹³ "Ces lignes directrices n'ont certes pas valeur de loi (Peter/Besson, *ibid*), elles n'en constituent pas moins un instrument de travail précieux, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage international pour le règlement des conflits d'intérêts."

¹⁴ article 4.4.1 of the IBA Conflict Rules



decision might, however, cause concern. Whilst it is standard practise that objections against an arbitrator must be raised immediately upon learning about the relevant facts, the standard established now by the Federal Supreme Court according to which "the most elementary precaution" requires to investigate already in the very beginning, whether the arbitrator(s) nominated provide sufficient guarantee as to their independence, puts a heavy burden on the parties counsels. Do they really have to turn every stone they might find in the internet? One would hope that not!

The fact that out of the only 26 members of Rex Sport two arbitrators and the opposite counsel were all members could really raise concerns. But it may well be that the arguments presented by X for his claim and the quality of the award rendered were of a nature that the Federal Supreme Court was satisfied with the result and saw therefore no need to intervene *a posteriori*. Nevertheless, some of the reasonings presented by the Federal Supreme Court are really far reaching. How can e.g. a party establish, as requested by the Federal Supreme Court, that an arbitrator systematically supports the position of the nominating party? It is, on the one hand, well established that the mere likelihood that an arbitrator, by a particular set of facts, might no longer seem to be independent, is not reason enough to successfully recuse this arbitrator. But, on the other hand, to ask for proof as the Federal Supreme Courts does now, is putting this issue out of balance. At various occasions the Federal Supreme Court does in its decision for good cause call upon the peculiarities of arbitration but it should then also consider that confidentiality, one of the corner stones of arbitration, makes it almost impossible to provide proofs as requested.

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Addendum

The Federal Supreme Court just made available on May 13, 2008 on its website a new decision where a party, based on the identical facts - namely the membership of an arbitrator and the opposite counsel to Rex Sport - asked with the identical arguments for a revision of an arbitral award issued by a CAS tribunal¹⁵.

¹⁵ 4A_528/2007 of April 4, 2008

This request for revision was rejected amongst other and again with the argument that the concerns against the arbitrator could and should have been raised earlier as the pertaining arguments were available in the public domain. The (German) language of this most recent decision of the Federal Supreme Court seems however less rigid as it requires only "reasonable investigations"¹⁶ which at a first glance seem not to be the same as "the most elementary prudence" referred to in the previous decision. But the most recent decision concludes, in making reference to the previous decision that the party requesting revision has forfeited such right by its own negligence¹⁷.

¹⁶ "Es obliegt ihnen [den Parteien], die ihnen zumutbaren Abklärungen zeitgerecht vorzunehmen, um allfällige Ausstandsgründe zu erkennen". Consideration 2.5, with reference again to BGE 129 III 445 E 4.2.1, S. 465.

¹⁷ "Wenn er [der Gesuchsteller] nicht bereits im Laufe des Verfahrens erkannte, dass sowohl der Rechtsvertreter wie auch der am Verfahren beteiligte Schiedsrichter derselben Vereinigung angehörten, hat er dies seiner eigenen Nachlässigkeit zuzuschreiben (dazu ausführlich zit.Urteil 4A_506/2007,E.3.2.)"