

Swiss Supreme Court sets aside CAS award for admitting a time-barred request for disqualification of an arbitrator

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_100/2023*, the Swiss Supreme Court set aside a CAS award for having wrongly admitted a time-barred disqualification request based on article 190(2)(a) of the Private International Law Act.

Speedread

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In a recently published French-language decision, the Swiss Supreme Court set aside a CAS award for having wrongly admitted a time-barred request for disqualification of an arbitrator based on article 190(2)(a) of the Private International Law Act (PILA).

The underlying dispute arose out of an employment contract between an Austrian coach and a Croatian professional football club affiliated to the Croatian Football Federation (CFF) (a member of FIFA) and containing a jurisdictional clause in favour of the CFF Court of Arbitration. However, the coach brought a claim against the club before the FIFA Players' Status Chamber (PSC), which, despite the jurisdictional clause, retained its jurisdiction and rejected the club's argument that the CFF Court of Arbitration had exclusive jurisdiction to hear the claim. The FIFA PSC rendered a decision in favour of the coach, which was subsequently challenged by the club before the CAS.

One of the main issues before the CAS was whether the CFF Court of Arbitration provided sufficient guarantees to be qualified as an independent and impartial tribunal.

During the CAS proceedings, the club appointed an arbitrator (C), who disclosed five months after his appointment that he is also on the list of the CFF Court of Arbitration, as visible on the CAS website. FIFA submitted a disqualification request the day immediately after the disclosure, leading to C's removal by the ICAS Challenge Commission. The CAS later rendered its final award dismissing the club's appeal, which the club challenged before the Swiss Supreme Court.

In its decision, the Supreme Court held that the arbitrator's duty of disclosure is "not absolute" and that the parties' "duty of curiosity" extends to information easily accessible online, in particular on the CAS website. The court agreed with the position of the club that FIFA should have objected to C's appointment immediately, given that the information about being on the list of the CFF Court of Arbitration was expressly mentioned in his CV, which was easily accessible on the CAS website, rather than following his disclosure to the parties. Therefore, the objection was time-barred.

The decision reiterates the Supreme Court's case law on the limited scope of the arbitrators' duty of disclosure and highlights the parties' duty of curiosity and the need to object on the basis of article 190(2)(a), PILA as soon as possible following appointments. (*Decision 4A_100/2023 (22 June 2023)*.)

Background

Private International Law Act

Article 179 of the Private International Law Act (PILA) (in force since 1 January 2021) regulates the appointment, removal and replacement of arbitrators as follows:

"1. The members of the arbitral tribunal shall be appointed or replaced in accordance with the agreement between the parties. Unless the parties agree otherwise, the arbitral tribunal shall comprise three members, with the parties each appointing one member; the members shall appoint a chairperson by unanimous decision.

2. In the absence of an agreement or if the members of the arbitral tribunal cannot be appointed or replaced for other reasons, the state court where the arbitral tribunal has its seat may be seized. If the parties have not agreed on a seat or only agreed that the seat of the arbitral tribunal be in Switzerland, the first state court seized has jurisdiction.

[...]

6. A person who is asked to become a member of the arbitral tribunal shall without delay disclose the existence of circumstances that could give rise to legitimate doubt as to his or her independence or impartiality. This obligation applies throughout the entire proceedings."

Article 180(1) of the PILA sets out grounds for challenging arbitrators:

"A member of the arbitral tribunal may be challenged:

- a. if they lack the qualifications agreed by the parties;
- b. if there is a ground for challenge in accordance with the rules of arbitration adopted by the parties; or
- c. if circumstances exist that give rise to legitimate doubt as to his or her independence or impartiality."

Article 190(2) of the PILA provides grounds to set aside awards:

"An arbitral award may be set aside only:

- a. where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal improperly constituted;
- b. where the arbitral tribunal wrongly accepted or declined jurisdiction;
- c. where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;
- d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated;
- e. where the award is incompatible with public policy."

IBA Guidelines on Conflict of Interest in International Arbitration

The *IBA Guidelines on Conflicts of Interest in International Arbitration* (IBA Guidelines) provide a set of principles on the selection, appointment and retention of arbitrators and aim to ensure that arbitrators remain impartial and independent throughout the conduct of the arbitration. The non-mandatory Guidelines include non-exhaustive lists of circumstances, divided by colour (red, orange and green), which give guidance on the practical application of the general standards. Article 1.3 of the Non-Waivable Red List refers to situations where "[t]he arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case".

Facts

In 2019, a Croatian professional football club (Club) hired an Austrian individual as an assistant coach (Coach). The Club was affiliated to the Croatian Football Federation (CFF), a member of the Fédération Internationale de Football Association (FIFA). Following early termination of the Coach's employment contract by the Club, the Coach filed a claim for compensation for termination without just cause before the FIFA Players' Status Committee (FIFA PSC). In response, the Club invoked the jurisdictional clause included in the employment contract providing for the jurisdiction of the CFF Court of Arbitration.

On 9 February 2021, the FIFA PSC rejected the Club's defence, holding, among other things, that the jurisdictional clause did not provide for the exclusive jurisdiction of the CFF Court of Arbitration and that FIFA can hear employment-related international disputes between a club or an association and a coach. On the law, the FIFA PSC partially accepted the Coach's claim and ordered the Club to pay compensation.

On 19 March 2021, the Club appealed against the decision before the Court of Arbitration for Sport (CAS), reiterating that the FIFA PSC lacked jurisdiction. One of the main issues before the CAS was whether the CFF Court of Arbitration provided sufficient guarantees to be qualified as an independent and impartial tribunal.

Before the CAS, the Club requested that the case be heard by a panel of three arbitrators and appointed a Croatian lawyer as arbitrator (C). Shortly after, C signed a declaration of acceptance and independence in which he did not disclose any circumstances likely to compromise his independence. On 26 April 2021, the CAS informed the parties that the dispute would be heard by a panel of three arbitrators, including C. The Parties subsequently confirmed that they had no objections regarding the constitution of the panel.

On 21 September 2021, the CAS informed the parties that C had updated his "Acceptance and Statement of Independence" form, disclosing that "I serve as one of the twelve arbitrators of the list of Croatian Football Federation Court of Arbitration, I note this to be a public information, that can be seen from my CV on CAS profile".

The following day, FIFA requested that C be replaced by another arbitrator. The Club argued that FIFA's petition should be declared inadmissible because it was late or dismissed as groundless and without merit.

On 15 November 2021, the ICAS Challenge Commission removed C from the panel. It observed that FIFA's request was not made late as it immediately followed the disclosure of the relevant information and that C's case fell under the scope of article 1.3 of the Non-Waivable Red List of the IBA Guidelines of 23 October 2014.

On the same day, the Club was invited by the CAS to nominate a new arbitrator, failing which its appeal would be considered to have been retracted. The Club nominated another arbitrator, but reserved its rights to challenge the ICAS Challenge Commission's decision, which it considered unjustified.

On 16 January 2023, the CAS rendered its award dismissing the appeal. Deciding by a majority, the CAS held, among other things, that the CFF Court of Arbitration did not provide sufficient guarantees to be qualified as an independent and impartial tribunal.

On 14 February 2023, the Club filed an application to set aside the award before the Swiss Supreme Court, based on article 190(2)(a) of the PILA. The Club argued that the arbitral tribunal had been irregularly constituted and that FIFA's application to disqualify C was belated and, in any event, unfounded. According to the Club, FIFA failed in its duty of curiosity, as the disputed information was available on the CAS website and could not reasonably be ignored, and therefore it ought to have submitted its challenge within seven days of C's appointment on 26 April 2021 (and not following the arbitrator's disclosure to the parties on 21 September 2021).

In response, the Coach argued that the ground invoked by the Club did not fall within the scope of article 190(2)(a) of the PILA and that the rules governing the appointment of arbitrators had been complied with. The Coach also remarked that, in any event, the Club was subsequently provided with the opportunity to choose a new arbitrator. As to the CAS, it observed that FIFA's challenge was made within the seven-day time limit set out in article R34 of the Code of Sports-related Arbitration and pointed out that the Club had requested that the award be set aside, rather than formally requesting the appointment of a new panel.

Decision

The Swiss Supreme Court set aside the CAS Award.

On the status of FIFA

The Supreme Court began by explaining that FIFA could not benefit from the status of party or participant in the proceedings before the Supreme Court despite having been a co-respondent during the CAS proceedings, as it had played a role similar to that of a court of first instance in the case.

On arbitrators' duty of disclosure and guarantee of impartiality and independence

Addressing article 190(2)(a) of the PILA, the Supreme Court distinguished two types of complaints covered by the provision:

- Breaches of rules on the appointment or replacement of arbitrators and whether these rules are based on the parties' agreement (*article 179(1), PILA*) or are statutory (*article 179(2), PILA*).
- Failures to comply with the rules on the arbitrator's impartiality and independence (*article 180, PILA*).

More specifically on the guarantee of an independent and impartial tribunal, the Supreme Court reiterated that its purpose is to prevent circumstances outside the case from influencing the decision in favour of, or to the detriment of, a party. According to the court, it is sufficient that the circumstances give rise to concerns of bias on the part of the arbitrator, but these must be objectively ascertained circumstances as opposed to purely individual impressions. As to the IBA Guidelines, the court stated that, despite the lack of any force of law, they may serve as a useful working tool.

The Supreme Court then turned to the duty for arbitrators to disclose without delay any fact that could give rise to legitimate doubts as to their independence or impartiality, resulting from article 179(6) of the PILA and article R33 of the Code of Sports-related Arbitration. However, the court observed that such a duty only exists with regard to facts for which the arbitrator has sufficient reasons to believe are not known to the party who may invoke them, and that its breach does not, on its own and in the absence of other corroborative circumstances, constitute a ground for disqualification. According to the Supreme Court, the duty of disclosure is "not absolute".

In the present case, the Supreme Court took the position that C could assume in good faith that the disputed information was known to the parties at the time of his appointment, as it was expressly mentioned in his CV, which was easily accessible on the CAS website. The Supreme Court also noted that the Coach had also been represented by counsel on the list of twelve arbitrators sitting at the CFF Court of Arbitration during the arbitration. In light of these facts, the Supreme Court considered that C did not breach his duty of disclosure.

As to the Coach's defences, the Supreme Court confirmed that the Club's arguments fell under the scope of article 190(2)(a) of the PILA, as decisions of private bodies regarding challenges made during arbitration proceedings can indeed be reviewed in the context of an appeal against the award on the grounds of irregular composition of the arbitral tribunal. According to the court, a party who is deprived of the arbitrator it had initially chosen, and who was subsequently validly appointed by the arbitration institution concerned, cannot be denied the right to challenge the decision admitting the disqualification request of that arbitrator.

The Supreme Court also rejected the argument that the Club had been deprived of its right to challenge the ICAS Challenge Commission's decision because it had chosen a new arbitrator from the CAS list. According to the court, the Club was prevented from challenging the decision earlier (as decisions by private bodies such as arbitral institutions cannot be brought directly to the Supreme Court) and it was forced to appoint a new arbitrator, since its appeal would otherwise be declared inadmissible. Moreover, it had reserved its right to contest the ICAS Challenge Commission's decision.

On the parties' "duty of curiosity"

As a corollary to the arbitrators' duty of disclosure, the Supreme Court held that, based on the principle of good faith, a party who intends to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. According to the court, this rule applies to grounds of which the interested party was actually aware or that it could have been aware had it paid due attention. More concretely, the court referred to article R34 al. 1 of the Code of Sports-related Arbitration, which provides that the disqualification must be requested within seven days of learning of the reason for disqualification.

The court then pointed out that its case law imposes a "duty of curiosity" on the parties as to the existence of possible grounds for challenge that are likely to affect the composition of the arbitral tribunal. This implies that a party cannot settle for the arbitrator's general declaration of independence and must itself carry out certain investigations to ensure that the arbitrator offers sufficient guarantees of independence and impartiality.

While conceding that it is difficult to define the scope of the duty of curiosity, which depends on the circumstances of each specific case, the Supreme Court held that it is certainly possible to require that the parties use the main search engines and consult sources likely to provide information that could reveal a possible risk of arbitrator bias, such as the websites of the main arbitration institutions, of the parties, their counsel and the law firms in which they practise, as well as the law firms in which certain arbitrators practise.

Turning to the issue of whether FIFA complied with its duty of curiosity, the Supreme Court held that it had manifestly failed to do so, as it did not even consult C's CV, which was available on the CAS website. According to the Supreme Court, FIFA was precluded from requesting the disqualification of C on 22 September (that is, the day after the CAS's announcement to the parties that C had updated his Statement of Independence), as it should have discovered the disputed information earlier. The Supreme Court reiterated its case law according to which there is an "inexcusable lack of curiosity" when a party ignores data that is always accessible on the CAS website.

Based on the above, the Supreme Court concluded that the CAS should have rejected the challenge as inadmissible due to being time-barred and should not have ruled with a new arbitrator on the tribunal, and set aside the CAS award.

Comment

Through this decision, the Supreme Court reiterates its case law on the scope of the arbitrators' duty of disclosure and that of the parties' duty of curiosity, respectively.

It clarifies that the arbitrators' duty to disclose is not absolute, that parties must be proactive in verifying an arbitrator's independence and impartiality, and that parties may not rely only on an arbitrator's acceptance statement. Parties are expected to check, of their own initiative, information that is easily accessible online, in particular in the arbitrator's CV through the CAS website.

The decision also highlights the need for parties to act promptly when expressing their objections to arbitrators' appointments. Finally, it emphasises the need for arbitral institutions, when adjudicating challenges against arbitrators, to take into account the jurisprudence developed at the seat of arbitration.

Case

Decision 4A_100/2023 (Swiss Supreme Court) (22 June 2023).

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