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Multiple Appointments of an Arbitrator: Does the Swiss Federal Supreme Court really see no Limit?

The decision of the Swiss Federal Supreme Court of October 9, 2012 discussed herein was published on its website on November 6, 2012 (see enclosed).

Facts of the Case

Roel Paulissen is a Belgian mountain biker, licensed by the Royale Ligue Vélocipédique Belge ("**RLVB**") which is a member of the l'Union Cycliste Internationale ("**UCI**"). RLVB found Roel Paulissen guilty of a doping offense and, on November 22, 2010, sanctioned him pursuant to Art. 326 of UCI's anti-doping regulation ("**RAD**") with a two year ban and a fine of EUR 7'500.

On January 5, 2011 UCI appealed against this decision at the Tribunal Arbitral du Sport ("**TAS**"), thereby appointing Olivier Carrard as its arbitrator ("**Arbitrator**").[1] At the TAS hearing on July 13, 2011 Antonio Rigozzi, counsel for Roel Paulissen ("**Paulissen's Counsel**"), asked the Arbitrator if he deemed himself sufficiently open-minded to hear the Parties' arguments and to discuss them with his co-arbitrators without prejudice. This question was prompted by Paulissen's Counsel's discovery that the Arbitrator had sat as party appointed arbitrator of UCI already in two other cases, namely Redondo issued on October 4, 2010 ("**Redondo**") and Duval issued on February 18, 2011 ("**Duval**"), each dealing with financial sanctions pursuant to Art. 326 RAD. Satisfied with the Arbitrator's response Paulissen's Counsel confirmed, according to the verbatim transcript of the hearing, that he had no problem with the composition of the Tribunal.

Proceedings continued in their ordinarily way until December 2, 2011 when Paulissen's Counsel asked the UCI whether there were other pending arbitrations dealing with the validity of financial sanctions as foreseen in the RAD, and in the affirmative, to disclose the Tribunals' composition on these cases. Having received no answer, Paulissen's Counsel sent the same questions to the TAS on December 16, 2011, attaching said letter to UCI as annex. On the very same day UCI replied that it could not determine any basis on which it must provide information to Paulissen's Counsel about the other pending cases.

By fax of December 20, 2011 the TAS provided counsels the operative part of its award and three days later, again by fax, also its reasoning.

On December 29, 2011 Paulissen's Counsel requested the TAS to produce two unpublished awards, Larpe issued on March 24, 2011 ("**Larpe**") and Giunti issued on May 30, 2011 ("**Giunti**"), which were both referred to in the TAS award. Both cases were faxed by the TAS to Paulissen's Counsel on January 10, 2012 who then learned that the Arbitrator had also served as UCI's appointed arbitrator in those two cases. In the same correspondence the TAS, referring to Paulissen's Counsel's letter of December 16, 2011, stated that due to the confidentiality of pending cases it was impossible for the TAS to provide the requested information about any other pending case.

On January 19, 2012 the Parties were served with the original copy of the TAS award.

On February 6, 2012 Paulissen's Counsel, in light of the evident lack of transparency of the Arbitrator during the proceedings, asked the TAS to re-consider its decision of January 10, 2012 and to disclose the requested information about any other pending cases. The TAS denied such request, *inter alia*, by referring to the confirmation given by Paulissen's Counsel at the hearing that he had no problem with the

[1] The other arbitrators sitting on the panel were Prof. Ulrich Haas appointed by Roel Paulissen and Prof. Luigi Fumagalli as Chairman.

composition of the Tribunal and the fact that neither Larpe nor Giunti dealt with Art. 326 RAD.

On February 20, 2012 an action for annulment was filed by Sébastien Besson on behalf of Roel Paulissen before the Swiss Federal Supreme Court, *inter alia*, based on Art. 190 para. 2 lit. a SPILA (challenge of an arbitrator). During the course of these proceedings Sébastien Besson leanred about a further TAS award, issued on December 29, 2011 ("**Sentjens**"), in which the Arbitrator had once again sat as party appointed arbitrator of UCI.

As a summary of the relevant facts one can hence conclude that the Arbitrator has sat as UCI's party appointed arbitrator *at least seven times between October 2010 and end of 2012*, namely: (i) Redondo of October 4, 2010 (unpublished, but known to Paulissen's Counsel), (ii) Duval of February 18, 2011 (unpublished, but known to Paulissen's Counsel), (iii) Larpe of March 24, 2011 (unpublished, but quoted in the TAS award), (iv) Giunti of May 30, 2011 (unpublished, but quoted in the TAS award), (v) Pellizotti, published on the TAS website on June 14, 2011 (see below), (vi) Sentjens of December 29, 2011 (unpublished, but known to Sébastien Besson) and (vii) Astarloza of March 29, 2012 (unpublished) (see below).

Finding of the Swiss Federal Supreme Court

After re-iterating its well established principles applicable to impartiality and independence of arbitrators, in particular that any challenge of an arbitrator must be raised immediately[2], the Swiss Federal Supreme Court dealt exclusively with the question of when exactly Paulissen's Counsel had learned that UCI had appointed the Arbitrator. In this respect it held that it was clear that Paulissen's Counsel knew about Redondo and Duval at the TAS hearing on July 13, 2011. He should have also known of a further case in which the Arbitrator sat as UCI's appointed arbitrator, namely the Pellizotti case which was published on the TAS website on June 14, 2011 ("**Pellizotti**").

The Swiss Federal Supreme Court then went on to state that one could hardly imagine that Paulissen's Counsel, being a specialist in sports arbitration and in particular in respect of the case law of TAS and the TAS as institution itself, did not have an extensive knowledge about UCI's affinity to appoint the Arbitrator, particularly in view of his comment in his publication "*L'arbitrage international en matière de sport*", published in 2005, where he expressly stated in footnote 2672: "*Par example que L'UCI, dont le siege est à Lausanne, nomme presque systématiquement Me Olivier Carrard, arbitre domiciliè à Genève*".

Against this background the Swiss Federal Supreme Court noted that even in the most favourable case for Paulissen's Counsel he was, at said hearing, aware of at least two cases (Redondo and Duval) in which the Arbitrator was appointed by the UCI and which dealt with Art. 326 RAD. Consequently, the present facts were the same as those described in another case rendered by the Swiss Federal Supreme Court[3] and, therefore, Paulissen's Counsel should have exercised his duty of curiosity[4]. In doing so, he should have asked the Arbitrator at the hearing (i) how many times he had been appointed by the UCI dealing with the question of financial sanctions and, (ii) depending on the answers, requested the Arbitrator to immediately step down. The Swiss Federal Supreme Court continued that if Paulissen's Counsel had asked the Arbitrator and/or the UCI (sic!) these questions, he would have learned at the hearing that the Arbitrator sat also in Larpe, Giunti and Sentjens and that he had been appointed in a still pending case Astarloza for which the award was rendered on March 29, 2012 ("**Astarloza**").

Should the Arbitrator or the UCI, as the case may be, have rejected these questions by arguing that the requested information was confidential they would not have been entitled to raise the argument that the challenge was belated in the proceedings before the Swiss Federal Supreme Court. However, the Swiss Federal Supreme Court noted that Paulissen's Counsel never specifically asked the Arbitrator to disclose whether or not he had been appointed by UCI in other cases, and in the affirmative, to specify the number of cases. To the contrary: the Swiss Federal Supreme Court held that the questions asked

[2] For matters in sports arbitration R-34 of the TAS Code foresees a seven day deadline.

[3] BGE 4A_256/2009, discussed in our Arbitration Newsletter of December 7, 2011.

[4] *Cf.* "*devoir de curiosité*" in BGE 136 III 605.

by Paulissen's Counsel were clearly limited in scope and, even if they were not, it would remain questionable why Paulissen's Counsel did not insist on a clear answer but rather confirmed, at the end of the hearing, that he had no problem with the composition of the Tribunal.

The Swiss Federal Supreme Court also rejected the argument that the Arbitrator should have disclosed the cases spontaneously on the basis that this duty applies only to facts an arbitrator reasonably believes are unknown to the party affected.

For the reasons set out above, the Swiss Federal Supreme Court concluded that the challenge of the Arbitrator was raised belatedly and did not discuss the merits of the challenge.

Conclusions

Recent decisions of the Swiss Federal Supreme Court on independence and impartiality of the arbitrator - on the one hand extremely demanding as to the documentary evidence required to establish multiple appointments of an arbitrator[5] and on the other hand taking a very flexible approach in role changes of an arbitrator[6] - gave raise to concern.[7] But with this most recent decision the Swiss Federal Supreme Court clearly manoeuvred itself out of bounds. One is tempted to re-use the following headline: "*The Swiss Federal Supreme Court got it wrong, wrong and wrong a fourth time*".[8]

Wrong No. 1: the Swiss Federal Supreme Court reproaches Paulissen's Counsel for not having clearly asked the Arbitrator at the hearing of July 13, 2011 in how many other cases of the UCI he was presently sitting as 'its' arbitrator. But this is saddling the horse from the back! It is not the counsel who has to ask, it is the arbitrator who has to disclose.

The multiple appointment of an arbitrator is addressed in Section 3.1.1 of the IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**") in the Orange List.[9] The circumstances described under Section 3 of the IBA Guidelines can be waived - but for a waiver there must first be disclosure, meaning full disclosure. This results clearly from the "Background Information" of the Working Group attached to the IBA Guidelines.[10] The Swiss Federal Supreme Court has always qualified the IBA Guidelines as "*precious tool*"[11] and it is simply incomprehensible why the Swiss Federal Supreme Court completely ignored now this generally accepted duty of disclosure.

Paulissen's Counsel asked, in view of the two other cases then known to him, the Arbitrator a clear question about his independence. This would have been the last moment for the arbitrator to make a full disclosure about his pending involvement in UCI cases at the TAS. We know now that there were actually seven cases in $1^1/_2$ years where the Arbitrator sat as party appointed arbitrator by UCI (of which only one was published), far in excess of what is permitted under Section 3.1.3 of the IBA Guidelines. But the Arbitrator apparently simply confirmed that he still felt

[5] *Cf.* BGE 4A_256/2009 and BGE 4A_258/2009 on the alleged multi-appointments of an arbitrator, where the Swiss Federal Supreme Court requested several details (including case numbers!) of the various cases this arbitrator was apparently involved; such details being, due to confidentiality restrictions in arbitration, simply not available.

[6] BGE 4A_458/2009 (Mutu) where in the case on the merits Dirk Rainer Mertens was acting as chairman of the TAS Tribunal and then, in the same case on the quantum, served as party-appointed arbitrator. *Cf.* also BGE 136 III 605 (Valverde) where Prof. Ulrich Haas served on various occasions as consultant of WADA and was then in this TAS case appointed by WADA as 'its' arbitrator. In both cases the Swiss Federal Supreme Court saw the independence of those two arbitrators not in peril.

[7] *Cf.* in particular LUCA BEFFA, "*Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator - Is it time to change the approach?*", ASA Bulletin 3/2011, p. 598ff., and our Arbitration Newsletter of December 7, 2011.

[8] PIERRE A. KARRER, in ASA Bulletin 1/2010, p. 111, where the author criticises the Vivendi decision.

[9] "*The arbitrator has within the past three years been appointed as an arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.*"

[10] "*The purpose of disclosure is to reveal information that can begin a dialogue about whether a conflict exists and whether an arbitrator can act independently and impartially. Disclosure of the situation respects party autonomy by giving parties relevant information so they may decide how to deal with specific circumstances relating to the potential conflicts of prospective arbitrators*", p. 454.

[11] For the first time in BGE 4A.506/2007, see also our Arbitration Newsletter of May 16, 2008.

independent and impartial.[12] This was, under the prevailing circumstances, certainly not the appropriate answer and instead of blaming Paulissen's Counsel for not having posed adequately detailed questions, the Swiss Federal Supreme Court should rather have qualified the Arbitrator's answer as insufficient.

Finally, it should also be noted that virtually all relevant institutional arbitration rules assume that the arbitrator has a duty to disclose.[13] This applies equally to the TAS under R-33 of its Code: "*Every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties*". How comes that this very clear duty under R-33 has apparently never been addressed in the present proceedings? How could the Arbitrator reasonably assume, upon being questioned about his involvement in two previous UCI cases also dealing with Art. 326 RAD, that he has no duty to disclose his multiple appointments by the UCI in view of his obligation to "*immediately disclose any circumstances likely to affect his independence*"? Why does the Swiss Federal Supreme Court not recognize that the arbitration community assumes that it is the arbitrator's duty to disclose *sua sponte*?

<u>Wrong No. 2:</u> the Swiss Federal Supreme Court further underlines its permissive position with the argument that disclosure is necessary only for facts where the arbitrator has reason to believe that they are not already known to the party affected. And what if the arbitrator errs? Is it then helpful to have a dispute as to whether the arbitrator could have reasonably assumed that the affected party was already aware of the relevant facts? Would it not be much more appropriate to simply disclose? What is wrong with disclosure anyway? In opening 'the-reason-to-believe'-gate, the Swiss Federal Supreme Court is heading in the wrong direction. Disclosure is not about belief!

<u>Wrong No. 3:</u> Paulissen's Counsel is the author of the key publication on sports arbitration[14] and he is, consequently, also frequently involved in sports related matters. Indeed, in a footnote of his 2005 publication he addresses the fact that based on the awards published by the TAS in 2005 it appeared that the UCI had appointed the Arbitrator in a quasi-systematic fashion.[15] However, the Swiss Federal Supreme Court gives no consideration whatsoever to the environment in which arbitration proceedings should take place. In its view, Paulissen's Counsel should have hammered the Arbitrator with a number of straightforward questions, effectively undermining the Arbitrator's authority to sit. But is it really desirable for the practitioners in the field of arbitration to pursue, from now, this investigative, even hostile approach in the constitution of a Tribunal? Paulissen's Counsel referred to two cases at the hearing (there was actually a third one he could have referred to as well) but we know now that there were actually seven cases where the Arbitrator was sitting on for UCI. What kind of questions do we as counsel have to ask from now on in order to satisfy our "*duty of curiosity*"[16]? Is the onus on counsel to ask each and every arbitrator whether he has failed to disclose circumstances that might draw his independence and impartiality into question? In fact, would this not be an implied accusation that the arbitrator may be acting in an improper fashion? Do we really want this to become the standard of curiosity?

Further, why must Paulissen's Counsel have to assume that a statement he made seven years ago in a footnote regarding the nationality of arbitrators is assumed to be still relevant today? Particularly when it appears that the statement was made on the basis of published awards, while in the present case the challenge was based on the fact that the Arbitrator failed to disclose his other appointments.

Finally, the confrontation of Paulissen's Counsel with his own academic work, his general involvement in sports related arbitration matters and the knowledge attributed to him about the Arbitrator's involvement with UCI is regrettable. The legal community, including the Swiss Federal Supreme Court, are all heavily dependent on the academic contributions of a

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[12] Whilst the question of Paulissen's Counsel is described in the decision of the Swiss Federal Supreme Court, we do not know the actual answer given by the Arbitrator; the decision simply states: "*Satisfied with the affirmative answer by the arbitrator designated by UCI...*".

[13] Art. 11(2) ICC Rules, Art. 9(2) Swiss Rules, Art. 5.3 LCIA, Art. 11 UNICITRAL, Art. 14(2) and (3) SCC, to name just a few.

[14] "*l'arbitrage international en matière de sport*", published in 2005.

[15] Stating that the UCI almost systematically appoints the Arbitrator.

[16] "*le devoir de curiosité*", BGE 136 III 605, cons. 3.4.2, p. 618.

number of selected and dedicated writers. Writing such academic contributions to the benefit of the legal community is an arduous job which financially hardly ever pays off. It has, therefore, been a general understanding of the same legal community that such authors should not be confronted with their conclusions if they sit as arbitrator or plead as counsel. There are generally other ways of supporting one's position, without having to seek recourse to an academic contribution of an arbitrator or counsel.

Wrong No. 4: yes, this case is about doping of a cyclist and we have learned through recent disclosures in the Armstrong case that doping apparently was - and might still be - the rule in this particular sport. And, yes, also the case of Roel Paulissen may have been, as to its merits, not too strong. In such a case, in hindsight, the contribution of the Arbitrator to the TAS award might not have mattered at all, since Roel Paulissen might have been doped anyway and, consequently, had to be sanctioned. But this hindsight approach, which seems to be the preferred position of the Swiss Federal Supreme Court, is ill-placed to render or sanction a decision on independence of an arbitrator. Independence is not result-oriented. Independence and impartiality of an arbitrator represent two of the core values of arbitration and must be preserved. It is, therefore, about time for the Swiss Federal Supreme Court to take a stricter approach in matters of independence of an arbitrator, even if this results in the annulment of an award which may be plausible and justified in its outcome. If one of the arbitrators rendering this award was, by objective standards, not independent this award is defective and needs to be redone - even if the outcome will most likely again be the same. The Swiss Federal Supreme Court sends the wrong message to the international arbitration community, if the rumour spreads that as to the independence of an arbitrator in Switzerland "*anything goes!*".

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Attachment:
- BGE 4A_110/2012