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Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders

Each case is usually published in its original language with a head note in English, French and German. All articles include an English abstract.

Books and journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias Scherer, LALIVE, P.O. Box 6569, 1211 Geneva 6, Switzerland).

The Ongoing Duty to Disclose and the Taciturn Chairwoman

Case Note on Swiss Federal Supreme Court Decision 4A_462/2021[*]

HANSJÖRG STUTZER[**]

Independence and impartiality of arbitrators – Scope and duration of the duty to disclose – Anonymity at the Supreme Court

Summary

In a recent decision the Swiss Federal Supreme Court tied the duration of the arbitrator's duty to disclose circumstances which might raise doubts as to the arbitrator's independence or impartiality to the date of completion of the deliberations rather than to end of the arbitration proceedings − as per Art. 179(6) PILA. This case note analyses whether such individualized interpretation is still in line with the meaning of Art. 179(6) PILA. In addition, the case note recalls the practice of the Supreme Court for anonymizing (or not) the identity of the parties.

[*] ASA Bull. 3/2022, p. 676.
The present case note represents an amended version of the newsletter made public on social media on 23 May 2022. For the benefit of the readers not being able to follow the decision in the German language, the facts of the case and the considerations of the Supreme Court are briefly summarized at the beginning. A summary can also be found in the Introduction to the Case Law section in this Bulletin, p. 564.

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1. Facts

The case under scrutiny in this note was an international arbitration held in Basel under the Swiss Rules. The dispute was heard by a panel of three arbitrators, presided by a chairwoman ("**the Chairwoman"**). All members of the arbitral tribunal were appointed by the Swiss Arbitration Centre. The arbitral tribunal had to resolve a dispute between a Turkish manufacturer ("Company A" or "**the Claimant**") and its exclusive Turkish agent ("**Company B**" or "**the Respondent**"), a subsidiary of an American group, having over 250 subsidiaries worldwide ("**the B Group**"). In 2016 the two parties entered into a joint venture by forming a company C but that joint venture did not develop as anticipated and Company A, therefore, terminated the joint venture, alleging a breach of contract by Company B and requesting damages.

Company A initiated arbitration proceedings on 25 October 2017 resulting in a final award ("**the Award**") on 15 July 2021. The arbitral tribunal dismissed both the claim and counterclaim. The Award was rendered by a majority decision.

In this case note, we will focus on a specific circumstance that prompted Company A to seek the annulment of the Award. The issue was how the Chairwoman (referred to in the Decision with the German term "die Vorsitzende") had handled her duty to disclose. Under Art. 179(6) PILA, any arbitrator sitting in Switzerland must

> *"disclose the existence of circumstances that could give rise to legitimate doubt as to his or her independence or impartiality. This obligation persists throughout the entire proceedings."*

In its action before the Swiss Federal Supreme Court (the "**Supreme Court**") for annulment of the Award, the Claimant requested, amongst others, that (i) the Chairwomen be removed due to her lack of independence and impartiality and (ii) the Award be quashed. The underlying facts of this request were that, on 1 September 2021, the Chairwoman had sent out an informational email according to which she was from now on working as a partner in the law firm G AG, which, as such, caused no concern. However, the real problem was that the B Group was, apparently, a key client of the litigation and arbitration practice of law firm G AG. The Supreme Court decision did not disclose how the Claimant learned about this fact.

To understand better the potential exposure of the Chairwoman in her move to law firm G AG, the following facts, as presented in the decision of the Supreme Court, are to be considered.[1]

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[1] BGer 4A_462/2021 consid. 4.1 and 4.3.1.

2007 – 2009	the Chairwoman worked, together with the present in-house counsel of Company B, in the law firm G AG. In total, the Chairwoman was employed for five years at that law firm
autumn 2020	the Chairwoman had informal discussions with various law firms about a potential move but without achieving any results
19 – 24 October 2020	Hearing
19 January 2021	Submissions on Costs
28 January and 5 February 2021	deliberation by the tribunal and final decision reached internally
8 February 2021	the Chairwoman starts drafting the Award
26 February 2021	the Chairwoman meets representatives of law firm G AG, for initial discussions
21 March 2021	exchange of information between the Chairwoman and the law firm G AG, to detect potential conflicts of interests
16 April 2021	the Chairwoman receives a formal offer from law firm G AG
28 April 2021	the Chairwoman signs the offer
18 June 2021	the Chairwoman discloses in another arbitral proceeding her move to law firm G AG
28 June 2021	in the case management conference of that other arbitral proceedings, the Chairwoman disclosed that she did not detect any conflicts of interests in her new position as partner in law firm G AG
15 July 2021	Award issued
1 September 2021	the Chairwoman announces by email that she has as per that date become a partner in law firm G AG
14 September 2021	Claimant files its action for annulment at the Supreme Court

8 November 2021	In the consultation paper,[2] the tribunal rejects the arguments of the Claimant
9 December 2021	Further submission of the Chairwoman

2. Findings of the Supreme Court

After having summarized the relevant facts – see above – the Supreme Court recalled its consistent jurisprudence in the field of independence and impartiality of a judge or arbitrator. It recalled that judges which are not employed on a full-time basis but also work as attorneys[3] lack independence if he/she acts at the same time as a lawyer for a party in the proceedings or has in the past been instructed by a party in such proceedings on various occasions – irrespective of whether such other instructions bear any relation to the case in question.[4] Such lack of independence is assumed by the Supreme Court not only if the part-time judge or arbitrator has such relation to one of the parties but also when only a partner of his/her law firm entertains such a client relationship with a party to the proceedings. A law firm is to be considered as one unit only.[5] These standards are the same for an arbitrator.

The Supreme Court rejected the Chairwoman's argument that all her fees generated in this arbitration between Company A and Company B were still credited to her earlier law firm. According to the Supreme Court, a lack of independence and impartiality can already be assumed if, based on the circumstances of the particular case, the impression could arise that an arbitrator might treat a party more favourably in view of his/her future activities in such a new law firm. The flow of money as such is irrelevant.

However, the Supreme Court saw no reason to assume any lack of independence and impartiality by the Chairwoman in the present case because the three arbitrators jointly confirmed in their written submission to the Supreme Court that their final decision had already been reached on 5 February 2021 – i.e. at a time when the Chairwoman had not yet commenced discussions about joining law firm G AG again. Therefore, the fact that B Group was a key

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2 It is due to such "Vernehmlassung" by the tribunal that the Decision could revert to internal date of the tribunal, such as date and duration of the deliberation, the date of the decision making and the date of the drafting of the drafting of the Award, information which is generally not disclosed to the parties.

3 "Nebenamtliche Richter".

4 BGE 147 II 89 consid. 4.2.2; BGer 4A_404/2021, ASA Bull. 3/2022, p. 691, consid. 5.2.2.2.

5 BGE 147 II 89 consid. 4.2.2.2; 140 III 221 consid. 4.3.2; 139 III 433 consid. 2.1.5 ("Nespresso Case"); BGer 4A_404/2021 consid. 5.2.2.2.

client of the law firm G AG could, in the view of the Supreme Court, not have played any role in the decision making process of the Chairwoman or the arbitral tribunal.

Applying the same reasoning, the Supreme Court also rejected the Claimant's argument that the duty to disclose applies until the very end of the proceedings, i.e. the date when the award is rendered (in casu: 15 July 2021). While the Supreme Court conceded that the way of reasoning of an award might still have an impact on the outcome of the case, this did not apply to the present case, however, in view of the confirmation of the three arbitrators as to the timing of their decision-making,

Finally, the Supreme Court dealt with the Claimant's argument that the Chairwoman had deliberately withheld information on her move to the law firm G AG because she had previously disclosed that change earlier in another, unrelated arbitration proceeding but not in the present one. Such deliberate withholding of information did – in the view of Claimant – already by itself amount to a ground for annulment. Again, the Supreme Court concluded that with the final decision having already been reached on 5 February 2021, the Chairwoman had had no duty to have informed the parties about her subsequent move to the law firm G AG.

Question 1: **The duty to disclose – how long does it last?**

The wording of Art. 179(6) PILA is quite clear: the disclosure obligation continues to persist "*throughout the entire proceedings.*"

Art. 179(6) PILA reads in the three official languages as follows:

"Diese Pflicht bleibt während des ganzen Verfahrens bestehen."

"Cette obligation perdure jusqu'à la clôture de la procédure arbitrale".

"Tale obbligo sussiste durante l'intero procedimento".

In domestic arbitration, identical language is used in Art. 363 (2) of the Civil Procedural Code ("CPC"). As a matter of fact, this language came first and was then subsequently implemented into Art. 179 PILA in the general amendment of Chapter 12 of PILA.

Whereas the German and Italian versions are identical ("ganzes Verfahren") ("l'intero procedimento") the French version seems more explicit by clearly tying the duty to disclose to the "clôture de la procédure arbitrale", i.e. to the closing of the arbitral proceedings. However, in no way can it be assumed that those three provisions are different in their content with the French version being simply more precise but the meaning of those provisions in the three official languages remains absolutely identical.

Although Art. 179(6) PILA was introduced only in the recent amendment of Chapter 12 PILA, effective as of 1 January 2021, a consensus reigns that such ongoing duty of disclosure had already been imposed previously on any arbitrator.[6] Also, Art. 12(3) Swiss Rules, applicable in the present case, leaves no room for interpretation. Once again, the duty of disclosure is required for the "course of the entire proceedings". Other institutions use a similar expression such as "*throughout the entire arbitration*" (Art. 9 DIS Arbitration Rules), "*each arbitrator shall assume a continuing duty, until the arbitration is finally concluded...*" (Art. 5.5 LCIA Rules), "*the duty to immediately disclose such circumstances continues to apply throughout the arbitration.*" (Art. 16 (4) Vienna Rules). And also Art. 11(3) ICC Rules states that any arbitrator "*shall immediately disclose... any facts or circumstances... concerning the arbitrator's impartiality or independence, which may arise during the arbitration*."

The most explicit wording in this respect is to be found in the IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 ("**the IBA Guidelines**") which state that the arbitrator's duty to be impartial and independent of the parties "*shall remain so until the final Award has been rendered or the proceedings have otherwise finally terminated.*" Part I (1), General Principles corresponds closely with the French version of Art. 179 (6) PILA, namely "*jusqu'à la clôture de la procédure arbitrale*".

Although all the above provisions may slightly differ in their respective wording, the meaning of such provisions is quite clear and corresponds to what is expressed in the IBA Guidelines, namely that the duty to disclose remains in force, within the realm of relevance, until the final award is rendered or the proceedings have otherwise finally be terminated. This triggering point corresponds to the fact that an arbitrator becomes *functus officio* only when the final award has been rendered or the proceedings have otherwise been finally terminated.[7]

The Supreme Court's interpretation, tying the termination of the duty to disclose to the moment when the arbitrators have concluded their deliberations

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6 PHILIPP HABEGGER, Das revidierte Kapitel 12 IPRG über die Internationale Schiedsgerichtsbarkeit, ZZZ 53/2021, p.371 et seq., in particular p. 380; BSK-PETER/LEGLER/RUSCH, 4th Edition 2020, N 68 to Art. 179 PILA.

7 This conclusion is also unanimously approved in scholarly writing: "*The requirement that an arbitrator be impartial and independent of the parties at all times and stages of the proceeding is one of the generally accepted standards of international arbitration*." Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 4th edition 2021; BOOG/STARK-TRABER, Berner Kommentar N 43 to Art. 363 ZPO; BSK ZPO-WEBER-STECHER, N 17 to Art. 363 ZPO.

in an award, finds no support whatsoever in any court precedents – even less so in scholarly writing. The interpretation of Art. 179(6) PILA of the Supreme Court is simply *contra legem.* This conclusion can best be illustrated by considering the position of a sole arbitrator. If the duty to disclose is tied to the time the arbitral tribunal has deliberated and come to a verdict what then? Does he have to stamp and seal his thoughts to prove that on date x he has in his mind decided the case?

In addition, we have all experienced the circumstances where, even if there reigns unanimity within the panel, thereafter, in drafting the award, the arbitrators realize that their decision reached does not stand and calls for further deliberations.

In short, the interpretation of the Supreme Court, tying the end of the duty to disclose to the time the arbitrators conclude their deliberation, opens floodgates for controversial arguments. It seems that the Supreme Court has, in its objective of preserving the integrity of this particular award, set a dangerous path into a grey area of discretion – but in matters of disclosure and rendering of the award, there is no room for such discretion. Any arbitrator's duty of disclosure remains, again within the realm of relevance, up to the moment of the rendering of the award, where then the arbitrator becomes *functus officio* - but never earlier!

Question 2: Was there a duty on the Chairwoman to disclose? And, if so, what should have been the consequences of a failure to disclose, if any?

Before entering into this analysis a brief clarification as to the two terms "independence" and "impartiality" may be helpful. The terms are certainly tied to each other as twins, though they are not synonymous. Generally, independence is a matter of perception, whereas impartiality is a matter of proof.

If there are consequences to be drawn in a particular situation where an arbitrator may be perceived to be no longer independent or seems to lack impartiality, the relevant standpoint to render a decision in this respect is to be found in Part 1(2)(c) IBA Guidelines:

> *"Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."*

In a recent landmark decision, with a familiar factual matrix namely a chairman of an arbitral tribunal failing to disclose relevant further appointments as arbitrator, the UK Supreme Court confirmed a more succinct

description of the standard to be applied, by referring to the "*fair-minded and informed observer"*[8].

Bearing this in mind we should now consider if the IBA Guidelines provide any indication as to whether the Chairwoman should have disclosed her move to law firm G AG at the same time to Company A as she disclosed it at the case management conference of the other, unrelated, arbitration. In this respect, it comes as no surprise that the particularities of this case from a change to a law firm where a party in the proceedings is a "key client" is not specifically reflected in the IBA Guidelines. However, *per analogiam*, the following provisions might have to be considered.

Under the waivable red list Art. 2.3.6 could come into play and under the orange list Art. 3.2.1 and Art. 3.2.3 might be applicable but the common denominator of all these three potential provisions is that the underlying factual matrix in the present case comes into play only in the future, namely, on 1 September 2021, when the Chairwoman joined law firm G AG, i.e. after the final award had been rendered on 15 July 2021. However, the thread of bias had already come into existence on 28 April 2021 when the Chairwoman signed the agreement to join law firm G AG, hence at a time when the duty to disclose continued to exist.

In addition, the general principle in Part I(3)(d) IBA Guidelines should have been considered, namely that any doubt on disclosure should be resolved in favour of disclosure, whereby no consideration should be given as to whether the arbitration is at the beginning or at a later stage[9].

The Chairwoman would, therefore, have been well advised to disclose her move on 28 April 2021, i.e. the time of signing her move to law firm G AG, to the parties in the present proceedings. This is for the following reasons:

– Had the Chairwoman disclosed in the present case her move to law firm G AG at the same time she disclosed this to the case management conference, she could still have presented the same argument, namely that the arbitrators had already decided the case on 8 February 2021; this would have had the advantage of disclosing

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8 Halliburton Company v Chubb Bermuda Insurance Ltd., UKSC 2018/0100, of 27 November 2020, p. 18, referring to Porter v Margill [2001] UKHL67 [2002] 2 AC 357 para. 103: *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*; Paula Hodges, "The View from the English Courts on Conflicts of Interest: *Halliburton* and Beyond", in "Clear Path or Jungle in Commercial Arbitrator's Conflict of Interest?", ASA Special Series No. 48 (2021), pp. 91 *et seq*.

9 Part I (3) (e) IBA Guidelines.

proactively and thus significantly reducing the chances for Company A to successfully challenge her.

– The Chairwoman's opting not to disclose her move to law firm G AG at the appropriate time, casts, as a minimum, a shadow of doubt because every wilful concealment of relevant facts which might, in the view of the "*fair-minded and informed observer*" give rise to doubts as to the arbitrator's independence and impartiality is, at least in a first step, interpreted against the non-disclosing party. However, as stated in Part I(3) of the explanation to General Standard 3 (c), IBA Guidelines, disclosure does not necessarily imply the existence of any conflict of interest. Nevertheless, the Chairwoman could not reasonably have relied in advance on the benevolence of the Supreme Court in moving the triggering date back to the date of deliberation and thereby providing her with a free ride thereafter.
– Finally, the Chairwoman might simply have based her decision not to disclose on the "*rather restrictive approach*" of the Supreme Court "*in allegation of bias*",[10] respectively on the fact that "*the Court's [Supreme Court] approach to arbitrator challenges is conservative....*".[11]Indeed, there are previous decisions of the Supreme Court where one wonders why it took such a lenient approach in each of those cases in deciding on the independence of an arbitrator.[12] The present decision falls into the same category.

Question 3: What is the policy of the Supreme Court regarding the anonymity of the parties or respectively the disclosure of the parties' and arbitrator's names?

About a month after its decision in the present case, the Supreme Court issued a decision[13] in a sports-related matter, amongst others, addressing the problem of multiple appointments by FIFA of the same arbitrator(s) at CAS. Although the action for annulment was dismissed, the Supreme Court

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10 DIANA AKIKOL, "The View from the Swiss Courts on Conflicts of Interest, Disclosure, Objection, and Challenges" in "Clear Path or Jungle in Commercial Arbitrator's Conflict of Interest?", ASA Special Series No. 48 (2021) p. 61. This Article does provide a succinct analysis of the numerous decisions of the Supreme Court in this field.

11 DIANA AKIKOL, Ibid, p. 77.

12 Mutu (BGer 4A_458/2009, ASA Bull. 3/2010, p. 520.) Valverde (BG 136 II 605) Paulisson (BGer 4A_110/2012, ASA Bull. 1/2013, p. 174); see also 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, pp. 598 *et. seq*.; PIERRE LALIVE, l'Article 190 al. 2 LDIP a-t-il une utilité, ASA Bulletin 4/2010 pp. 726 *et seq*.

13 BGer 4A_520/2021 ("the FIFA Case"), ASA Bull. 3/2022, p. 704.

nevertheless named (and shamed) the chairman of the CAS panel being confronted with the problem of multiple appointments by FIFA. Why then was the identity of the Chairwoman not disclosed in the present case?

It might therefore be helpful to recall the provisions relevant in this particular field. The starting point is Art. 27 of the Federal Law on the Supreme Court ("**BGG**") which, on the one hand, imposes a duty on the Supreme Court to inform the public of its decision and, on the other hand, that such information has to occur generally in anonymised form, whereby the relevant principles are laid down in a separate regulation.[14] According to that regulation, the chair of each chamber is in charge of taking the appropriate measures to protect the privacy of the parties and the secretary is in charge of anonymising the decision. Finally, the Supreme Court has issued rules for anonymising its decisions, and Art. 4 of such rules describes the information which is generally not to be anonymised, namely names of governing bodies, names that are directly and inseparably related to the substance matter of the dispute, such as trade names, etc. Of relevance is Art. 4 (1) (d) of those rules, which states that names that are notoriously and on a long-term basis not worth of protection are exempted from such duty to anonymise. Notoriety is in this respect to be assumed if such is the case through media coverage before or during the dispute.[15]

This was the case in the matter of the prominent Chinese swimmer Sun Yang, trying to escape from a doping ban before the Olympics of Beijing, by challenging a CAS award imposing an 8 years ban at the Supreme Court for lack of independence and impartiality of the chairman. The decision of, amongst others, the Supreme Court not only disclosed the identity of the parties involved but also the names of the arbitrators sitting on the CAS panel, in particular the name of the chairman, whose comments against Chinese eating habits on Twitter betrayed a lack of impartiality.[16]

In the case of the Chairwoman, it was certainly justified for the Supreme Court not to have disclosed her identity in its decision but then the identity of the chairman in the FIFA case should not have been disclosed. The underlying CAS decision is not available on the CAS website. The Appellant, being a former FIFA Vice President and President of the Brazilian Football Confederation and other important football functions, is certainly a public figure - but this did not induce the Supreme Court to disclose his identity, contrary to the identity of the chairman. Why?

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14 Reglement für das Bundesgericht (BGerR), SR 173.110.131.

15 Daniel Hürlimann/Daniel Kettiger, Anonymisierung von Urteilen 2021, with various contributions, in particular, PETER BIERI, das Handwerk der Urteilsanonymisierung, pp. 1 *et seq*.

16 BGE 147 III 65, ASA Bull. 3/2021, p. 736.

A similar question mark is to be set for the Supreme Court decision BGer 4A_292/2019, a minor dispute for USD 66'000, where the arbitrators were named for no apparent reason[17]. And, very recently, the Supreme Court published a BIT decision against Venezuela where the Claimant was not named but the case number at the Permanent Court of Arbitration in The Hague was prominently added to the decision, thus making it easy to find out the identity of the Claimant in this case.[18] Why then anonymise?

3. Conclusions

- The Supreme Court's interpretation of Art. 179(6) PILA in the present case is *contra legem.* The decision sends a disturbing signal that the deadline for the duty of disclosure is of an individual nature, depending on the particular circumstances of each individual case.
- In this author's view the Chairwoman should have disclosed her move to law firm G AG at the time of signing the respective agreement, i.e. on 28 April 2021 and not on 1 September 2021 but the fact that she did not do so did not automatically disqualify her from continuing to sit.
- The anonymisation of the identity of the Chairwoman in the decision is in line with the pertinent regulations of the Supreme Court. Those regulations are, however, not always applied consistently.

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17 BGer 4A_292/2019, ibid.

18 BGer 4A_398/2021; the same in BGer 4A_322/2020, ASA Bull. 4/2021, p. 936, and BGer 4A_396/2017, ASA Bull. 4/2019, p. 983.

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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor **(mscherer@lalive.law)** and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

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