Around the World

Switzerland

CAS AWARD RE SUN YANG SET ASIDE BY THE FEDERAL SUPREME COURT AFTER A SUCCESSFUL CHALLENGE OF THE CHAIRMAN OF THE ARBITRAL TRIBUNAL

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Arbitration awards; Challenges to arbitrators; Court of Arbitration for Sport; Impartiality; Sportspersons; Swimming; Switzerland

Facts

Sun Yang is a very successful Chinese swimmer, Olympic medalist and World Champion in several events. One September 2018 night, he was faced with an unannounced out-of-competition doping control ordered by the International Swimming Federation (FINA) which ended quite turbulently. He co-operated initially, but, after having been bothered by one of the sample collection agency's staff who surreptitiously took photos of him with his private mobile phone, Sun Yang examined the identification documents presented to him by the three staff of the agency more closely than before. After conferring with his advisers thereon, he refused to collaborate further, arguing that the identification documents of the two assistants of the doping control officer (DCO) in charge were insufficient. He had the container with the blood samples, which had already been taken, smashed with a hammer, retrieved the samples and tore the form he had previously signed. Instead, he issued a declaration pursuant to which the doping control could not be completed for lack of sufficient proof of certification and identification. This declaration was also signed by his doctor and the three staff of the sample collection agency.

As a consequence of the events of that night, proceedings regarding a potential anti-doping rule violation were initiated against Sun Yang. However, in January 2019, the FINA Anti-Doping Commission found in favour of Sun Yang and confirmed that he had not committed an anti-doping rule violation. The commission found that the doping control was not properly commenced. The lack of official documentation for the collection staff meant that Sun Yang was not properly notified. The blood was not collected with proper authorisation, and the request to provide a urine sample was not properly accomplished. Additionally, the DCO had failed to articulate in sufficient clarity that she was treating Sun Yang's conduct as a failure to comply and that serious consequences would apply. Therefore, the sample collection session was considered invalid. In very clear words at the end of the award, though, the Commission informed Sun Yang that this was a "close-run thing" and that his behaviour was a huge and foolish gamble, putting his entire career at stake while there would have been safer possibilities protecting his rights.

Within the applicable period of 21 days, the World Anti-Doping Agency (WADA) submitted a statement of appeal to the Court of Arbitration for Sport (CAS), and FINA was joined to the proceedings. They requested that Sun Yang be suspended for eight years and that his results of competitions having taken place after the failed doping control be annulled. Initially, there were a few procedural irritations initiated by Sun Yang which are not of interest here, such as (i) the challenge of the WADA-appointed arbitrator and his subsequent resignation, followed by the appointment of a new arbitrator and another challenge, (ii) discussions regarding the admissibility of the appeal, and (iii) discussions regarding a potential conflict of interest of WADA's counsel. When these issues were cleared, the proceedings were held, and in February 2020 the CAS Panel found Sun Yang guilty of an anti-doping rule violation. It suspended him for eight years as of the date of

the award. Contrary to the FINA Anti-Doping Commission, the CAS Panel found that the DCO had correctly notified Sun Yang of the intended out-of-competition doping control and that the documents presented to him were sufficient to proceed to the control. Moreover, it held that the swimmer's behaviour during the doping control could not be justified and that he had been validly alerted of the potential consequences such behaviour would have. Therefore, they found Sun Yang guilty of a violation of an anti-doping rule and doubled the regular suspension period of four years to eight years as this was already his second suspension.

Consequently, within the applicable 30 days, Sun Yang filed an appeal with the FSC, requesting the annulment of the CAS award (the Award), again challenging the second WADA-appointed arbitrator.

Six weeks later, he additionally filed an application for revision of the Award with the FSC. He requested the annulment of the Award and the disqualification of the chairman of the CAS Panel. As to the latter, Sun Yang argued that he had been confronted with several highly inappropriate tweets by the chairman of the CAS panel by an article which had been published only after the deadline for an appeal against the Award had expired. The chairman had posted these tweets in the years 2018 and 2019 (i.e. before and during the proceedings before the CAS) and had therein expressed his disgust with the treatment of animals by Chinese nationals, requested international consequences for this treatment and commented on the skin colour of Chinese nationals, all in very harsh words. Sun Yang claimed that these comments raised serious doubts regarding the impartiality of the chairman in proceedings concerning a Chinese party.

Held

The FSC confirmed that an international arbitral award would be revised if the applying party had discovered a ground to challenge an arbitrator only after the expiry of the deadline to file an appeal against the award, provided that this party had exercised due diligence as required under the specific circumstances during the proceedings and still was not able to detect the reason for the challenge at an earlier point in time. An application for revision must be filed within 30 days of discovery of this reason.

As Sun Yang had not discovered the criticised tweets during the CAS proceedings, even though they had already been in existence then, the FSC needed to analyse whether he had complied with his duty of diligence at the time or could have known these tweets had he applied due care. Sun Yang had argued that, when the chairman was appointed, a google search with the name of the chairman did not bring up those tweets. Additionally, he filed a report by a forensic expert who confirmed this. This argument was contested by CAS and WADA. They further pointed to the fact that the article which Sun Yang relied on was published on a website which was managed by a law firm specialising in defending athletes suspected of doping and written by a journalist who had written another article in defence of Sun Yang. Also, they criticised the alleged efforts to research the chairman's background after his appointment to be minimal and therefore insufficiently diligent, as a google search with the name of the chairman would have revealed his Twitter account on the first page of search results.

The FSC confirmed that parties may not rely on the self-declaration of independence made by each arbitrator but must investigate the arbitrators' independence themselves, namely by reviewing internet sources which are likely to reveal a potential partiality. However, this duty is not unlimited, and parties cannot be expected to conduct a systematic and in-depth research of all sources relating to a particular arbitrator. Not every miss of information accessible through the internet is to be considered a breach of duty. The circumstances of the specific case will be decisive for the extent of due diligence required. Moreover, parties cannot be expected to continue

monitoring the internet activities of an arbitrator during the arbitration proceedings. Applying these principles to the case at hand, the FSC confirmed that the criticised tweets would theoretically have been accessible for Sun Yang at the beginning and during the arbitration proceedings. However, it maintained that—while it would have been advisable at least to review, at least to some extent, the main social networks during the official challenge period after the chairman's appointment—it could not be expected that he would scrutinise every single tweet by the chairman (who was very active on Twitter). For lack of a respective duty, Sun Yang was also not required to detect doubtful tweets which were posted by the chairman during the proceedings. Therefore, the FSC came to the conclusion that Sun Yang was not to be criticised for insufficiently researching the chairman's impartiality.

As to the chairman's impartiality, the FSC was less lenient. It reminded in general terms that the disqualification of a judge is necessary not only when bias of the judge is proven; rather, it is sufficient that objective circumstances provide an impression of partiality. The chairman had defended his tweets outlining that he had been a vigorous defender of animal rights for many years and that the criticised tweets had all been made in the context of an annual dog meat festival held in China which he considered an animal massacre. He had stressed that he had no reservations against Chinese nationals in general and that he had proven this by maintaining an excellent relationship with China in his former office as the Italian minister of foreign affairs. Also, he had confirmed that no external elements had influenced the making of the award, which had been rendered unanimously. However, the FSC did not take this as a sufficient justification. It explained that not so much the cause defended by the chairman seemed problematic but much rather certain extremely violent terms he had used, such as: "those bastard sadic chinese who brutally killed dogs and cats in Yulin", "This yellow face chinese monster smiling while torturing a small dog, deserves the worst of the hell!!! Shame on China, pretending to be a superpower and tolerating these horrors!!" or "Racist????Me??ehi guy, I repeat: those horrible sadics are CHINESE! not French or Italian or polish!". Based thereon, the FSC considered the doubts as to the impartiality of the chairman by Sun Yang and also a reasonable third person taking note of them to be objectively justified, creating an appearance of partiality. Therefore, the FSC approved of the challenge of the chairman by Sun Yang, admitted the application for revision and annulled the Award.

The separate FSC appeal proceedings (4A 192/2020) were consequently dismissed as having become moot. However, as Sun Yang had initiated the proceedings and had failed to request a stay of the appeal proceedings at an early stage, after filing the application for revision, which would have made it possible to avoid unnecessary costs, the FSC imposed court costs and a duty to compensate WADA and FINA for parts of their attorney costs onto Sun Yang.

Discussion

As a consequence of the FSC vacating the Award, the CAS will have to resume the previous proceedings and issue a new award under correct circumstances (as stressed in FSC decision 4A_192/2020).

This case is unusual not only regarding the factual events leading up to it but also with regard to several aspects on how it was litigated. This goes beyond the formal proceedings and includes the post-litigation strategy. If the article containing the tweets was indeed ordered by Sun Yang's counsel, as his counterparties had insinuated in the FSC proceedings, it may well be seen as a masterpiece in defence litigation that they thereby resulted in having a negative award against their client annulled by the FSC.

Just as noteworthy are the very clear words of the FINA Anti-Doping Commission in sections 6.54 to 6.57 of its decision which were partially cited above ("*foolish gamble*" etc). Besides the words of warning as to how close Sun Yang got to facing a serious problem, the Anti-Doping Commission also outlined, exemplifying, how an athlete confronted with a similar situation should act. First, to provide a sample under protest with subsequent litigation is far more prudent than protesting and not providing a sample. Second, an athlete may not take a signature of a DCO on a declaration drafted by the athlete or his staff as an affirmation of the content of that declaration, as the DCOs are held by the applicable International Standard for Testing and Investigations (ISTI) issued by WADA to sign any declarations issued by controlled athletes to confirm that the comments provided by them reflect their concerns. Third, the fact that a doping control extends far into the night is unproblematic as long as it started during the hour previously identified as suitable by the athlete. Fourth, under the ISTI, it is sufficient that the DCO is formally accredited as a DCO; it is not necessary that all their staff can provide the same accreditation as long as they are otherwise properly authorised to perform their tasks. Fifth, the fact that Sun Yang had, a year before the ominous out-of-competition control, challenged the DCO's authority and that her superior had consequently complained about Sun Yang's behaviour having been extremely rude, abusive and uncooperative, does not give rise to a conflict of interest so as to disqualify the DCO for the control under discussion.

The FSC also gave an important guideline for the parties of arbitral proceedings on how to preserve their right to possibly challenge the impartiality of an arbitrator at a later stage. It outlined in detail the search efforts by Sun Yang's counsel. Apparently, they had been in a position not just to describe but also to document the searches conducted after the appointment of the chairman. This seems to be the key part to the entire case. Had Sun Yang's counsel not been able to document their efforts, the outcome of the case could possibly have been different.

While discussing the chairman's impartiality, the FSC gave a perfect example of how private rules can have a career on their own by making their way into state jurisdiction. It referred to the IBA Guidelines on Conflicts of Interest in International Arbitration and qualified them, despite of their lack of legal force, as a useful working instrument for the harmonisation and unification of the standards applied in international arbitration.

On a more theoretical note, Sun Yang filed both an appeal and an application for revision with the FSC. These two legal remedies are not identical and complement each other on the timeline. While an appeal needs to be filed within 30 days of having been served with the award to be appealed, an application for revision may be filed thereafter. The deadline to be observed for this depends on the grounds for revision and may be between 30 and 90 days. In an ordinary appeal, the appellant may criticise (i) the improper constitution of the arbitral tribunal, (ii) the wrongful acceptance of denial of jurisdiction by the arbitral tribunal, (iii) *extra* or *infra petita*, (iv) the violation of the principle of equal treatment of the parties or their right to be heard, and (v) the incompatibility with public policy. The grounds for revision, on the other hand, are different. They concern (i) specific procedural issues such as the incorrect constitution of the arbitral tribunal, *extra* or *infra petita* and the inadvertant ignorance of relevant facts, (ii) the breach of the European Convention on Human Rights, (iii) the influence of

a criminal act on the award, or (iv) the discovery of decisive evidence that would have existed at the time of the award but which could not then be found.

Eva Gut
STAIGER Attorneys at Law, Zurich

Christoph Gasser[*]
BianchiSchwald, Zurich

[*] Eva Gut is a member of the major Swiss business law firm STAIGER Attorneys at Law and advises clients in various matters of litigation, bankruptcy and arbitration matters, contractual law and sports law. She has been a member of the supervisory body of the judicial bodies within the Swiss Ice Hockey Federation since 2018 and was, before that, the secretary to the president of said body for 13 years. In addition, between 2004 and 2011, she was a member of the working group on doping controls of the Swiss Federal Commission on Sports. Christoph Gasser is a member of the major Swiss business law firm BianchiSchwald and advises clients in various matters of intellectual property, litigation and arbitration matters, contractual law and sports law.