

Arbitration - Switzerland

Independence and impartiality of party-appointed arbitrators

Contributed by [Tavernier Tschanz](#)

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In a recent decision, the Supreme Court held that:

- the chairman and party-appointed arbitrators must comply with the same requirement for independence and impartiality;
- these requirements are no less stringent in sport arbitrations than they are in commercial arbitrations; and
- the Supreme Court has jurisdiction to order the removal of an arbitrator further to a successful challenge.

Furthermore, the Supreme Court seems to have acknowledged a presumption of impartiality and independence in favour of university professors who are appointed as arbitrators.

Facts

The Spanish professional cyclist Alejandro Valverde Belmonte was found guilty of violating Italian Anti-doping rules. Thus, the national tribunal of the *Comitato Olimpico Nazionale Italiano* (CONI) excluded him from all competitions organised by CONI and other sports federations in Italy for a period of two years.

Valverde appealed against this decision before the Court of Arbitration for Sport. CONI nominated Professor Ulrich Haas as arbitrator. The latter accepted the mandate but disclosed that he had been involved in the revision of the World Anti-doping Code of the World Anti-doping Agency (WADA) between 2006 and 2007.

The composition of the arbitral tribunal was confirmed by the Court of Arbitration for Sport and none of the parties challenged Haas's independence.

Subsequently, at CONI's request, the International Cyclist Union and WADA became parties to the arbitration as co-respondents. Once WADA became a party, Valverde disputed Haas's independence and impartiality due to his previous activities in relation to the World Anti-doping Code.

Valverde's challenge was rejected by the International Council of Arbitration for Sport. Valverde challenged this decision before the Swiss Supreme Court.

Decision

For the Supreme Court, the chairman and the party-appointed arbitrators must meet the same requirement of independence and impartiality. However, the court acknowledged that total independence may be idealistic. In particular, the nomination of its arbitrator by a party implies some kind of relationship between them. Although this circumstance is inherent to arbitration, it must not be permitted for a party-appointed arbitrator to act as an additional counsel for the party who nominated him or her.

The court held that there is no reason for independence and impartiality in sports arbitrations to be treated differently than they are in commercial arbitrations. However, the court repeated that the specific requirements of sports arbitration must be taken into consideration. Among these specific requirements are the limited choice of arbitrators (since they must be chosen from a pre-defined list) and the requirement that arbitrators must have genuine competence in sports matters. The court noted that these

Authors

[Frank Spoorenberg](#)



[Nathalie Buergermeier](#)

requirements could result in arbitrators having close contacts with sport organisations, specialised lawyers or experts in sport matters. As such, in the court's view, such contacts do not jeopardise the arbitrator's independence or impartiality.

Moreover, again bearing in mind the specific requirements of sports arbitration, the court outlined a presumption of impartiality in favour of university professors who sit as arbitrators, even if they have previously worked for one of the parties. For the Supreme Court, it was to be assumed that such professors can make the distinction between their two roles and thus remain impartial. However, it appears that the court limited this presumption to instances in which the professor's past activities for the party pursued a general interest, were related to the professor's expertise in a specific field and consisted of limited assignments which were carried out long before the arbitration.

Considering more particularly Haas's case, the court noted that his previous activities on behalf of one of the parties were completed several years before the start of the arbitration. It further noted that Haas did not seem to have received remuneration which would be comparable to the fees a lawyer would have charged for the same service. The court also considered that, apparently, Haas did not work under the instructions of the party which nominated him as an arbitrator. Moreover, his previous activities for this party had no close connection with the case since they related to the issuance of a set of rules which were not applicable to the case in question. The court also noted the absence of any indication that professor Haas would receive more assignments from the same party in the future.

Therefore, the court rejected Valverde 's challenge.

Incidentally, the court also clarified a procedural issue after years of uncertainty. The court acknowledged that it has jurisdiction to order the removal of an arbitrator who has been successfully challenged. Prior to this finding, the issue of whether the Supreme Court could take such a step itself or whether it could merely annul a challenged decision as is normally the case in setting aside proceedings before the Supreme Court had been open to debate.

Comment

Thus, it has been confirmed that the requirements for independence and impartiality are the same for party-appointed arbitrators as they are for the chairman of an arbitral tribunal.

More generally, this decision is in line with the Supreme Court's welcome tendency not to intervene in the arbitration process except in the rare case of extremely serious flaws. The decision is also in line with the position that sports arbitration proceedings should be differentiated from commercial arbitration proceedings. Sports arbitration proceedings regularly require tailored decisions which do not necessarily fit commercial arbitrations.

The specifics of this case should strictly limit the scope of the Supreme Court's apparent acknowledgement of the presumption of impartiality of university professors.

*For further information on this topic please contact [Frank Spoorenberg](#) or [Nathalie Buergermeier](#) at *Tavernier Tschanz* by telephone (+41 22 704 3700), fax (+41 22 704 3777) or email (spoorenberg@tavernierschanz.com or buergermeier@tavernierschanz.com).*

Endnotes

(1) Supreme Court Decision 4A_234/2010 in *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano*. The full text of the decision is available in French at <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

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