

Arbitration - Switzerland

Supreme Court rules on prior involvement of arbitrators

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The 'closed list'-based appointment procedure for arbitrators operating under the aegis of the Switzerland-seated Court of Arbitration for Sports (CAS) has been under close scrutiny from the Swiss Supreme Court in the last few years.⁽¹⁾ The Supreme Court has made its point clear: the independence and impartiality of arbitrators are paramount requirements of both judicial and arbitral justice – there can be no fair adjudication without an independent and impartial adjudicating authority. Sports adjudication is no exception.

Facts

The *Mutu v Chelsea FC* dispute is probably better known for the astronomical compensation – over €17 million – awarded to Chelsea Football Club as a result of Romanian footballer Adrian Mutu's serious breach of his contractual duties and obligations to the club than for the legal controversy surrounding the arbitration tribunals which decided the various stages of the case.⁽²⁾ Yet this second aspect is of particular interest to arbitration practitioners. In August 2003 Mutu was transferred on a five-year contract from Parma to Chelsea for a transfer fee of €22.5 million plus various premium and commission fees. Weeks into his new contract, Mutu received a seven-month ban from all competition and a fine from the English Football Association on drug-related charges. Chelsea immediately rescinded Mutu's five-year employment contract for unilateral breach devoid of just cause/sporting just cause, in line with the International Federation of Association Football (FIFA) Regulations for the Status and Transfer of Players, 2001 version, Articles 21 to 23. Internal and arbitral proceedings ensued, to determine first the validity of the rescission of the contract, and then Chelsea's right to compensation. The first issue was consensually referred to the English Premier League Appeal Committee and, on appeal, to the CAS before a panel presided over by CAS arbitrator Reiner Martens. The CAS panel confirmed the appeal committee's finding that:

- the notion of unilateral breach within the meaning of the FIFA regulations was meant to apply to contractual infringements and not, as the player argued, to contract rescission; and
- in the case at hand, the club had validly rescinded the player's contract for unilateral breach.

In a subsequent proceeding filed before FIFA's Dispute Resolution Chamber, the club was awarded €17 million in compensation for unilateral breach of the employment contract by the player. Mutu appealed the chamber's decision before the CAS, and a new panel was constituted. Chelsea designated Martens as co-arbitrator. Mutu's request to disqualify Martens was denied by the International Council of Arbitration for Sport. As that decision was made by a private body, it could not be challenged immediately before the Swiss Supreme Court.⁽³⁾ Consequently, Mutu could raise the issue of Martens' alleged partiality only before the Swiss Supreme Court in his challenge against the final CAS award which confirmed the €17 million compensation decision. Mutu argued, among other things, that Martens could not have remained independent and impartial in the compensation proceeding, after chairing the arbitral panel that ruled overwhelmingly in the club's favour in the first stage of the proceeding. The player relied, in particular, on the standards set under the International Bar Association (IBA) Guidelines on Conflict of Interests in International Arbitration 2004 concerning arbitrators' prior involvement in cases.⁽⁴⁾

Supreme Court decision

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The Swiss judges, while acknowledging the useful guidance offered by the IBA guidelines, stressed that ultimately "the circumstances of the case at hand, as well as the Swiss Supreme Court case law on the matter, will always be decisive to determine the question of conflict of interests".⁽⁵⁾ Referring to its prior decisions on the independence and impartiality in the judiciary,⁽⁶⁾ the court acknowledged that the prior involvement of a judge in a case could cause legitimate suspicion of partiality. Such prior involvement would thus be tolerated from the perspective of due process only provided that it could be reasonably and objectively considered that the judge has not acquired, in the first proceeding, a pre-formed opinion on the issues to be decided in the second proceeding to such an extent that the outcome of the second proceeding would have been pre-judged in the first proceeding.

Extending this reasoning to the arbitral process, the court considered that the prior involvement of an arbitrator in related or successive proceedings was not, as such, sufficient to conclude unconditionally with regard to his or her partiality. Rather, in the court's view, the risk of prevention should be assessed based on the concrete and specific circumstances of the case, including the nature and scope of the prior involvement and/or decisions of the arbitrator.

In the case at hand, the court considered that the first procedure between the parties was strictly confined to the determination of the player's unilateral breach. Such determination was no longer contested in the second procedure, which was itself limited to the principle and quantum of the club's compensation. The court found no indication, in the first award, of any pre-judgement on the amount of the compensation awarded. The court thus concluded that:

"save to judge arbitrator Martens on his mere intent, it is not possible to acknowledge, objectively, that by deciding the two aforementioned issues [the notion of unilateral breach within the meaning of the FIFA regulations and the club's rescission of the player's contract for unilateral breach], which were mostly theoretical, the arbitrator behaved in such a way as to cause any doubts about his impartiality and to lend support to the view that he had already formed his opinion in favour of the defendant [ie, Chelsea]."⁽⁷⁾

For the Swiss judges, the first phase of the proceeding constituted in fact a preliminary stage to the disputed award, and based on constant practice:

"saved exceptional circumstances, it is in principle not admissible [for a party] to challenge a posteriori the regularity of the composition of the arbitral tribunal having issued its final award on the sole ground that its members had already decided on the same matter when taking part in the issuance of interim or partial awards. To allow it would be tantamount to signing the death warrant of such awards."⁽⁸⁾

Comment

There appear to be few grounds to argue with the court's reasoning that, in principle, it is admissible for an arbitrator to be involved in various stages of an arbitral process without this fact alone constituting sufficient grounds to question that arbitrator's independence and impartiality. Similarly, the court's firm stance against a party's allegation, in its challenge of the final award, of partiality based on a tribunal having issued interim or partial awards in the same dispute and/or proceeding is to be welcomed. However, it could be argued that fair and balanced decision-making, which would be derived from the parties' fair and equal treatment and the integrity of the arbitral process, would require that all arbitrators be equally informed on a given case. This prerequisite of equal information among arbitrators would arguably require, subject to the specific circumstances of a case, a repetition of all or part of the procedure in case of replacement of one or more arbitrators in the course of the arbitral process. It is debatable whether this equality would have been respected, in the *Mutu* case, between Martens and the other two arbitrators who were involved in the second stage of the dispute only.

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Endnotes

(1) See, for example, Supreme Court Decision 4A_234/2010, October 29 2010. For further information on this case please see "[Independence and impartiality of party-appointed arbitrators](#)". See also Decisions 4A_210/2008, 4A_528/2007 and 4A_506/2007.

(2) Supreme Court Decision 4A_458/2009 in *Mutu v Chelsea Football Club Limited*. The full text of the decision, which will not be published in the official reports of the Supreme Court's decisions, is available in French at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

The remuneration was deemed not to be contrary to international public order as recognised in Switzerland considering the considerable economic advantages enjoyed by the player as a result of his transfer to the English club.

(3) Supreme Court Decision 4A_644/2009, April 13 2010.

(4) Section 2.1.2 (waivable red list) and 3.1.5 (orange list), accessed at www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx.

(5) Decision 4A_458/2009, ground 3.3.3.1, authors' translation.

(6) For example, ATF 126 I 168 ground 2 and references.

(7) Decision 4A_458/2009, ground 3.3.3.2, authors' translation.

(8) *Ibid*, authors' translation.

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