Swiss Supreme Court rejects set aside application based on an alleged violation of the right to be heard

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In *decision 4A_202/2016*, the Swiss Supreme Court considered a petition to set aside an award rendered by the Court of Arbitration for Sport (CAS) based on an alleged violation of the petitioner's right to be heard.

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Speedread

The Swiss Supreme Court has held that the application of Swiss law in circumstances where an arbitration agreement permitted the tribunal to apply principles of *ex aequo et bono* (principles of equity) as well as any rule of law that it considered appropriate, did not constitute a violation of a party's right to be heard. It further held that a failure to consider a party's subsidiary argument, where that argument was irrelevant, did not breach a party's right to be heard. (*Decision 4A_202/2016)*.

The dispute concerned two related agreements: one between cycling team (A) and cyclist (B) and another between A and B's image marketing company. The first agreement determined the terms of B's engagement with A between January 2011 and December 2014; the second covered the exploitation of the related image rights.

At the 2012 Tour de France, B tested positive for doping. Subsequently, the International Olympic Committee (IOC) suspended B for one year backdated from 14 July 2012. On 21 June 2013, A terminated both agreements with B and B's company with retroactive effect from 14 July 2012. B and B's company then filed a claim for compensation against A pursuant to the two agreements. The Court of Arbitration for Sport (CAS) tribunal qualified the termination of the two agreements as unjustified, awarding EUR 1'365'000 and EUR 630'000 to B and B's company, respectively.

Before the Supreme Court, A alleged that its right to be heard, enshrined in Article 190(2)(d) of the Private International Law Act, had been violated, based on two grounds.

The Supreme Court dismissed A's first ground that the CAS tribunal had taken a surprising decision to apply Swiss law. Although the parties had chosen the law of their common place of residence to govern their dispute, the arbitral agreement authorised the CAS tribunal to decide *ex aequo et bono* (on principles of equity) and to apply "any rule of law" that it considered appropriate. In line with this wording and the *jura novit curia* principle (the court knows the law), the CAS tribunal by applying Swiss law had not violated A's right to be heard. The seat of the CAS (as per CAS procedural rule 28), the fact that the CAS tribunal was composed of three Swiss arbitrators and the fact that CAS procedural rule 45 provides that Swiss law shall apply in the absence of a choice by the parties, further contributed to the conclusion that the application of Swiss law was appropriate, not surprising and did not violate A's right to be heard.

A further argued that the CAS tribunal's failure to consider its subsidiary reasoning also violated its right to be heard. The Supreme Court dismissed this argument too on the basis that a CAS tribunal does not have to consider arguments that lack relevance. In the present case, A had based its 2013 termination of the agreements on one particular contract clause. However A's subsidiary reasoning for the termination submitted in 2015 was based on an entirely different contract clause. The Supreme Court held this was inconsistent with A's behaviour at termination. Consequently, it considered this argument to have been retrospectively constructed and held that by not considering it, the CAS tribunal had not violated A's right to be heard.

Case: *Decision 4A_202/2016 (www.practicallaw.com/7-633-8681)* (Swiss Supreme Court).

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