Swiss Supreme Court confirms requirement under Swiss law to timely and expressly file objection to jurisdiction

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In decision *4A_102/2016*, the Swiss Supreme Court considered a petition to set aside an award based on the petitioners' argument that the Court of Arbitration for Sport (CAS) had exceeded its jurisdiction by deciding *de novo*.

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The Swiss Supreme Court has rejected a petition to set aside a Court of Arbitration for Sport (CAS) award. The Supreme Court held that the petitioners had forfeited the right to challenge the jurisdiction of the CAS, due to their conduct during the proceedings.

The petitioners consisted of 34 Australian football players against whom the CAS had ordered two-year bans for violations of anti-doping regulations. The petitioners' main argument was that the CAS had exceeded its jurisdiction (under Article 190(2)(b) of the Private International Law Act) by deciding the dispute *de novo* (that is, as a complete rehearing) based on the CAS Code, rather than on the more restrictive provisions of the Australian Football League's Anti-Doping Code 2010.

The Supreme Court held that, although the petitioners had initially questioned the jurisdiction of the CAS, they did not object when the CAS said that it intended to render its decision *de novo* based on the CAS Code. Instead, they signed, without reservation, an Order of Procedure confirming the jurisdiction of the CAS and its "full power to review the fact and the law". Further, the petitioners themselves submitted new evidence and commented at the hearing that the CAS should decide the matter *de novo*.

The Supreme Court stated that the petitioners (who were duly represented) could have reserved their rights when signing the Order of Procedure. By not doing so, the petitioners had accepted the CAS' jurisdiction and were barred from raising that issue before the Supreme Court. The Supreme Court nevertheless proceeded to comment, *obiter*, on the merits of the jurisdictional issue. The Supreme Court reminded that on an alternative basis, the validity of an arbitration agreement is determined by Swiss law. In the Supreme Court's view, under Swiss law, the CAS needs full scrutiny in all its appeal cases, in order to set the necessary international standards. Therefore, any restriction would be impossible, and based on the parties' intention at the time of concluding the contract containing the arbitration agreement, it could be expected that the parties would have provided for full scrutiny had they been aware of such impossibility.

Case: *Decision 4A_102/2016 (www.practicallaw.com/w-004-5352)* (Swiss Supreme Court).

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