

CAS termination orders subject to judicial review (Swiss Supreme Court)

by Practical Law Arbitration, with *Schellenberg Wittmer Ltd*

Legal update: case report | Published on 05-Jan-2021 | Switzerland

In Decision *4A_416/2020*, the Swiss Supreme Court dismissed an application to set aside a termination order issued by the Deputy President of the Court of Arbitration for Sport (CAS) Appeals Division for alleged breach of procedural public policy.

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The Swiss Supreme Court has dismissed an application to set aside a termination order of the Deputy President of the CAS Appeals Arbitration Division.

A dispute arose between two football clubs: A (applicant) and B (respondent). A filed an appeal with the CAS against the decision of FIFA's Single Judge of the Players' Status Committee. The CAS set a deadline of 14 May 2020 for A to appoint an arbitrator, warning A that non-compliance with this deadline would be considered a withdrawal of its appeal under article R36 of the CAS Code. A appointed its arbitrator a day late on 15 May 2020 and the Deputy President issued a termination order due to the late appointment.

A applied to set aside the termination order based on a violation of procedural public policy (*article 190(2)(e), PILA*), arguing that the CAS had applied article R36 of the CAS Code in an arbitrary way. A submitted that this provision only covers cases in which an arbitrator resigns, dies, is challenged or revoked. A also invoked a violation of the prohibition of excessive formalism, alleging it should have been given a grace period to nominate its arbitrator in accordance with article R48 of the CAS Code.

The court underscored that the termination order was not a mere procedural order by the Deputy President, but that it was akin to a decision on admissibility that terminated the proceedings. As such, it was subject to challenge before the court despite not being termed an "award".

On the merits, the court emphasised that an erroneous, or even arbitrary, application of arbitration rules does not constitute a violation of public policy. Further, the interpretation and application of procedural rules are beyond its scope of review and, in any event, the application of article R36 was not to be criticised in this matter.

On the second argument, the court underlined that while article 29(1) of the Swiss Constitution prohibits excessive formalism, procedural standards are necessary to guarantee the principle of equal treatment and the application of substantive law. Here, the CAS had not breached the prohibition of excessive formalism.

This decision confirms that CAS termination orders can be challenged before the Swiss Supreme Court. Further, the court has not ruled out that a serious violation of the prohibition of excessive formalism could constitute a breach of procedural public policy.

Case: *Decision 4A_416/2020 (Swiss Supreme Court) (4 November 2020)*.

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