

# Swiss Supreme Court rejects challenge based on "appellatory" criticism of arbitral award

by **Practical Law Arbitration**, with **Schellenberg Wittmer Ltd**

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In *Decision 4A\_384/2020*, the Swiss Supreme Court rejected an application to set aside a CAS award, confirming that alleged violations of the right to be heard cannot be used to obtain "appellatory" review of the merits of an arbitral award.

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In a recently published French-language decision, the Swiss Supreme Court rejected an application to set aside an award by a CAS panel. The applicant's arguments on violations of his right to be heard were in part unfounded and in part inadmissible because they contained "appellatory" criticism of the award's merits.

A football player claimed that, in September 2016, he entered into a two-year employment contract with a club starting 1 January 2017, which the club disputed. In October 2016, the player and a different club concluded a contract for a fixed term until 15 June 2017, which ended in December 2016. Both the FIFA Dispute Resolution Chamber and, upon appeal, a CAS panel, rejected the player's claim for damages against the first club. The player requested that the Swiss Supreme Court set aside the award, arguing that the CAS had violated his right to be heard.

As a preliminary matter, the Supreme Court confirmed that the answer to the setting aside application may be filed by the CAS Director General, as opposed to the CAS panel that rendered the challenged award, even though the CAS Code provides no basis for this practice.

First, the player argued that the award's reasoning was surprising. The CAS had not decided whether the contract was effectively concluded, but relied on FIFA regulations and found that the alleged first contract had in any case automatically terminated when the player concluded the second contract (which partly related to the same period). The Supreme Court considered that this was not surprising, given that the relevant provision was discussed in the club's written submission and at the hearing.

Second, the player argued that the CAS had omitted several essential issues when deciding that the alleged first contract was automatically terminated due to the second contract. The court recalled that an arbitral tribunal has a duty to examine relevant issues, but that the right to be heard cannot be used to obtain a review of the application of substantive law. Therefore, the player's "appellatory" criticism of the awards' merits was inadmissible. In any case, the player's arguments would have been unfounded given the panel had refuted them, at least implicitly.

The decision confirms that mere criticism of the merits of an award put forth as a violation of the right to be heard is inadmissible before the Supreme Court.

Case: *Decision 4A\_384/2020 (Swiss Supreme Court) (10 December 2020)*.

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