

Excessive formalism part of procedural public policy only in serious cases

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

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In *Decision 4A_666/2020*, the Swiss Supreme Court dismissed an application to set aside an award rendered by the Court of Arbitration for Sport (CAS), holding that excessive formalism may be part of procedural public policy, but its requirements were not fulfilled in this case.

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The Swiss Supreme Court (SC) has dismissed an application to set aside an award rendered by the Court of Arbitration for Sport (CAS).

A dispute arose between a football player and a club in relation to termination of an employment contract. The FIFA Dispute Resolution Chamber (DRC) ordered the club to pay damages for termination without just cause.

Using article 15(1) of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, the DRC notified the operative part of its decision by email. The club failed to comply with the decision, informed FIFA that it had not received the decision and requested the DRC's reasons. FIFA dismissed the request for reasons because it was not made within ten days of notification of the decision which had therefore become final. The club later alleged that the decision email was in its spam folder. It filed an appeal with CAS against the DRC's decision and FIFA's decision to reject the club's request.

A CAS tribunal dismissed the appeal, finding that the club acted negligently by not regularly reviewing its spam folder and the DRC's decision had become final and binding.

The club argued that the tribunal acted arbitrarily by giving more weight to the player's arguments without justification, and by using arbitrary reasoning, thus violating the club's right to be heard. The SC disagreed, finding that whether the club had acted negligently involved an assessment of evidence and application of the law, which falls outside of the SC's powers of review.

The club also invoked a violation of procedural public policy, asserting that the tribunal had been excessively formalistic in finding the club's appeal inadmissible because of its late request for reasons. The SC noted that avoidance of excessive formalism may indeed form part of procedural policy in serious cases. However, strict compliance with rules relating to appeals (time limits and other conditions of admissibility) is necessary to equal treatment and legal certainty. It therefore dismissed the club's plea. Finally, on a more practical note, the SC explained that while article 77(2bis) of the Supreme Court Act allows parties to file submissions in English from 1 January 2021, this does not apply to the SC's communications, procedural orders and judgments, which even in cases filed in English must be written in one of the Swiss national languages.

Case: *Decision 4A_666/2020 (17 May 2021)* (Swiss Supreme Court).

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