

Arbitral tribunal competent to investigate jurisdiction of its own volition where respondent fails to participate (Swiss Supreme Court)

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

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In *Decision 4A_618/2019*, the Swiss Supreme Court dismissed an application to vacate an award based on the pleas of wrongful decision on jurisdiction and breach of procedural public policy. It found that the sole arbitrator was permitted to conduct investigations of her own volition regarding her jurisdiction where the respondent failed to participate in the arbitration. Moreover, a decision of an anti-doping authority that fails to indicate the remedies available to challenge it, does not result in a violation of public policy, especially where a party is legally represented.

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In a recently published French-language decision, the Swiss Supreme Court dismissed an application to set aside a Court of Arbitration for Sport (CAS) award that had declined jurisdiction. The court found that the arbitrator was entitled to make investigations of fact of its own volition with regard to matters relevant to determine its jurisdiction in a case where the respondent failed to participate.

The Greek anti-doping authority sanctioned a football player (A) for a doping offence. The decision did not contain a reference to any legal recourse. Nonetheless, A initiated a CAS arbitration against that decision, in which the anti-doping authority failed to participate as the respondent. The sole arbitrator issued a final award declining jurisdiction. A challenged the award before the Swiss Supreme Court, alleging a wrongful decision on jurisdiction and a violation of procedural public policy.

The court dismissed the challenge. First, A had argued that the arbitrator had no authority to make any additional enquiries on her own motion as to whether A had standing before the CAS, but should rather have only relied on the information available to her, and that on that basis, the arbitrator should have confirmed her jurisdiction. The court rejected this argument holding that, while the arbitrator was not required to do so, she was at liberty to request further information or even make her own investigations on A's background to clarify whether she had jurisdiction to hear the dispute.

Second, A submitted that the decision of the anti-doping authority violated procedural public policy because it did not set out the remedies available to challenge it. The court indicated (obiter) that it was highly questionable whether a failure to mention the available legal recourses in a decision could ever amount to a violation of procedural public policy. In any event, the court found that A was represented by a lawyer to whom the decision of the anti-doping authority had been communicated. As such, A could have sought advice from his lawyer to determine what the competent appeal authority was.

The decision is a helpful reminder of the tribunal's competence to examine its own jurisdiction in default proceedings on its own motion and of the high threshold the court applies in connection with the plea of violation of (procedural) public policy.

Case: *Decision 4A_618/2019 (17 September 2020)* (Swiss Supreme Court).

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