

Validity of CAS arbitration clause upheld despite party's alleged lack of financial means (Swiss Supreme Court)

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

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In *Decision 4A_166/2021*, the Swiss Supreme Court dismissed an application to annul a Court of Arbitration for Sport (CAS) award, rejecting, among other things, the applicant's argument that the arbitration agreement had been rescinded because the applicant lacked the financial means to cover the cost of the proceedings.

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In a recently published German-language decision, the Swiss Supreme Court dismissed a set-aside application in respect of a Court of Arbitration for Sport (CAS) award. It rejected the applicant's argument that his poor financial standing invalidated the arbitration agreement and that the insufficient legal aid granted to him constituted a violation of the principles of equal treatment and of the right to be heard.

The Union Cycliste Internationale (UCI) had found that the applicant was in violation of anti-doping regulations, and financially sanctioned and suspended the applicant for four years. The applicant appealed the decision to CAS, and was granted legal aid, although, according to the applicant, an insufficient amount. The CAS panel reduced the financial sanction but confirmed the suspension. The applicant applied to set-aside the CAS award before the Swiss Supreme Court.

Among other things, the court rejected the applicant's argument that the CAS arbitration agreement was invalid as it had been concluded through fraud or fundamental error, because the UCI's Anti-Doping tribunal had informed him that legal aid was available for CAS arbitration, but in fact the legal aid was insufficient to cover such proceedings. The court ruled that the reference to the mere possibility of being granted legal aid did not result in an act of fraud or error. Consent to CAS arbitration crystallised with the conclusion of the applicant's sports license, thereby excluding causation between the alleged error and the conclusion of the arbitration agreement. The court further explained that if an arbitral institution, such as CAS, provides legal aid to indigent parties, this precludes a dissolution of the arbitration agreement due to lack of financial means based on Article 6(1) of the European Convention on Human Rights or Article 29a of the Swiss Constitution.

Further, the court dismissed the applicant's plea that the principles of equal treatment and the right to be heard had been breached due to the insufficiency of legal aid granted. It ruled that the applicant had failed to show any violation of those principles and why equal treatment and the right to be heard would entail the right to the free choice of a legal representative and of the payment for such representation.

This decision is interesting for international arbitration in general as it addresses the consequences of poor financial standing on the validity of an arbitration agreement.

Case: *Decision 4A_166/2021 (Swiss Federal Supreme Court) (22 September 2021)*.

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