

CAS jurisdiction confirmed despite compulsory arbitration clause (Swiss Supreme Court)

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

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In *Decision 4A_600/2020*, the Swiss Supreme Court dismissed an application to set aside a Court of Arbitration for Sport (CAS) award thereby confirming the European Court of Human Rights' decision in *Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018))*, that CAS is an independent and impartial tribunal that has jurisdiction notwithstanding the fact that a party did not voluntarily consent to the arbitration clause.

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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 and confirmed by reference to the European Court of Human Rights' (ECtHR) decision in *Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018))*, that compulsory arbitration in sport is permissible provided the arbitral tribunal is sufficiently independent and impartial.

The dispute arose between two football clubs (A and C) belonging to federation B, regarding the use of the name and brand of historical football club D. In July 2019, B's executive committee granted C the right to participate in B's competitions under D's name and brand. A appealed the decision to CAS, the appellate body provided for in B's statutes, but argued that CAS lacked jurisdiction because the domestic courts had exclusive jurisdiction. CAS dismissed the appeal, found that A accepted CAS jurisdiction by signing a declaration consenting to B's statutes, and confirmed B's decision. A challenged the CAS award before the Swiss Supreme Court who dismissed all grounds of challenge.

First, A relied on ECtHR decisions in *Cañas (ATF 133 III 235)* and *Mutu and Pechstein v Switzerland* to argue that it was not bound by the arbitration clause in B's statutes because it had not willingly consented to it, and therefore CAS had wrongly accepted jurisdiction. The court distinguished these cases from the present case, which concerned two football clubs, not an athlete and a federation. Moreover, the court recalled that the ECtHR accepts "compulsory arbitration" provided the arbitral tribunal is independent and impartial, which the ECtHR in *Mutu and Pechstein v Switzerland* found CAS to be.

Second, A claimed that CAS' decision granting production of only excerpts of recordings allegedly demonstrating that B had previously tolerated A's use of D's name, violated its right to be heard. However, the court noted from the procedural history that it was A itself who had objected to production of the recordings.

Finally, A argued that the award was contrary to public policy because it endorsed a decision taken by B who had allegedly acted in bad faith by adopting a contradictory position on use of D's name. The court found that A had not made this argument before CAS and could not raise it in retrospect. Moreover, A did not precisely demonstrate how the award was contrary to Swiss public policy.

Case: *Decision 4A_600/2020 (27 January 2021)* (Swiss Supreme Court).

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