

CAS award annulled for lack of jurisdiction (Swiss Supreme Court)

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

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In *Decision 4A_564/2020*, the Swiss Supreme Court upheld a motion to set aside an award of the Court of Arbitration for Sport (CAS) for lack of jurisdiction, confirming that a tribunal must determine *ex officio* (of its own motion) whether it has jurisdiction and that the Supreme Court has full power to review a plea for lack of jurisdiction.

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In a recently published French-language decision, the Swiss Supreme Court set aside a Court of Arbitration for Sport (CAS) award for lack of jurisdiction under article 190(2)(b) of the Swiss Private International Law Act (PILA).

A dispute arose between two Colombian football clubs regarding the transfer of a player. Upon the applicant's request, the Commission on the Status of the Player of the Major Division of Colombian Football (CSJ DIMAYOR), issued an award in the applicant's favour, which the respondent unsuccessfully appealed to the CSJ FCF Players' Status Committee (CSJ FCF) and then to the CAS Panel together with a request for interim measures.

The CAS Panel dismissed the applicant's objection to jurisdiction and issued an award against it. The applicant filed a motion to set aside the CAS award, pleading lack of jurisdiction.

In its decision, the Supreme Court rejected the respondent's argument that the CAS Panel's interpretation of the applicable rules was binding on the court. It recalled that, when seized of a plea of lack of jurisdiction, it freely examines the questions of law, including the preliminary questions, which determine the jurisdiction of the arbitral tribunal (or lack thereof).

The court noted that an arbitral tribunal must determine *ex officio* whether it has jurisdiction (*article 186(1), PILA*) and rejected the argument that the burden of proof regarding jurisdiction rested on the respondent as the party that brought the proceedings. In addition, the court noted that article 186(2) PILA, according to which a plea for lack of jurisdiction must be raised before any defense on the merits, is not mandatory, and that answering a request for interim measures does not amount to an implicit acceptance of the tribunal's jurisdiction.

The Supreme Court ruled that the CAS Panel had incorrectly applied the "pro arbitration" and *contra proferentem* principles: neither the applicant nor the respondent had drafted the Colombian football federation rules, which were clear in that no appeal to CAS against the CSJ FCF's decision acting as a second instance was possible. Therefore, based on the applicable rules, there was no arbitration agreement giving CAS jurisdiction, despite the CAS Panel's efforts to seek a legal basis in the Colombian football federation rules. The court also ruled that whether the judicial bodies of sports associations can be equated with actual arbitration courts was not decisive in deciding whether CAS had jurisdiction.

Case: *Decision 4A_564/2020 (7 June 2021)* (Swiss Supreme Court).

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