

Arbitration - Switzerland

Standard form insufficient to exclude violation of right to be heard

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Introduction

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Introduction

The Supreme Court recently ruled that the mere proviso in an award whereby all relevant facts, arguments and evidence submitted by the parties have been taken into account, but only those necessary to explain the reasoning have been restated, does not suffice to preclude a violation of the parties' right to be heard.⁽¹⁾

Facts

A dispute arose after an athlete had allegedly evaded an anti-doping control organised by the International Association of Athletics Federations (IAAF). The IAAF challenged the local athletics federation's decision to clear the athlete before the Court of Arbitration for Sport. The court upheld the IAAF's challenge, annulled the local athletics federation's decision and imposed a two-year ban on the athlete. The athlete challenged the award before the Supreme Court on the grounds of infringement of the right to be heard.

Decision

Referring to the well-established principles to be applied when examining allegations of violation of the right to be heard, the Supreme Court reiterated that the right to be heard is a formal right, the infringement of which entails the annulment of the decision irrespective of the challenging party's chance of obtaining a different ruling.⁽²⁾

The athlete argued, among other things, that the arbitrators had ignored the subsidiary argument developed in his written submission. In the award, the arbitrators stated that they had taken into account all the facts, arguments and evidence submitted by the parties during the proceedings, but that only those arguments and evidence necessary to explain their reasoning would be restated. The court found such standard form, which it qualified as a *clause de style*, to be insufficient to preclude any violation of the right to be heard when arbitrators omit to consider some of the statements, arguments, evidence and offers of evidence of the parties that are material for the decision to be issued.⁽³⁾

However, in this case, the defendant had established in its written submission before the Supreme Court that the argument ignored by the arbitrators was immaterial to the resolution of the dispute. The Supreme Court thus denied any breach of the right to be heard and dismissed the challenge.

The Supreme Court also confirmed that a party referring its case to an accelerated arbitration proceeding cannot complain subsequently, in a challenge against the final award, about the restricted opportunities to argue its case and the shorter deadlines subject to the parties' right to be heard and to an equal treatment.⁽⁴⁾ It also stated that a two-stage communication of an award (dispositive part – full motivation) does not affect the unity of the final award.⁽⁵⁾

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Endnotes

(1) Supreme Court Decision 4A_730/2012. See www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html

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(in French).

(2) Ground 3.1, referring to Supreme Court Decision 4A_360/2011. For further details please see "[Violation of right to be heard and partial annulment](#)".

(3) Ground 3.3.2.

(4) Ground 3.2.1.

(5) Ground 5.

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