

# Switzerland—no set-aside for CAS award on legal aid grounds (*A v Union Cycliste Internationale*)

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**Arbitration analysis:** In a landmark decision issued on 22 September 2021 and published on 5 October 2021, the Swiss Federal Tribunal (the Swiss Supreme Court) rejected an application requesting the setting aside of a Court Arbitration for Sport (CAS) award. The decision dealt with the crucial issue of legal aid in international arbitration proceedings. In its analysis, the court examined whether the legal aid system offered by the CAS was sufficient to preserve the applicant's fundamental procedural rights. It found that the applicant's rights to access justice and to equal treatment were not infringed. Written by Pierre Ducret, partner at CMS von Erlach Partners Ltd (Geneva).

*A v Union Cycliste Internationale* [4A 166/2021](#)

## What are the practical implications of this case?

The Swiss Federal Tribunal clarified that the possibility for an indigent party to rescind an arbitration agreement depends on the availability of legal aid. Whereas the state (at least in Switzerland) does not grant legal aid for international arbitral proceedings, arbitral institutions may provide for other solutions to enable access to arbitration despite the lack of financial means. Depending on the fairness and effectiveness of the legal aid system put in place, an indigent party may therefore be prevented from rescinding an arbitration agreement. With regard to CAS proceedings, the Swiss Federal Tribunal considered that the legal aid system put in place by the CAS institution allows indigent persons to access to it. Furthermore, the Swiss Federal Supreme Court considered that the limitation of choice of counsel to a pre-established list of pro bono counsel did not constitute an infringement to the right to access to justice and/or to the right to equal treatment. The decision of the Swiss Federal Tribunal reinforces the binding nature of arbitration agreements contained in sports regulations.

## What was the background?

On 30 May 2017, A underwent an out-of-competition doping control ordered by the Union Cycliste Internationale (UCI). Following the opening of a disciplinary procedure, the single judge of the UCI Anti-Doping Tribunal found that A had breached UCI Anti-Doping Rules and imposed him a four-year ban and a fine of €56,000.

On 14 December 2018, A filed an appeal with the CAS, along with a legal aid application which was mostly rejected. Although A was awarded the sum of CHF1,500 for his travel and accommodation costs and those of his counsel, the International Council of Arbitration for Sport (ICAS) rejected his request to be assisted by pro bono counsel on the ground that he was already represented by counsel who was not on the CAS list of pro bono counsel. The ICAS also rejected his request to cover the costs of the same number of experts as UCI. After A indicated that he had rescinded the arbitration agreement, the ICAS reconsidered its decision by granting the assistance of a pro bono counsel. The procedure continued after A informed the CAS that he had appointed a pro bono counsel. On 10 February 2021, the CAS partially upheld the appeal by reducing the fine to €26,000. However, the four-year ban was confirmed.

Within the 30-day time limit set by Swiss law, A filed an application to set aside the CAS award with the Swiss Supreme Court arguing inter alia that the CAS had no jurisdiction because he had rescinded the arbitration agreement. In this respect, A claimed that he had been misled as to the concrete scope of the legal aid offered by the CAS. In his application, A also invoked various violations of his due process rights.

## What did the court decide?

The court swiftly dismissed A's argument concerning the alleged lack of jurisdiction of the CAS. However, in an obiter dictum, the court examined the fairness and effectiveness of the legal aid system put in place by the CAS. Having reviewed the provisions of the Guidelines on Legal Aid issued by the ICAS, it found that the path to the CAS was in principle open to indigent persons. In this context, the court noted that it would be wrong to conclude that the right of access to justice can only be preserved with the assistance of a counsel entitled to a fee. In conclusion, the court held that there was no reason to enable A to rescind the arbitration agreement.

The court went on to examine whether A's due process rights had been breached. The federal judges observed that the applicant was not able to demonstrate how those rights would materialise in a right to freely appoint a non pro bono counsel. In any event, A's criticisms as to the CAS pro bono counsel list were dismissed.

Furthermore, the court held that the preservation of the right to equal treatment under Swiss law does not require that the opposing parties have equal resources for the conduct of the procedure. Rather, what is required is that each party is given the same opportunity to present his or her point of view in the arbitration.

### Case details:

- Court: Swiss Federal Tribunal
- Judge: Hohl (chairwoman), Kiss, Rüedi and May Canellas
- Date of judgment: 22 September 2021

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