

CAS decision on timely filing of submission not open to challenge before Swiss Supreme Court

by **Philippe Bärtsch** (Partner) and **Simon Demaurex** (Associate), Schellenberg Wittmer Ltd

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In *Decision 4A_287/2019*, the Swiss Supreme Court held that a decision by a CAS Panel declaring that an appeal brief had been filed in a timely manner did not relate to the tribunal's jurisdiction *ratione temporis*. As a result, the decision could not be challenged before the Supreme Court.

In a French-language decision of 6 January 2020, but recently published, the Swiss Supreme Court declared inadmissible an application to set aside a decision by a Panel of the Court of Arbitration for Sport (CAS) that an appeal brief had been filed timely.

In this case, which had already been brought before the Supreme Court (see *Legal update, Counsel's conflict of interest and late filing of appeal in CAS arbitration are admissibility and not jurisdictional issues (Swiss Supreme Court)*), the applicant requested the CAS to terminate the proceedings on the ground that the respondent's appeal brief had been filed belatedly (as per *Articles R49 and R51* of the CAS Code). The Panel issued a decision dismissing the applicant's objections to the admissibility of the appeal brief. The applicant then applied to the Supreme Court to set aside that decision, arguing, amongst other things, that the Panel lacked jurisdiction *ratione temporis* under Article 190(2)(b) of the Swiss Private International Law Act because the appeal brief had not been filed timely.

The Supreme Court recalled that, in order to be admissible, an application to set aside must be directed against an arbitral award. This notion includes final awards, partial awards and preliminary or interim awards. When a tribunal finds that it lacks jurisdiction, this constitutes a final award. Conversely, when a tribunal dismisses a jurisdictional objection, this represents an interim award. The Supreme Court further considered that the "common denominator" of these jurisdictional decisions is that they rule, in a final manner, on the tribunal's jurisdiction. However, it is not possible to appeal against an award that only rules "on a provisional basis" on the tribunal's jurisdiction.

Applying those principles, the Supreme Court found that the Panel's decision related to a procedural issue that did not pertain to jurisdiction, that is, the admissibility of the appeal brief. Although the Panel had to implicitly assume *prima facie* that it had jurisdiction, it did not rule in a final and definitive manner on its jurisdiction. The Supreme Court therefore declared the appeal inadmissible.

Interestingly, the Supreme Court held that the characterisation of the decision by the CAS Secretary General, who had filed determinations in the proceedings, was not binding on the Supreme Court, but nevertheless represented a relevant element that had to be taken into account.

Case: *Decision 4A_287/2019* (Swiss Supreme Court).

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