# Legal nature of CAS ADD left undecided while obligation to exhaust arbitral remedies before motion to set aside confirmed (Swiss Supreme Court)

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In *Decision 4A_612/2020*, the Supreme Court declared inadmissible a motion to set aside a decision of the Anti-Doping Division of the Court of Arbitration for Sport (CAS ADD) because the applicant had not exhausted available arbitral remedies. It left the question of the legal nature of the CAS ADD undecided.



## Speedread

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In a recently published French language decision, the Swiss Supreme Court dealt with the issue of whether a decision of the Anti-Doping Division of the Court of Arbitration for Sport (CAS ADD) can be directly challenged before the Supreme Court.

The underlying dispute was between an Olympian biathlete (Athlete) and the International Biathlon Union (IBU) in relation to an anti-doping rule violation (ADRV).

The IBU filed a request for arbitration before the CAS ADD. The Athlete disputed the jurisdiction of the CAS ADD.

A sole arbitrator confirmed that she had jurisdiction to hear the matter and rendered a decision finding that the Athlete had committed an ADRV, sanctioning him with a four-year ban and disqualifying his results.

The Athlete filed a motion with the Supreme Court to set aside the CAS ADD's decision. At the same time, the Athlete appealed the CAS ADD's decision with the CAS Appeals Arbitration Division.

 

The Supreme Court first recalled that since 2019, the IBU has delegated its disciplinary power in doping matters to the CAS ADD. The Supreme Court further explained that there was no need to decide whether the CAS ADD's decision should be deemed a decision taken by a body of a sports association or a genuine arbitral award because in any event the set-aside application was inadmissible.

If the CAS ADD's decision were deemed a decision of the sports federation concerned, the court found that it only represented the IBU's expression of will, constituting an act of management but not a judicial decision, which cannot be directly challenged before the Supreme Court. If the CAS ADD's decision were deemed an arbitral award, according to the applicable CAS rules, it had first to be challenged before the CAS Appeals Arbitration Division, as the Athlete had done with his parallel appeal.

The Supreme Court therefore underscored that the rule that all prior legal remedies must be exhausted before the Supreme Court can be seized, also applies in international arbitration. (*Decision 4A_612/2020) (18 June 2021).*)

## Background

Article A2 first paragraph of the *Arbitration Rules of the CAS Anti-Doping Division* (CAS ADD Rules) provides that:

"CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged anti-doping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an anti-doping rule violation has occurred. CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions."
Article A21 fifth paragraph CAS ADD Rules provides that:

"Unless Article 15 para. 1 applies, the award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons by mail or courier in accordance with Articles R47 et seq. of the Code of Sports-Related Arbitration, applicable to appeals procedures."
Article 47(1) of the *Code of Sports-related Arbitration* (CAS Code) states:

"An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned."
Article 75(1) of the *Supreme Court Act* (SCA) provides that:

"The appeal is admissible against decisions taken by the cantonal authorities of last instance, by the Federal Administrative Court or by the Federal Patent Court."
Article 77(1) and (2) of the SCA provides that:

Appeals in civil matters, regardless of the amount in dispute, are admissible against decisions of arbitral tribunals:
in the case of international arbitration, under the conditions set out in Articles 190 to 192 of the Federal Act of 18 December 1987 on Private International Law;
[...] In these cases, Art. 48 para. 3, 90-98, 103 para. 2, 105 para. 2, 106 para. 1 and Art. 107 para. 2 do not apply, insofar as the latter provision allows the Supreme Court to rule on the merits of the case.
Article 390(1) of the Swiss Civil Procedure Code (CPC) provides that:

 

"By express declaration in the arbitration agreement or in a subsequent agreement, the parties may agree that the arbitral award may be contested by way of objection to the cantonal court that has jurisdiction under Article 356 paragraph 1."
Article 391 of the CPC provides that:

"An objection is only admissible after the means of arbitral appeal provided for in the arbitration agreement are exhausted."

## Facts

The dispute involved a former international level biathlete (Athlete) and the International Biathlon Union (IBU), the world governing body for biathlon, based in Salzburg, Austria.

Between 24 January 2010 and 14 February 2014, various blood samples were taken in order to establish the Athlete's biological passport. In a report dated 21 March 2017, a panel of three experts concluded that it was highly probable that the Athlete had made use of a prohibited substance or method. After hearing the Athlete and conducting additional testing, the experts confirmed on 11 January 2020 their initial finding.

On 21 January 2020, the IBU charged the Athlete with a violation of article 2.2 of the IBU Anti-Doping Rules (2009 edition) for using a prohibited substance or method between 2010 and 2014, and invited the Athlete to either acknowledge the anti-doping rule violation or to request a hearing.

On 7 February 2020, the Athlete disputed the doping charges.

On 25 February 2020, the IBU filed a request for arbitration with the Anti-Doping Division of the Court of Arbitration for Sport (CAS ADD) pursuant to article 13 of the CAS ADD Rules.

On 6 March 2020, the Athlete raised the procedural objection that the CAS ADD lacked jurisdiction to hear the matter.

By decision dated 27 October 2020, titled "Arbitral Award", a sole arbitrator asserted jurisdiction over the matter and found that the Athlete had violated article 2.2 of the IBU Anti-Doping Rules, pronounced his suspension for four years from the date of the award and ordered the disqualification of all results obtained by the Athlete between 24 January 2010 and the end of the 2013 and 2014 season. Under the heading "Appeal", the sole arbitrator specified that the decision could be appealed to the CAS Appeals Arbitration Division in accordance with article 47 of the CAS Code.

On 23 November 2020, the Athlete filed a motion to set-aside the CAS ADD's decision with the Supreme Court.

At the same time, the Athlete challenged the CAS ADD's decision to the CAS Appeals Arbitration Division.

## Decision

The Supreme Court found that the motion to set-aside the CAS ADD's decision was inadmissible.

It recalled that in 2019, the IBU had delegated its disciplinary powers in doping matters to the CAS ADD so that this body would sit "as the Disciplinary Tribunal" for the IBU. As such, the CAS ADD replaced the previous IBU Anti-Doping Hearing Panel (IBU ADHP) as the first instance body. The Supreme Court then pointed out that, like the previous IBU regulations, the new regulations also provide for the possibility of appealing first-instance decisions

 

to the CAS Appeals Arbitration Division. Therefore, the legal situation has not changed with regard to an athlete's right of appeal if it is found guilty in the first instance of an ADRV.

As to the admissibility of the set-aside application, the Supreme Court considered that there was no need to decide whether the CAS ADD's decision should be characterized as a decision taken by an internal body of a sports federation or a genuine arbitral award that could be challenged before the Supreme Court. This was because in both cases the set-aside application was inadmissible.

## CAS ADD as an internal body of the IBU

Recalling its previous case law, the Supreme Court held that, assuming the CAS ADD's decision was a disciplinary decision rendered by a division of CAS by delegation from the IBU, such decision would be of the same legal nature as a decision previously taken by the IBU ADHP, namely the expression of will of the IBU, meaning an "act of management" and not a judicial act. According to the Supreme Court, a decision of this kind can be challenged by means of a claim before a court based on article 75 of the Swiss Civil Code when Swiss law is applicable, or before an arbitral tribunal, provided that the latter represents a proper judicial authority and not merely the internal jurisdictional body of the association concerned.

By reference to the *Mutu and Pechstein v Switzerland* case, the Supreme Court concluded that in the present case, the CAS ADD's decision could be challenged before the CAS Appeals Arbitration Division, which is a truly independent and impartial tribunal (see *Legal update, CAS procedures compatible with right to a fair trial except for refusal of public hearing (European Court of Human Rights)*). This is in fact what the Athlete did, in addition to his challenge to the Supreme Court. Therefore, the Supreme Court found that CAS ADD's decision could not be directly challenged in the Supreme Court. Only the decision of the CAS Appeals Arbitration Division could ultimately be challenged.

## CAS ADD as an arbitral tribunal proper

The Supreme Court explained that even if the CAS ADD were considered an arbitral tribunal proper, the set-aside application would equally be inadmissible, and dismissed the Athlete's arguments to the contrary.

First, the Athlete had argued that the CAS ADD's decision was a preliminary award within the meaning of article 190(3) PILA because it purportedly settled procedural questions, namely the CAS ADD's jurisdiction and the constitution of the tribunal. The Athlete further contended that because the CAS ADD lacked jurisdiction, the CAS Appeals Arbitration Division would equally lack jurisdiction to rule on the CAS ADD's jurisdiction. Therefore, the Athlete contended that only the Supreme Court could rule on his pleas of lack of jurisdiction.

The Supreme Court disagreed: it held that the Athlete was in fact confusing the question of the final nature of a final award (as opposed to a preliminary award or a partial award, which do not put an end to the proceedings) with that of the finality and enforceability of the award, which consists in determining whether the award is subject to judicial review. The Supreme Court concluded that the Applicant was incorrectly characterizing the CAS ADD's decision as an interim award.

Second, the Athlete contented that because article 77 SCA does not expressly contain an obligation to exhaust all legal remedies, but merely states that an arbitral award can be challenged before the Supreme Court, the decision was open to an immediate challenge before the Supreme Court.

 

The Supreme Court explained that the rationale of the obligation to exhaust all prior instances is that the Supreme Court should in principle only have to deal with a case once, and that such a principle also extends to arbitral awards. In this respect, the Supreme Court mentioned *obiter* that article R47 of the CAS Code also provides that an appellant must have exhausted all legal remedies prior to the appeal. Further, the Supreme Court referred to article 391 of the Swiss Civil Procedure Code (CPC), governing domestic arbitration, according to which a motion to set aside an arbitral award before the Supreme Court is only admissible after all arbitral remedies provided for in the arbitration agreement have been exhausted. The Supreme Court found that there was no reason to depart from this requirement in international arbitration, even if that requirement is not expressly mentioned in article 77 SCA or in article 190 PILA. A further element in support of the Supreme Court's finding is the analogous application of article 75(1) SCA which provides that the Supreme Court hears appeals against decisions of last instance courts.

Third, the Athlete argued that an exception should be made to the requirement to exhaust all available arbitral remedies on the ground that an appeal to the CAS Appeals Arbitration Division would be made in vain because the CAS Appeals Arbitration Division is organizationally linked to the CAS ADD. Therefore, the CAS Appeals Arbitration Division does not meet the Athlete's right to an independent and impartial tribunal.

The Supreme Court dismissed that argument reasoning that, nothing could be drawn from an analogous application of article 390(1) of the CPC and from case law on that provision, because it deals with a different issue. In any event, a mere allegation of lack of impartiality by the CAS AAD would not allow the Athlete to skip a step and file a set-aside application against the CAS ADD directly with the Supreme Court.

## Comment

This decision is noteworthy not only in relation to sports arbitration, but in relation to international arbitration in general, as it confirms that all available arbitral remedies must be exhausted before a set-aside application can be filed with the Supreme Court, even if such a rule is not expressly provided for under Swiss law governing international arbitration.

With regard to sports arbitration specifically, the Supreme Court did not rule on the legal nature of the CAS ADD, that is, whether its decisions qualify as arbitral awards proper or merely internal decisions of the sports federation that has delegated its decision-making powers in anti-doing matters to the CAS ADD. The decision also does not address the situation where a decision of the CAS ADD is not appealed before the CAS Appeals Arbitration Division and becomes final or where the CAS ADD sits as a three-member panel, a scenario in which article A15(1) CAS ADD Rules provides that no appeal before the CAS Appeals Arbitration Division is possible. The future will show to what extent the Supreme Court accepts challenges against such decisions.

## Case

*Decision 4A_612/2020 18 June 2021 (18 June 2021)* (Swiss Supreme Court).

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