

Counsel's conflict of interest and late filing of appeal in CAS arbitration are admissibility and not jurisdictional issues (Swiss Supreme Court)

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In *Decision 4A_413/2019*, the Swiss Supreme Court held that an application to set aside a CAS award was inadmissible on the basis that neither the alleged lack of capacity of counsel to appear due to a conflict of interest, nor the alleged failure to file the CAS appeal within the time limit under the CAS code, vitiated the jurisdiction of the arbitral tribunal. Rather, these issues pertained to the admissibility of the appeal before the CAS.

In a recently published French-language decision, the Swiss Supreme Court held that an application to set aside a preliminary award rendered by the Court of Arbitration for Sport (CAS) was inadmissible.

On 3 January 2019, the anti-doping commission of the Fédération Internationale de Natation (FINA), cleared professional swimmer Sun Yang (Athlete) from anti-doping rule violations. On 14 February 2019, the World Anti-doping Agency (WADA) appealed this decision before the CAS, requesting that the Athlete be suspended for eight years. The Athlete and FINA argued that counsel for WADA should withdraw from the proceedings due to an alleged conflict of interest as that counsel had served on the legal commission of FINA and had only just resigned to represent WADA before the CAS. Counsel for WADA denied any conflict and, on 3 April 2019, filed the appeal brief with the CAS.

In May 2019, the Athlete raised the conflict of interest issue again, requesting that counsel be banned from representing WADA in the proceedings and that the CAS declare the appeal inadmissible as counsel lacked capacity to file the appeal on behalf of WADA. Since WADA's counsel was allegedly conflicted, the Athlete argued that consequently the appeal had not been validly filed with the CAS within the applicable timeframe, and therefore the CAS lacked *ratione temporis* jurisdiction to hear the appeal.

On 26 July 2019, the CAS dismissed all of the Athlete's claims. It held that counsel for WADA was not conflicted and that counsel's involvement in the proceedings did not affect the admissibility of the appeal filed on behalf of WADA, or the CAS' jurisdiction to hear the dispute. In September 2019, the Athlete applied to set aside this preliminary award before the Swiss Supreme Court.

The Supreme Court found that the Athlete's application to set aside the award was inadmissible on the ground that it did not fall under the conditions stipulated in Articles 190(2) and 190(3) of the Swiss Private International Law Act (PILA). The Supreme Court held that the alleged lack of capacity of counsel to appear due to a conflict of interest, resulting in the alleged failure to file an appeal with CAS in a timely manner, affected the admissibility of the CAS appeal, not the jurisdiction or the composition of the CAS arbitral tribunal. Therefore, the preliminary award could not be set aside on the grounds listed in Article 190(2) of PILA.

Case: *Decision 4A_413/2019, 28 October 2019*.

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