

Legal status of CAS anti-doping division decisions must be assessed case-by-case (Swiss Supreme Court)

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_232_2022*, the Swiss Supreme Court (SSC) refused to set aside a preliminary award on jurisdiction rendered by the Court of Arbitration for Sport (CAS) Appeals Arbitration Division (CAS AArbD). The SSC confirmed that decisions by non-arbitral disciplinary bodies of first instance cannot be reviewed by the SSC and, in this case, the SSC found that the underlying decision of the CAS Anti-Doping Division (CAS Anti-DD) did not qualify as an arbitral award. However, the SSC declined to make a ruling as to the status of the CAS Anti-DD decisions in general.

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In a recently published decision, the Swiss Supreme Court (SSC) dismissed a motion to set aside a preliminary award on jurisdiction under Article 190(2)(b) of the Swiss Private International Law Act (PILA).

The dispute concerned a former international biathlete (Athlete), who was charged by the International Biathlon Union (IBU) in 2020 with an anti-doping violation.

The IBU filed a request for arbitration with the Court of Arbitration for Sport (CAS) Anti-Doping Division (CAS Anti-DD). The Athlete challenged the jurisdiction of the CAS Anti-DD. A sole arbitrator appointed by CAS rendered an "arbitral award" (Anti-DD Decision), dismissing the Athlete's jurisdictional objection and confirming an anti-doping violation. The SSC declared the Athlete's challenge to the Anti-DD Decision inadmissible. In parallel, the Athlete appealed to the CAS Appeals Arbitration Division (CAS AArbD), which rendered a preliminary award dismissing the Athlete's objections and finding that it had jurisdiction over the appeal (AArbD Decision).

The Athlete then appealed the AArbD Decision to the SSC, arguing that the CAS AArbD had been wrong to accept jurisdiction because the CAS Anti-DD had lacked jurisdiction in the first place.

The SSC recalled that a jurisdictional challenge to an award under Article 190(2)(b) of the PILA is admissible only in relation to "genuine arbitral tribunals". This meant that both the AArbD and Anti-DD Decisions must qualify as arbitral awards.

Rejecting a request by the Athlete to determine the legal status of the CAS Anti-DD, the SSC ruled that this had to be determined case-by-case because of the different situations and legal bases under which the CAS Anti-DD can be seized. In this case, the SSC held the CAS Anti-DD acted, not as an arbitral tribunal, but as a disciplinary body. Accordingly, the Anti-DD Decision was not an arbitral award, meaning the challenge to the AArbD Decision was inadmissible insofar as, indirectly, it amounted to a challenge to the CAS Anti-DD's jurisdiction.

The SSC's decision is notable as the first ruling on the legal nature of the CAS Anti-DD. However, the SSC expressly declined to make a general ruling on the status of the CAS Anti-DD at large. The SSC may well reach a different conclusion if requested to rule, for example, on a situation where the parties agree that a dispute before the CAS Anti-DD should be heard by a three-member panel and the athlete waives their right of appeal to the CAS AArbD.

Case: [Decision 4A_232_2022](#) (Swiss Supreme Court) (22 December 2022) (French language, not currently available in English).

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