Compliance with time-limits is an admissibility requirement and alleged breaches of ECHR only considered from ordre public perspective (Swiss Supreme Court)

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

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In *Decision 4A_406/2021*, the Swiss Supreme Court rejected an application to set aside an award of the Court of Arbitration for Sports (CAS), which reversed a decision of the antidoping commission of the International Swimming Federation (FINA). The Supreme Court notably rejected the applicant's contention that the question of whether an appeal brief had been filed in time pertained to the arbitral tribunal's jurisdiction, as well as the applicant's arguments regarding alleged breaches of the European Convention on Human Rights (ECHR).

Speedread

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In a recently published French language decision, the Supreme Court rendered its latest decision in the Sun Yang saga. The Supreme Court rejected a setting aside application by Chinese swimmer Sun Yang (Athlete) against an award of the Court of Arbitration for Sport (CAS) finding him guilty of an Anti-Doping Rule Violation (ADRV).

Initially, the Athlete had refused to release samples to testing personnel during an unannounced doping control in September 2018, leading to disciplinary proceedings before the International Swimming Federation (FINA). The Athlete was cleared by the FINA Doping Panel but that decision was appealed by the World Anti-Doping Agency (WADA) before the CAS, who upheld the appeal in a final award that was later set aside.

A new CAS panel was constituted. The parties were permitted to file limited submissions, followed by a hearing. One issue the panel had to decide was the Athlete's objections regarding the admissibility of WADA's appeal brief, made on grounds that the submission was filed late under the applicable rules.

The second CAS panel rendered its award in June 2021, finding the Athlete guilty of an ADRV. The Athlete appealed against this award before the Supreme Court, alleging that the tribunal lacked jurisdiction due to the lateness of WADA's appeal, had violated his right to be heard and that the second award violated public policy.

The Supreme Court rejected the Athlete's challenge. Consistent with existing authority, it confirmed that a time limit for appeal to the CAS is an admissibility requirement not affecting the tribunal's jurisdiction. The Athlete's criticism regarding the timeliness of WADA's appeal was thus inadmissible as a ground for setting aside, as well as being unfounded. The court also rejected the Athlete's allegations that his right to be heard had been violated, concluding that the second panel constituted was not required to repeat all procedural steps.

Lastly, the Supreme Court rejected the Athlete's objection that the award violated public policy. Specifically, the Supreme Court held that it could only review alleged violations of the ECHR from the perspective of public policy, but that violations of the ECHR did not form part of the (exhaustive) grounds for setting aside mentioned in article 190(2) of the Swiss Private International Law Act (PILA). Furthermore, it considered that the outcome of the award was not incompatible with public policy, and held that its limited power of review was not incompatible with article 13 ECHR (*Decision 4A_406/2021 (14 February 2022)*.)

Background

Article 13.7.1 of the *FINA DCR*, in force on 1 January 2015, provides:

> "DC 13.7.1 Appeals to CAS
> The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party…
> …The above notwithstanding, the filing deadline for an appeal filed by WADA shall be the later of:
> a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or
> b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision.
> Similarly, the filing deadline for an appeal by FINA shall be in any event the later of:
> a) Twenty-one (21) days after the last day on which any other party (except WADA) could have appealed before CAS; or
> b) Twenty-one (21) days from the day of receipt of the complete file relating to the decision."

Article 190 of the Private International Law Act (PILA) states:

> "IX. Finality
> Setting aside
> 1.The award is final from its notification.
> 2.The award may only be challenged:

(a) If the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
(b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
(c) if the arbitral tribunal's decision went beyond the claims submitted to it, or it failed to decide on one of the claims for relief;
(d) if the principle of equal treatment of the parties or the parties' right to be heard was violated;
(e) if the award is incompatible with public policy.
3.Interim awards may only be challenged based on the grounds mentioned at the above paras 2(a) and 2(b); the time-limit runs from the notification of the interim award.
4.The time-limit to challenge the award is 30 days as from the notification of the award."

Facts

Sun Yang (Athlete) is a Chinese international-level swimmer, who holds a number of Olympic and world championship titles. In September 2018, the Athlete was subject to an out-of-competition doping control ordered by the International Swimming Federation (FINA).

The Athlete initially collaborated with the testing but then questioned the credentials of two of the sample collection personnel, and contended that, in his view, they had not presented sufficient certification. The Athlete refused to co-operate further, insisted on the return of samples already provided and destroyed the doping control form that he had signed. Following these events, FINA initiated proceedings against the Athlete for an Anti-Doping Rule Violation (ADRV).

The FINA Doping Panel cleared the Athlete of any ADRV on 3 January 2019. On 14 February 2019, WADA filed a statement of appeal against this decision with the CAS, and submitted its appeal brief on 3 April 2019. The Athlete denied having committed an ADRV, and objected to the CAS jurisdiction on the ground that WADA did not file its appeal within the appropriate deadline under article 13.7.1 of the FINA DCR.

A (first) award was rendered on 28 February 2020, finding the Athlete guilty of an ADRV and suspending him for a period of eight years. Following a request for revision filed by the Athlete, the Supreme Court annulled this award on 22 December 2020, finding that there were justifiable doubts as to the impartiality of the presiding arbitrator (see *Legal update, CAS award in Sun Yang case annulled for arbitrator bias (Swiss Supreme Court*).

Following the annulment of the first award, the two other arbitrators resigned, after the Athlete challenged them. A new panel was constituted which decided not to repeat all the procedural steps that had been conducted previously, but invited the parties to file brief written submissions. A new hearing was also held, during which various witnesses were heard. In February 2021, the new panel rejected the Athlete's objections regarding the timeliness of WADA's appeal.

In June 2021, the new panel issued its final award, in which it partially upheld WADA's appeal, and reduced the Athlete's period of suspension. The panel however rejected WADA's request that the Athlete's competitive results be disqualified.

On 23 August 2021, the Athlete filed a setting aside application against the award, arguing that the arbitral tribunal lacked jurisdiction, that the arbitral tribunal had violated his right to be heard and that the award was incompatible with public policy.

Decision

The Supreme Court rejected all of the grounds raised by the Athlete and confirmed the award. In particular, the Supreme Court, referring to its previous case law, confirmed that the question of whether an appeal has been filed in time is an admissibility

issue not affecting the arbitral tribunal's jurisdiction. The Supreme Court further considered that, in any event, the Athlete's criticism of the arbitral tribunal's interpretation and application of article 13.7.1 of the FINA DCR was misplaced. The court also rejected the Athlete's arguments regarding alleged violations of his right to be heard and the award's alleged incompatibility with public policy.

The Supreme Court was bound by the factual findings of the award, to which it referred.

Time-limit to file an appeal with the CAS as an admissibility requirement

The Supreme Court started by referring to *Decision 4A_413/2019*, also rendered in the context of the ADRV allegations against the same Athlete, Sun Yang, in which it held that compliance with the deadline to appeal to the CAS was an admissibility requirement, rather than a jurisdictional issue. In that case, the Supreme Court held that failure to comply with this deadline leads to the appeal being inadmissible but does not deprive the arbitral tribunal of jurisdiction (*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)*). Accordingly, any alleged non-compliance with the deadline to appeal to the CAS cannot be reviewed based on article 190(2)(b) PILA.

The Supreme Court noted that this approach has been confirmed several times since, in Decision 4A_198/2020 (see *Legal update, CAS award implicitly dismissing requests for relief not subject to challenge (Swiss Supreme Court)*), Decision 4A_290/2020 and *Decision 4A_287/2019* (also rendered in the Sun Yang case, see *Legal update, CAS decision on timely filing of submission not open to challenge before Swiss Supreme Court*). In particular, the Supreme Court referred to Decision 4A_374/2021, in which it reviewed scholarly opinions on the issue and in which it noted that most authors had welcomed the solution adopted by the Supreme Court (see *Legal update, Swiss Supreme Court dismisses set aside application confirming restrictive approach to doctrine of "surprise effect"*).

Because the Athlete's criticism was not directed against a jurisdictional issue, the Supreme Court concluded that he did not raise an admissible ground for setting aside, although it went on to consider whether WADA's appeal had, in fact, been filed late.

Interpretation of article 13.7.1 of the FINA DCR

The Supreme Court noted that a sports association's statutes, as well as any lower-ranking rules (such as regulations) must be interpreted by reference to the principles of interpretation applicable to formal laws.

Significantly, this meant that, in this case, article 13.7.1 of the FINA DCR must be interpreted first by reference to its letter (literal interpretation), although this is not decisive. To establish the scope of this provision, it is necessary to also look at the broader context and its relationship with other provisions (systematic interpretation), the purpose of the provision (teleological interpretation) and the intent of the body that adopted this provision, as reflected in the *travaux préparatoires* (historic interpretation). The Supreme Court also explained that no single interpretation method prevailed, and that there was no hierarchy among them.

On that basis, the Supreme Court agreed with the arbitral tribunal's interpretation of article 13.7.1 of the FINA DCR, according to which WADA had 21 days to file its appeal after the last day on which any other party in the case could have appealed, including FINA. This meant that the deadline for WADA's appeal only started to run after the expiry of the deadline for FINA to file an appeal with the CAS, and that WADA had filed its statement of appeal and appeal brief in time. Thus, in addition to being an inadmissible ground for setting aside, this ground also failed on the merits.

No violation of Athlete's right to be heard

The Supreme Court then turned to the Athlete's allegations that his right to be heard had been violated under article 190(2)(d) of PILA because the tribunal failed to consider some of his arguments on the inadmissibility of WADA's appeal, by limiting the length of his brief on this issue to five pages.

Reiterating its (well-established) case law on this point, the Supreme Court first noted that there was no general principle according to which all procedural steps would have to be repeated following the successful challenge and replacement of an arbitrator. Accordingly, nothing required the arbitral tribunal to allow the parties to reiterate all of their arguments on the admissibility of the appeal and on the merits.

Furthermore, the tribunal had allowed the parties to file additional written submissions, and held a new hearing. The court also noted that the Athlete had not complained about the length limitation of the briefs, meaning that it could not, in good faith, raise any complaint about this now. The Supreme Court therefore rejected the Athlete's argument on this point, as well as three other, separate arguments said to constitute violations of his right to be heard.

Alleged violations of ECHR can only be examined from a public policy perspective

The Supreme Court then examined whether the award was incompatible with substantive public policy (*article 190(2)(e), PILA*). It started by recalling that, in order to violate substantive public policy, an award must disregard essential and widely recognised values which, according to the views prevailing in Switzerland, should be at the basis of any legal order. It further stressed that the outcome of the award must be incompatible with fundamental legal or moral concepts underpinning any legal order, and that the notion of public policy was more restrictive than that of arbitrariness. It highlighted that it was extremely rare that an arbitral award would be set aside on that basis.

The court then recalled its case law that the violation of a provision of the ECHR or of the Swiss Constitution does not form part of the (exhaustive) grounds for setting aside mentioned in article 190(2) PILA. A plea alleging a violation of the ECHR or the Swiss Constitution can only be considered under the (restrictive) ambit of public policy under article 190(2)(e) PILA.

The Supreme Court then examined the Athlete's allegation that the award was in breach of articles 10(2) and 13 of the Swiss Constitution, of *article 8 ECHR* and of article 17(1) of the UN Pact II. The Supreme Court considered that sports associations had more limited means to fight doping than State investigative bodies, meaning that it was not obvious that the ECHR guarantees applicable in criminal proceedings applied in the same way in antidoping proceedings. It further referred to decisions of the European Court of Human Rights (ECtHR) holding that the fight against doping in sports constituted an important objective that justifies serious restrictions to athletes' rights.

On that basis, the court considered that the sanction ordered against the Athlete, a suspension of four years and three months, was not incompatible with public policy. It held that the Athlete was in fact trying to challenge the tribunal's interpretation of the International Standard for Testing and Investigations, which pertains to an issue of law and did not fall within the Supreme Court's power of review.

Supreme Court's limited power of review not incompatible with article 13 ECHR

As a last argument, the Athlete alleged that the Supreme Court's limited power of review in the context of setting aside proceedings against an arbitral award was incompatible with *article 13 ECHR*, which guarantees the right to effective judicial protection.

The Supreme Court held that this argument was inadmissible, by first holding that the ECHR provisions do not directly apply in setting aside proceedings, and that this criticism did not fall under any of the grounds for setting aside exhaustively listed in article 190(2) PILA. The Supreme Court then referred to its landmark ruling in Decision 4A_248/2019 and 4A_398/2019 (*Caster Semenya* case), in which it concluded that the specific rules governing setting aside applications against international

arbitral awards was compatible with the ECHR (see *Legal update, CAS award in Caster Semenya case not contrary to substantive public policy (Swiss Supreme Court)*).

In particular, the Supreme Court recalled that, as stated in that decision, the following were all compatible with the requirements of the ECHR:

- The limited and exhaustive grounds for setting aside set out in article 190(2) PILA.
- The limitation of any substantive review of the award to the restrictive standard of public policy (*article 190(2)(e) PILA*).
- The strict requirements concerning a party's duty to allege and substantiate its grounds for setting aside.

More generally, the Supreme Court's limited power of review was all compatible with the requirements of the ECHR.

The Supreme Court emphasised that it could not be compared to an appellate court that would supervise the CAS and freely review the awards issued by that body. It noted that the Athlete was allowed to raise all of his arguments before the CAS, which is an independent, impartial specialised tribunal, with a full power of review.

Comment

The Supreme Court's latest decision in the Sun Yang judicial and arbitral saga is noteworthy on several grounds.

First, it confirms that the Swiss Supreme Court draws a clear line between jurisdictional issues, which it may examine with full power of review, and non-jurisdictional issues, such as admissibility, which are in principle not subject to review. Although the Supreme Court does not provide a clear-cut test to assess whether a specific issue pertains to admissibility or jurisdiction, it considered the time-limit to file an appeal with the CAS as an admissibility requirement. So far, the Supreme Court's decisions all concern appeals before the CAS against decisions of sports associations, and the question remains open whether this decision sets out a broader principle that could be extended to all types of arbitrations.

Second, the Supreme Court reiterated that the provisions of the ECHR were not directly applicable in setting aside proceedings and that they can only be considered under the (extremely) restrictive ambit of public policy. Although, in this regard, the Sun Yang decision merely confirms the Supreme Court's previous case law, it is a strong reminder of the strict limitations and high thresholds that apply to any setting aside application.

Finally, and relatedly, the Supreme Court's brief comments on the compatibility between the setting aside mechanism under Swiss law and article 13 ECHR are telling. The Supreme Court puts considerable emphasis on the fact that the limitations of any setting aside proceedings are justified by the prior opportunity for the applicant to present his or her case to an independent and impartial tribunal that enjoys a full power of review and to whose jurisdiction the applicant consented. With the case of *Semenya v Switzerland* pending before the ECtHR, it will be interesting to see whether the ECtHR shares the Supreme Court's analysis in this regard. Depending on the ECtHR's decision, this could have far-reaching implications for the Swiss legal framework on international arbitrations.

Case

Sun Yang v AMA and another Decision 4A_406/2021 (Swiss Supreme Court) (14 February 2022).

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