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# Sports arbitration: does CAS have jurisdiction to hear an appeal filed after the time limit? The question remains open

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*In a French-language decision dated 18 June 2012 in Case 4A_488/2011, the Swiss Supreme Court considered as "convincing" the view that the Court of Arbitration for Sport has jurisdiction to hear an appeal filed after expiry of the time limit. Since the time limit to appeal turned out to be met in this case, the Supreme Court unfortunately did not decisively settle this issue but provided some interesting observations. Although in the final analysis it was held that the time limit was met, the Supreme Court's observations with regard to the admissibility of an appeal after expiry of the time limit are worthwhile to report. The Supreme Court also reiterated that the principle of reverse onus in doping disputes does not trigger "ordre public" in terms of Article 190(2)(e) PILA.*

**Facts**

X is a professional cyclist from Italy. As such, he is affiliated with the International Cycling Union (ICU). On 3 May 2010, the ICU informed the Italian Cycling Union that, based on the results reported in his Athlete Biological Passport, X was suspected of infringing the UCI Anti-Doping Rules (ADR). By a decision of 21 October 2010, the Italian Tribunal for Anti-doping (*Tribunale Nazionale Antidoping*, (TNA)) of the Italian National Olympic Committee (*Comitato Olimpico Nazionale*) dropped the charges against X on the ground that the doping practice had not been sufficiently established.

Upon receipt of this decision, the ICU filed an appeal before the Court of Arbitration for Sport (CAS). In an award dated 8 March 2011, the CAS annulled the decision of the TNA and ordered a two-year suspension against X. X challenged the CAS Award before the Swiss Supreme Court, alleging, among other arguments, that since ICU filed its appeal after the time limit, the CAS did not have jurisdiction to adjudicate the case. The petitioner also claimed that the CAS' reliance on the Athlete Biological Passport was incompatible with *ordre public* in terms of Article 190(2)(e) PILA.

**Decision and Comment**

The Supreme Court dismissed the appeal and rejected the petitioner's arguments with respect to the time limit to appeal and to the burden of proof.

• *Time limit to appeal and effect on ratione temporis jurisdiction of the CAS*

Relying on Article 190(2)(b) PILA, the petitioner claimed that because the appeal before the CAS was lodged after the prescribed time limit, the agreement to arbitrate had expired and the CAS

therefore lacked jurisdiction to hear the case. Although the Supreme Court considered the application to appeal to be timely, it nonetheless provided some interesting observations on this specific issue.

The Supreme Court held that "it is not certain" that in the context of sports-related disputes, the petitioner's argument can be raised in a challenge based on Article 190(2)(b) PILA. The Supreme Court further added that "whether or not an untimely appeal entails the CAS' lack of jurisdiction [*ratione temporis*] or simply the inadmissibility of the claim or even its dismissal is a delicate question". With respect to "typical" arbitration such as commercial arbitration, the Supreme Court confirmed existing case law pursuant to which a party may challenge an arbitral award by invoking lack of jurisdiction *ratione temporis*, in cases where the arbitral tribunal accepted jurisdiction despite expiration of the arbitral agreement. For example, this may be the case when the arbitral agreement is valid only for a limited period of time.

However, the Supreme Court expressed its doubts as to whether this solution may extend to sports arbitration and more specifically to the situation where the appeal before the CAS is filed after the time limit prescribed by Article R49 of the Code of Sports-related Arbitration. In any event, in this case, since the appeal was actually filed within the time limit, the Supreme Court considered it unnecessary to investigate this matter further.

While the decision does not decisively settle the issue as to whether an untimely appeal before the CAS triggers the lack of the *ratione temporis* jurisdiction of the CAS, it nevertheless provides some interesting indications as to how the Supreme Court could rule on this issue in the future. Very interestingly, the Supreme Court considered the view taken by an author (A. Rigozzi, L'arbitrage International en matière de sport, 2005, n° 1028 et seq.) that the solution adopted in commercial arbitration should not extend to sports arbitration and in particular not to the appeal before the CAS to be "*prima facie* convincing". If this is confirmed, it would be further evidence that within the practice of the Supreme Court, the gap between sports arbitration and commercial arbitration is becoming increasingly wider.

As outlined in this decision, in commercial arbitration, when the temporal validity of the agreement to arbitrate expires, the arbitral tribunal loses its jurisdiction and state courts become competent. In the author's view, to apply this solution in sports-related disputes would contravene the spirit of international sports-arbitration, as the athletes would not to be judged in the same way and according to the same proceedings. Indeed, in cases where the time limit to appeal is complied with, the athlete would be judged by the CAS, whereas he/she would be heard by a state court (and more specifically by the state court where the federation has its seat) if the time limit to appeal before the CAS has lapsed.

According to Antonio Rigozzi, non-compliance with the time limit should be considered as a waiver of the petitioner's claim. As such, where the time limit is not complied with, the CAS shall still admit its jurisdiction even if only to dismiss the appeal.

If the Supreme Court was to adopt this solution, which it seems inclined to, this would in fact accord with the solutions adopted by Anglo-Saxon courts. Pursuant to English case law, "if the clause stipulates that notice of claim must be within a certain number of days, then the obvious interpretation is that if the notice is not given, the claim is lost" (*Smeaton v Sassoon [1953] 2 Lloyd's Rep. 580, [1953] 1 WLR 1468, 1472*). Similarly, American courts consider that "were one of the parties to an arbitration agreement, containing a time limitation, permitted to allow such limitation to expire and then sue at law on the claim which it had agreed to arbitrate, the result would be a return to the situation obtaining [sic] when agreements to arbitrate were revocable at will of a party thereto" (*River Brand Rice Mills v Latrobe Brewery Co. 305 N.Y. 36, 110 N.E.2d 545 (1953*)).

• *Principle of reverse onus in doping matters*

The petitioner also argued that the Award was incompatible with *ordre public*, insofar as the CAS relied on X's Athlete Biological Passport to find him guilty of doping. The Athlete Biological Passport is a test which has been introduced by the UCI to monitor the athletes' biological variables over time. This facilitates indirect detection of doping on a longitudinal basis, rather than on the traditional detection of doping.
The petitioner argued that the Athlete Biological Passport was unreliable evidence, that it entailed a reverse onus and that it was therefore contravening the *in dubio pro reo* principle, as the athlete was basically obliged to establish that the adverse analytical finding had a physiological origin, while the anti-doping organisation did not have to show any concrete violation.
The Supreme Court denied the complaint on the ground that it was not within the restricted scope of *ordre public*. The Supreme Court also reaffirmed existing case law (Case 4A_612/2009 of 10 February 2010) pursuant to which the practice of reverse onus in sport disciplinary measures "does not violate public policy but refers to the allocation of the burden of proof and the standard of evidence which, in the area of application of private law cannot be determined from the perspective of criminal law concepts such as the presumption of innocence or the principles of *in dubio pro reo*". The Supreme Court therefore dismissed the petitioner's pleas on the standard of evidence and the reversal of the burden of proof, considering that these grounds were of an appellate nature and that they did not relate to *ordre public*.
This decision confirms the specificity of sports arbitration with respect to the reverse burden of proof in doping disputes, which was admitted for the first time by the Supreme Court in the *Gundel* decision (TF 4P.217/1992, 15.03.1993). Since this landmark decision, the CAS has endeavored to craft a uniform case law on the standard of evidence in doping matters, as did also the World Anti-Doping Code ("WADA Code"). As a reminder, the following rules of the WADA Code are worth pointing out:

- The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred (Art. 3.1 WADA Code). Facts related to anti-doping rule violations may be established by any reliable means (Art. 3.2 WADA Code).
- WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The athlete may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the adverse analytical finding. If the athlete succeeds, then the anti-doping organization shall have the burden to establish that such departure did not cause the adverse analytical finding (Art. 3.2.1 WADA Code).
- Regarding the demonstration of the athlete's intent to violate the anti-doping rule, the athlete's fault is presumed. Article 2.1.1 WADA Code provides that "it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping violation". However, the athlete may rebut this presumption by showing that he/she bears no fault or negligence for the presence of prohibited substance and by establishing how the latter entered in his/her system (Art. 10.5.1 WADA Code).
- Regarding the standard of proof to establish the breach, the WADA Code applies the standard of "comfortable satisfaction" of the hearing panel which has been adopted by the CAS since its decision Korneev and Gouliev v. CIO (CAS JO/96/003, CAS JO/96/004). This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt. The standard of proof required from the athlete to rebut a presumption or establish specified facts of circumstances shall be by a balance of probability (Art. 3.1 WADA Code).

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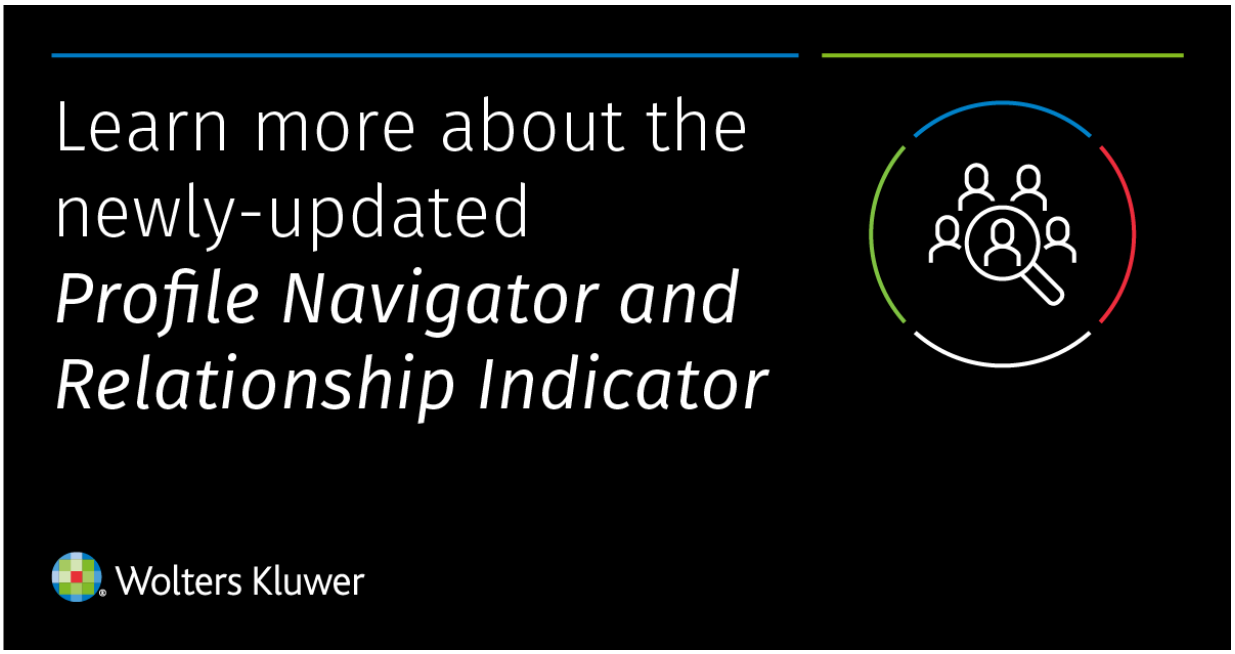


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