



## Arbitration Newsletter Switzerland

### Waiver of Annulment and the Right to be Heard

#### Facts

Guillermo Cañas is since 1995 a member of the Association of Tennis Professionals ("ATP"), an association under Delaware law; he is also a member of its player council. ATP has issued the "7.06 Tennis anti-doping program 2005", again governed by Delaware law, providing, amongst other, that any decision of the ATP Anti-Doping Tribunal can be appealed to the CAS, whereby the following restriction applies:

*"The decision of CAS shall be final and binding on all parties and no right of appeal will lie from the CAS decision. The CAS decision shall have immediate effect and all parties shall take action to ensure that it is effective."*

To the above Guillermo Cañas consented by signing a declaration under the heading "Player's Consent and Agreement to ATP official Rulebook" with the following terms:

#### **"PLAYER'S CONSENT AND AGREEMENT TO ATP OFFICIAL RULEBOOK**

*I, the undersigned player, consent and agree as follows.*

*2. I also consent and agree that any dispute arising out of any decision made by the Anti-Doping Tribunal, or any dispute arising under or in connection with the Anti-Doping Program, after exhaustion of the Anti-Doping Program's Anti-Doping Tribunal process and any other proceedings expressly provided for in the Program, shall be submitted exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport ("CAS") for final and binding arbitration in accordance with the Code of Sports-Related Arbitration. The decisions of CAS shall be final, non-reviewable, non-appealable and enforceable. I agree that I will not bring any claim, arbitration, lawsuit or litigation in any other court or tribunal. The time limit for any submission to CAS shall be 21 days after the*

*decision of the Anti-Doping Tribunal has been communicated to me.*

*3. I have read and understand the foregoing Player's Consent and Agreement."*

At an ATP Tournament in Acapulco a probe was taken on February 21, 2005 from Guillermo Cañas, which revealed that he had actually used an illegal substance listed by ATP. The ATP Anti-Doping Tribunal consequently banned Guillermo Cañas with its decision of August 7, 2005 for two years and requested that all his prize-money generated at the Acapulco Tournament and thereafter be returned.

Guillermo Cañas appealed against this ATP decision to the CAS and requested that the ban be lifted or be, at least, reduced. It would, according to the pleading of Guillermo Cañas, be against Delaware law to punish him for having taken, by an accident not to be attributed to him, a substance listed by ATP. The facts behind this argument were that at the ATP Acapulco Tournament Guillermo Cañas visited the tour doctor to obtain a remedy against flu. Not having the appropriate remedy in stock this tour doctor issued a prescription to Guillermo Cañas. The assistant of the ATP tour doctor then mixed up the medicine prescribed for the coach of an other player with the one prescribed for Guillermo Cañas.

Irrespective of this misunderstanding not attributable to Guillermo Cañas the CAS held, nevertheless, that he could not excuse himself by this confusion. In view of the CAS he should have checked whether he actually got what was originally prescribed by the ATP tour doctor. The CAS did, however, acknowledge that Guillermo Cañas had no intention at all to dope himself, to the contrary, the substance used by him was actually to the detriment of his performance and, consequently, the CAS reduced the ban to 15 months.

Against this decision of the CAS, rendered on May 23, 2006, Guillermo Cañas appealed to the Swiss



Federal Supreme Court ("Supreme Court"). The CAS did not comment its decision. ATP argued in its reply to the Supreme Court that Guillermo Cañas had actually waived to appeal any decision of the CAS.

Rather exceptionally the Supreme Court then ordered a second exchange of briefs as to that issue.

#### **ATP and Waiver of annulment**

The Supreme Court did restate in its decision its previous arguments rendered in BGE 131 III 173 (cf. my previous posting on our website dated November 29, 2006) and held that the wording agreed upon between ATP and Guillermo Cañas would actually qualify as a valid waiver of annulment in the sense of Art. 192 PILA. But it did thereafter note that in the "world of sport" there reigns usually no parity between contracting parties. In particular the Supreme Court considered in a very detailed and subtle reasoning that disciplinary sanctions of a sport federation against one of its members do not need enforcement proceedings as an award of an arbitral tribunal normally would. The Supreme Court concluded that Guillermo Cañas had actually no choice ("nolens rolens") than to sign the waiver of annulment. In analysing the circumstances of the alleged waiver of annulment the Supreme Court rendered also due respect to Art. 6 (1) of the HRC and, finally, concluded that in despite of the clear wording there was in this particular case no valid waiver of annulment. In doing so the Supreme Court stated that Art. 192 PILA would in general not fit to statutory sanctions in the field of sports.

#### **CAS and the Right to be Heard**

Guillermo Cañas did also argue that in its decision the CAS violated his right to be heard as established in Art. 190 (2) (d) PILA.

As a matter of fact he had submitted a detailed analysis of 12 pages why an athlete under the particular factual circumstances could, under Delaware law, not be exposed to sanctions as rendered by the ATP. The Supreme Court did also honour this argument. In doing so it noted that the right to be heard would not, *per se*, include the right for a motivated decision. Nevertheless, the right to be heard in front of an arbitral tribunal does, according to the Supreme Court, establish certain minimum guarantees as to that issue.

The fact that the CAS failed to deal with a detailed analysis of twelve pages on Delaware law and the non-applicability of drug-ban provisions under the pertaining circumstances of this particular case led the Supreme Court to the conclusion that Guillermo Cañas' right to be heard was actually violated. The CAS should have actually dealt with in a more detailed way with the pertaining arguments of Guillermo Cañas. In particular, Guillermo Cañas should have been able to learn why, in detail, the CAS did not believe his arguments under Delaware law to be relevant to his case. Consequently, the Supreme Court annulled (and this for the first time!), the CAS decision and returned it to the CAS for further deliberation.

#### **Conclusion**

The decision of the Supreme Court is to be welcomed. Its detailed analysis why a general waiver of annulment imposed on an individual athlete can not be held against him is convincing and shall cause numerous international federations to review their pertaining provisions. Whether the decision as to the right to be heard is appropriate could be judged only with access to the complete file. Irrespective of this an arbitral tribunal does certainly well in serving the parties a full line of arguments to its decision. The CAS tribunal fell obviously short on that; the fact that it opted not to further comment its decision to the Supreme Court did certainly not improve its position!

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Hansjörg Stutzer

For further information, please contact:  
Hansjörg Stutzer ([h.stutzer@thouvenin.com](mailto:h.stutzer@thouvenin.com))