Switzerland

TENNIS

Federal Supreme Court
No.4P.172/2006, March 22, 2007

Court of Arbitration for Sport; Disciplinary procedures; Drugs; Sportspersons; Switzerland; Waiver

Facts: Guillermo Cañas, a professional tennis player, was tested positive for a substance listed on the doping list of the Association of Tennis Professionals Tour (ATP). The ATP Anti-Doping Tribunal imposed, among other things, a two-year period of ineligibility on Mr Cañas.

Mr Cañas appealed to the Court of Arbitration for Sport (CAS). He claimed not to have committed any fault and argued that such suspension was not compatible with Delaware law which governed the relationship between him and the ATP. The CAS partially dismissed his appeal, stating that Mr Cañas indeed was at fault, however, neglecting to motivate the compatibility of the ineligibility with Delaware law.

Therefore Mr Cañas filed an action to set aside this award with the Swiss Federal Supreme Court (FSC), using basically the identical legal arguments as before the CAS. He additionally claimed that the declaration ''The decisions of CAS shall be final, non-reviewable, non-appealable and enforceable'' which he had signed in connection with the arbitration clause contained in his ''Player's consent and agreement to ATP official rulebook'' was void. ATP, on the other hand, disputed this argument and pointed out that the parties were, according to art.192(1) of the Swiss Private International Law Act (PILA), allowed to waive their right to appeal the CAS decisions to the FSC.

Held: In order to rule on the admissibility of the action to set aside the arbitral decision, the FSC examined the validity of the waiver to appeal. From a formal point of view, the waiver was accepted. It was explicitly contained in the declaration signed by Mr Cañas, and the wording was clear. From a substantial point of view, however, the FSC came to a different conclusion. It went back to the intentions of the legislator creating art.192 of the PILA in 1982 and argued at length that those were to give the parties the possibility to avoid a twofold control of an arbitral decision by a state court—by the FSC in an action to set aside an arbitral decision and by the *exequatur* judge during enforcement. However, if a statutory sanction such as ineligibility is not enforced by a state court but rather by the sports association imposing it on the athlete (in this case

ATP), there is no *exequatur* judge to call upon. The FSC stated that in such cases the review of the arbitral decision by at least one state court could not be waived and that, in these situations, the action to set aside was the only option. Therefore the waiver was declared void.

The FSC then gave another reason why the waiver was not considered to be binding. In professional sports, athletes often do not have a chance to agree on arbitration clauses or waivers of appeal on an even level with the sports associations. The hierarchy between the sports associations and the athletes was described as ''vertical'' as the sports federations do, factually, unilaterally control the requirements to be fulfilled by an athlete in order to be admitted to competitions. According to the FSC, an athlete only has the choice to *nolens volens* sign the waiver of appeal or not to compete on a professional level. Therefore the free will of the athlete which is a prerequisite for the conclusion of an agreement is not given upon the signing of a waiver of appeal which renders the waiver non-binding on the athlete. Mr Cañas's situation was considered to be such a *nolens volens* situation—even though he is a member of the players' council which is involved in the drafting of the ATP regulations. Therefore he was not bound by his waiver to appeal, and the FSC admitted his action to set aside the CAS award.

The CAS award then was, indeed, set aside as the FSC found the CAS to have neglected to motivate the compatibility of the ineligibility with Delaware law and therefore to have violated the right to be heard of Mr Cañas who had contested this compatibility. The case was returned to the CAS for further deliberation.

Comment: This decision has been widely discussed among Swiss sports lawyers, as for the first time in history the FSC set aside a decision of the CAS. The setting aside reasoning, however, does not seem to be the most important issue. It is obvious that in any circumstance, if a right to be heard is violated, the respective court of arbitration will have to remedy its fault. The more important and interesting aspect of this decision is the non-acceptance of the waiver to appeal.

It remains to be seen which consequences this decision will lead to. Not all questions with regard to waivers according to art.192 of the PILA have been answered yet. It would be interesting to see, for example, what the FSC would decide in a case where only one of the two elements (state court requirement/free will requirement) called upon by the FSC in the presently discussed decision were fulfilled. This might be the case in a situation where a (monetary) fine has been imposed on an athlete by a sports association. Such a fine would have to be enforced via the state courts, which means that there is an *exequatur* judge who can verify the minimum requirements of the arbitral decision. Only the argument with regard to the forced conclusion of agreement will remain. The FSC has not yet decided on such a case but as it did use quite clear wording in the presently discussed case, it is probable that even the sole element of hierarchical structures and the lack of free will in professional sports might suffice for the admissibility of an action to set an arbitral decision aside even in the presence of a waiver of appeal.

It is also interesting to see how the FSC differed between the waiver of appeal and the arbitration clause. It considered the free will of the athlete not given with regard to the waiver of appeal but then it stated that the requirement of specialised fast-track arbitration was apparent in sports related matters and that therefore an arbitration clause—even though signed under exactly the same circumstances as a waiver of appeal—was binding if the usual formal requirements were fulfilled.

A waiver of appeal according to art.192 of the PILA is possible only in arbitration cases in which both parties are domiciled outside Switzerland. As many sports federations are indeed domiciled in Switzerland, the impact of this FSC decision is limited. Nevertheless, sports associations domiciled

outside Switzerland might have to reconsider their arbitration regulations in the light of this decision.

It is interesting that, in this decision, the FSC seems to have changed its mind on two issues shortly before decided otherwise. First, in Decision 131 III 173,[1] it took a favourable approach to waivers of arbitration, reducing the clarity requirements to be fulfilled for the binding effort of a waiver of appeal. Obviously, this liberation tendency was not meant to be of a general nature. Secondly, in Decision 4P.240/2006,[2] the FSC stated shortly that, in football, FIFA takes a dominant position and that a club intending to play in any league does not have the possibility to avoid being a member. This statement, however, did not hinder the FSC to confirm a statutory sanction imposed by FIFA. In this case, the free will of the parties to sign up with sports federation regulations seems to have been given even though the structural situation was basically the same. The fine differences between those cases have not been elaborated by the FSC yet. Therefore, only future will show which path the FSC will follow in respect of sports related arbitration and if the respective reasoning of the FSC, which at the moment is very sports related, may possibly even be transferred into other aspects of life in which the parties are not at an even level.

1 See [2006] I.S.L.R. 99, comments.

2 Discussed at [2007] I.S.L.R. 29.

Christoph Gasser and Eva Schweizer Staiger, Schwald & Partner Zurich Christoph Gasser and Eva Schweizer are both members of a major Swiss business law firm and advise clients in various matters of intellectual property, litigation matters, contractual law and sports law.