



Arbitration CAS 2013/A/3242 Benjamin Hill v. Cycling Australia (CA), award on jurisdiction of 24 September 2013

Panel: The Hon. Tricia Kavanagh (Australia), Sole Arbitrator

Cycling

Doping

Right to waive a right to a fair hearing but no right to waive a right to appeal a sanction

Jurisdiction of the CAS Ordinary Division (not the CAS Appeal Division) and power to consider sanctions

1. According to the WADA Code and the Cycling Australia Anti-Doping Policy (CA Policy), an athlete can waive his/her right to that fair hearing as to the *Consequences* of an ADRV. The right of an athlete to provide such a waiver is also recognised under the ASADA Act. However, that waiver cannot remove an athlete's right to apply to a court, tribunal or other body for a review of a decision. In neither the WADA Code, the ASADA Act and its Regulations, nor under the National Anti-Doping (NAD) scheme as incorporated into the CA Policy is there any provision that allows a waiver of the right to appeal a sanction nor a provision that negates the right held by an athlete to appeal "a decision imposing *Consequences* for an ADRV".
2. Under the scheme adopted by Cycling Australia an appeal brought under CA Policy Art 19 must be an appeal from a decision made under CA Policy Art 16.9 by CAS. Given an athlete retains the right to appeal a decision on sanction and there has been no CA Policy Art 16.9 decision which would allow an appeal under the CA Policy the only way for the dispute as to sanction be heard is before the CAS ordinary division. Under Art 16 of the CA Policy, the CAS in its Ordinary Division has power to consider sanctions (CA Policy Art 16.3(b)) and other issues properly brought before it for determination (CA Policy Art 16.3(d)).

1. HISTORY

- 1.1. Benjamin Hill, (Mr Hill, the athlete) competed as a cyclist on 7 October 2011 in the Tour of Tasmania, an event under the auspices of Cycling Australia. On 20 February 2011, Mr Hill was served with an infraction notice asserting an Anti-Doping Rule Violation (ADRV) under the 2010 Cycling Australia Anti-Doping Policy (CA Policy).
- 1.2. Mr Hill in his application dated 28 June 2013 seeks to appeal, in the Court of Arbitration for Sport (CAS) appeal division, the decision of Cycling Australia made on 7 June 2013 (pursuant to Articles 15.8 and 17.1 of the CA Policy). Mr Hill admitted his ADRV in writing but

appeals the severity of the two year period of ineligibility imposed on him by Cycling Australia.

- 1.3. The CAS, on receipt of the appeal filed by the athlete, determined the Australian Sports Anti Doping Authority (ASADA) be named as an affected party as, under the CA Policy, Cycling Australia had referred a number of its powers re drug testing to ASADA, as evidenced in the CA Policy placed before the CAS.
- 1.4. The affected party, ASADA, joined by the Respondent, then raised an objection as a preliminary issue asserting the CAS appeal division, in the particular circumstance, does not have jurisdiction to hear the appeal of Mr Hill.
- 1.5. It is an agreed fact that Mr Hill informed ASADA he wished to make submissions as to sanction and later he provided a waiver under Art 15.7 of his right to a hearing on sanction. ASADA then determined not to refer the matter to hearing under Art 15.7 of the CA Policy.
- 1.6. The athlete submitted the imposition of the two year period of ineligibility was excessive and as the decision of Cycling Australia was made under Art 16 of the CA Policy the right to appeal that decision lies to the CAS appeal division as provided for by Art 19.1 of the CA Policy.
- 1.7. ASADA contended a right of appeal to the CAS appeal division under Art 19 of the CA Policy is only enlivened where there first has been a hearing under Art 16. There was no hearing and, therefore, there is no right of appeal to the CAS appeal division under Art 19 of the CA Policy.
- 1.8. The preliminary jurisdictional question, therefore, is whether or not the decision made by Cycling Australia was a decision made under Art 16 of the CA Policy.

2. ARBITRATION AGREEMENT

- 2.1. The jurisdiction of the CAS to hear and determine any appeal made by Mr Hill rests in the private contract between the athlete and Cycling Australia. There is no dispute between Cycling Australia and the athlete that the CA Policy is part of the contract between the parties and Mr Hill has admitted his ADRV under that contract. Articles 2, 3 and 4 of the CA Policy relevantly bind the parties:

a.a) What is CA's position on doping?

CA condemns doping as fundamentally contrary to the spirit of sport. The purpose of this ADP is to protect *Athletes'* fundamental right to participate in doping-free sport and to ensure harmonised, coordinated and effective anti- doping programs at the international and national level with regard to detection, deterrence and prevention of doping.

b.b) Who does this ADP apply to?

This ADP applies to *Athletes* and *Athlete Support Personnel* as defined under the *Code*. It also applies to *Members*, employees and contractors of *CA* and any other *Person* who has agreed to be bound by it.

c.c.) Obligations

The persons identified in Article 3 are bound by this ADP as a condition of their membership, participation and/or involvement in Cycling. *Athletes* and/or *Athlete Support Personnel* must comply with this ADP and the anti-doping rules as prescribed in the NAD scheme under the ASADA Act.

- 2.2. Therefore the CA Policy is part of the contract between the parties and it contains an arbitration agreement.
- 2.3. The subject (separable) arbitration agreement from which the CAS appeal division jurisdiction is derived is found within Art 19 of CA Policy (see [4]).
- 2.4. It is necessary here to divert to a consideration as to the applicable law under the arbitration agreement. The CA Policy names the CAS as the appropriate arbitral body. Therefore the jurisdiction of the CAS appeal division has to be addressed in this preliminary decision. The CA Policy is silent as to the applicable law.
- 2.5. Further the identification of the seat of the CAS is “vital” as the law of the seat is applicable to the substantive law of the arbitration.
- 2.6. The NSW Court of Appeal held, In *Raguz v Sullivan* [2000] NSWLR 236 at [93]:

[93] The “place” or “seat” of an arbitration is a vital concept. In *American Diagnostica*, Giles CJ Comm D said (at 324):

In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep 116, Kerr LJ, with whom Russell LJ and Sir Denys Buckley agreed, identified three systems of law potentially relevant to an arbitration with a foreign element, namely, the law governing the substantive contract, the law governing the agreement to arbitrate and the performance of that agreement, and the law governing the conduct of the arbitration. As to the law governing the conduct of the arbitration, his Lordship said (at 119):

“English law does not recognise the concept of ‘de-localised’ arbitration ... (see *Dicey v Morris* (at 541, 542)) or of ‘arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law’ (*Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at 301 (Court of Appeal)). Accordingly, every arbitration must have a ‘seat’ or *locus arbitri* or forum which subjects its procedural rules to the municipal law which is there in force.

The NSW Court of Appeal then declared in *Raguz* the seat of the CAS was Switzerland. (This ruling has been endorsed before the Swiss Federal Court). The current proceedings have been purported to commence in the CAS appeal division so the arbitration agreement, as distinct from the substantive law of the contract presumably made in Australia, must be characterised as a Swiss arbitration agreement as Switzerland is the seat of the CAS appeal division. Therefore, the relevant legislative provision to guide the consideration as to jurisdiction of the CAS appeal division is the Federal Code of Private International Law, Switzerland. Relevantly this code states:

Art 186

V11. Jurisdiction:

- 1. The arbitral tribunal shall rule on its own jurisdiction.*
- 2. The object of lack of jurisdiction must be raised prior to any defence on the merits.*
- 3. In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision.*

- 2.7. Further in the Statute of Bodies Working for the Settlement of Disputes , which covers the procedures to be followed by the CAS, which procedures were settled under the Swiss Code of Private International Law, it is stated the Arbitrator shall rule on its own jurisdiction (B, Ordinary Arbitration Procedure: Rule 47 and C, Special Provisions Applicable to the Appeal Arbitration Procedure: Rule 55). Rule 55 is specifically incorporated into the agreement through the Art 19.1 of the CA Policy and states:

Rule 55

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the opposing party (parties) to file written submissions on the matter of CAS jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

Further, under the Rules of the CAS appeal division:

R58 Law Applicable

*The panel shall decide **the dispute** according to the applicable regulations and the rules of law chosen by the parties, or in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the panel deems appropriate. In the latter case the panel shall give reasons for its decision (emphasis added).*

- 2.8. As Mr Hayes, Counsel for ASADA submitted and as was conceded by Mr Villa, counsel for the athlete:

The determination of the question of jurisdiction in the present case is of vital importance, given that an Award delivered in circumstances where the arbitral panel does not have jurisdiction to make such an Award, may be annulled by reason of Art 190(1)(a) and (b) of the Federal Code of Private International Law and therefore would not be enforceable, either in Switzerland or Australia.

- 2.9. I therefore find as the Arbitrator / Tribunal already constituted, I have the power to consider the question as to jurisdiction under the Swiss law given the seat of the CAS appeal division is in Switzerland.

3. THE SCHEME OF THE ANTI-DOPING POLICY

- 3.1. It is necessary to consider the full scheme under which the CA Policy is fashioned in order to determine the ambit of the CAS appellate jurisdiction and to consider the submissions of the athlete that his appeal is brought properly within the jurisdiction of the CAS appeal division.
- 3.2. The scheme outlined in the CA Policy has to be read in conjunction with a number of other instruments which provisions have been incorporated into the CA Policy, namely, the *World Anti-Doping Code* (WADA Code), the *ASADA Act* 2006 (as amended) and the *ASADA Regulations* which established the *National Anti-Doping Scheme* (NAD). All these instruments are acknowledged in Art 3 and 4 of the CA Policy (see [2.1] above):

The WADA Code

Under the WADA Code the following provisions are relevant:

Article 8: Right to a Fair Hearing

8.1 Fair Hearings

Each Anti-Doping Organization with responsibility for results management shall provide a hearing process for any Person who is asserted to have committed an anti-doping rule violation. Such hearing process shall address whether an anti-doping rule violation was committed and, if so, the appropriate *Consequences*. The hearing process shall respect the following principles:

- the right to respond to the asserted anti-doping rule violation and resulting *Consequences*;
- the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing panel's discretion to accept testimony by telephone or written submission);

- a timely, written, reasoned decision, specifically including an explanation of the reason(s) for any period of *Ineligibility*.

8.2 Event Hearing

...

8.3 Waiver of Hearing

The right to a hearing may be waived either expressly or by the Athlete's or other Person's failure to challenge an Anti-Doping Organization's assertion that an anti-doping rule violation has occurred within the specific time period provided in the Anti-Doping Organization's rules. Where no hearing occurs, the Anti-Doping Organization with results management responsibility shall submit to the Persons described in Article 13.2.3 (**read "athlete"**) a reasoned decision explaining the action taken.

...

13 Appeals

13.1 ...

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions

A decision that an anti-doping rule violation was committed, a decision imposing *Consequences* for an anti-doping rule violation ... may be appealed exclusively as provided in this Article 13.2.

13.2.1 ...

13.2.2 Appeals Involving National-Level Athletes

In cases involving national-level Athletes, as defined by each *National Anti-Doping Organization*, ..., the decision may be appealed to an independent and impartial body in accordance with rules established by the National Anti-Doping Organization.

(Comment to Art 13.2.2: An Anti-Doping Organization may elect to comply with this Article by giving its national-level Athletes the right to appeal directly to CAS.)

- 3.3. Therefore the WADA Code as a basic principle gives an athlete the right to appeal a decision related to the consequences (read sanction/period of ineligibility) of an ADRV.

The ASADA Act 2006

The Act authorises the establishment of a NAD scheme and the adoption of the WADA Code within Australian Sporting codes. Relevantly:

Section 14 Rights of Athletes and Support Persons

Waiver of Rights

1. ...
2. ...
5. The NAD Scheme may allow an athlete to waive a right under the NAD Scheme. However, the NAD Scheme must not allow a waiver of a right to apply to a Court, Tribunal or other body or person for a review of a decision under the NAD Scheme.

The ASADA Regulations 2006

Schedule 1

Regulation 3 establishes the NAD Scheme and also the Anti-Doping Rule Violation Panel (ADRVP). Sporting organisations must respect the rules of the NAD Scheme as approved by ASADA.

Under Regulation 4, ASADA and the ADRVP must have regard to the WADA Code.

Importantly it is clearly stated in the regulations the ADRVP does not have “the function of acting as a hearing panel of the kind mentioned in Article 8 of the WADA Code” (Regulation 4, 1.03 A (2)).

4. THE CA ANTI DOPING POLICY

- 4.1. The CA Policy in its “Background” section states at [7]:

... The ADP adopts and reflects the WADA Code (the Code) which is annexed to and forms part of this ADP.

and, in the Definitions section (1), ASADA means the Anti Doping Authority under the ASADA Act and the Anti Doping Rule Violation Panel (ADRVP). The CA Policy as stated above also acknowledges the provisions of the ASADA Act and the NAD scheme.

- 4.2. The provisions of the CA Policy which relevantly outline the scheme under which an ADRV, admitted by an athlete, is considered by ASADA (given the referral of powers) and Cycling

Australia are found within Articles 15 to 19 of the CA Policy. It is necessary to recite those provisions in order to determine the issue of jurisdiction in the context of the facts of this case.

Art 15 RESULTS MANAGEMENT

- 15.1 Results shall be managed in accordance with Article 7 of the (*WADA*) *Code*, the ASADA Act 2006 and the *NAD Scheme*.
- 15.2 *ASADA* will conduct any follow up investigation in accordance with the *Code*, the ASADA Act 2006 and the *NAD Scheme*.
- 15.3 ...
- 15.4 *ASADA* will issue an infraction notice. *ASADA* will advise *CA* and any other relevant parties that *ASADA* is issuing an infraction notice prior to issuing the infraction notice.
- 15.5 The infraction notice shall:
- (a) notify the *Person* of the anti-doping rule/s which appear/s to have been violated and the basis for the violation;
 - (b) enclose a copy of this ADP and the *Code* or the web site addresses where these documents may be found;
 - (c) state that *ASADA* will refer the matter to a hearing within 14 days (or other period determined by *ASADA* in accordance with the *Code*, the NAD Scheme and the ASADA Act), unless the *Person* gives a written waiver under **Article 15.7**; and
 - (d) state that if the *Person* does not respond within 14 days (or other period in accordance with the *Code*, the NAD Scheme and the ASADA Act) a hearing can be held in absentia or sanction can be applied in accordance with **Article 17**.
- 15.7 *ASADA* will refer the matter to hearing in accordance with **Article 16**. *ASADA* may decide not to refer the matter to hearing if the *Person* in writing:
- (a) acknowledges they have admitted the anti-doping rule violation; and
 - (b) waives the right to a hearing in relation to:
 - (i) whether they have committed an anti-doping rule violation; and
 - (ii) what sanction will apply.

- 15.8 If the *Person* does not respond within 14 days (or other period determined by *ASADA* in accordance with the *Code*, the NAD Scheme and the ASADA Act) a hearing can be held in absentia or sanction can be applied in accordance with **Article 17**.

Art 16 HEARING

- 16.1 Article 8 of the Code applies (here the Code means the WADA Code).
- 16.2 *ASADA* will wait 14 days (or other period determined by *ASADA* in accordance with the *Code*, the NAD Scheme and the ASADA Act or a period less than 14 days as agreed between *ASADA* and the *Person*) after sending an Infraction Notice above and then will convene *CAS* to conduct the hearing. *ASADA* will prosecute the alleged anti-doping rule violation.
- 16.3 *CAS* will determine:
- (a) if the *Person* has committed a violation of this ADP;
 - (b) if so, what sanction will apply;
 - (c) how long the sanction will apply; and
 - (d) any other issues properly brought before it for determination.
- 16.4 *CAS* will give to the *Athlete*, *ASADA* and *CA* a written statement of:
- (a) the findings of the hearing and brief reasons for the findings;
 - (b) what sanction (if any) will apply;
 - (c) for how long the sanction (if any) will apply; and
 - (d) any other issues determined by it.
- 16.5 Sanctions will be applied under **Article 17**.
- ...
- 16.9 Decisions by *CAS* under this Article may be appealed as provided in **Article 19**.

17 SANCTIONS

- 17.1 Articles 9 and 10 of the Code apply.
- 17.2 *CAS* or another relevant body may require the Athlete or other Person to

repay all funding and grants received by the Athlete from that body subsequent to the occurrence of the anti-doping rule violation. However, no financial sanction may be considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under this ADP. Repayment of funding and grants may be made a condition of reinstatement.

- 17.3 CAS may also determine, in addition to applying the sanctions under the Code, that a Person who has committed an anti-doping rule violation, is required to go to counselling for a specified period.

...

Art 19 APPEALS

- 19.1 Decisions made under Article 16 of this ADP may be appealed to the CAS Appeals Division in accordance with this ADP, Article 13 of the Code and the CAS Code of Sports Related Arbitration. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review authorized in the NAD Scheme or Article 16.9 must be exhausted. The following persons shall have the right to appeal:

5. the *Athlete* or other *Person* who is the subject of the decision being appealed;
6. the other party to the case in which the decision was rendered;
7. *ASADA*;
8. any other affected parties including *CA*.

- 19.2 ...

5. CONCLUSION AS TO THE EFFECT OF THE CA POLICY

- 5.1. The CA Policy, therefore, incorporates into it the WADA Code and the principles recited therein as well as those recited in the ASADA Act and through its Regulations, the NAD Scheme (CA Policy, Background, 7).
- 5.2. Read together an athlete has the right for a fair hearing for an alleged ADRV and for the “appropriate *Consequences*” of the ADRV (read sanction/period of ineligibility). Reasons must be given (WADA Code Art 8.1).

- 5.3. An athlete can waive his/her right to that fair hearing as to the *Consequences* of an ADRV (WADA Code Art 8.3 and CA Policy Art 15.7). The right of an athlete to provide such a waiver is also recognised under the ASADA Act (s 14).
- 5.4. However, that waiver cannot remove an athlete's right to apply to a court, tribunal or other body for a review of a decision (read "appeal" (ASADA Act s14)). The right to appeal a decision before an independent and impartial tribunal is clearly defined and separate right of appeal of "a decision imposing *Consequences*" for an ADRV (WADA Art 13.2 and Art 13.2.2) (also CA Policy Art 19).
- 5.5. There is no waiver provision under the WADA Code which affects an athletes right of appeal to an independent tribunal (WADA Code Art 13) nor is there such a waiver in any of the other legislative provisions – neither the ASADA Act or the CA Policy. There is a positive assurance under the ASADA Act (s 14) that a sports organisation's scheme "must not allow a waiver to a right to apply to a Court, Tribunal or other body or person for a review of a decision under the NAD Scheme".
- 5.6. The CA Policy (through Art 15.7) reflects the above principles and provisions. Under that provision, a waiver can be provided by an athlete, in writing, of his /her right to a hearing on sanction after he/she admits, in writing, an ADRV. Under the CA Policy Art 15.7 if there is no waiver a hearing is conducted under CA Policy Art 16 by the CAS.
- 5.7. The athlete, however, in accordance with the principles and provisions adopted in the CA Policy incorporating the WADA Code, the ASADA Act and the NAD scheme retains his/her right to appeal a decision imposing *Consequences* for an ADRV .No matter how the sanction is imposed, be it by the CAS under the WADA Code Art 8 and the CA Policy Art 16 or by Cycling Australia through the power under WADA Code Art 9 & 10 and CA Policy Art 17 there is a right to appeal a sanction imposed.
- 5.8. In neither the WADA Code, the ASADA Act and its Regulations, nor under the NAD scheme as incorporated into the CA Policy is there any provision that allows a waiver of the right to appeal a sanction nor a provision that negates the right held by an athlete to appeal "a decision imposing *Consequences* for an ADRV" (WADA Code Art 13 & Art 13.2.2).
- 5.9. Submissions of the Parties**
- 5.10. Mr Villa for the athlete contended that the decision of Cycling Australia was made under Art 16.5 of the CA Policy and that gives a right to appeal to the CAS appeals division as provided for by CA Policy Art 19.1. Mr Villa submitted CA Policy Art 17 does not itself authorise the imposition of sanctions. It provides, he submitted, for the application of WADA Code Art 9 and Art 10 to fix the period of ineligibility and other Consequences.
- 5.11. ASADA contended it is the CAS which is empowered to make decisions under CA Policy Art 16 related to ADRVs and sanctions. Cycling Australia has a separate power under CA Policy Art 17 (incorporating WADA Code Art 9 and Art 10) to apply a sanction on an athlete for an ADRV.

6. CONSIDERATION

- 6.1. The Tribunal must endeavour to objectively ascertain the parties intention at the time of the contract and ascribe meaning that reflects the parties intention in the operation of the CA Policy.
- 6.2. On a reading of the scheme, which incorporates the provisions of the WADA Code, the ASADA Act and Regulations into CA Policy and putting Cycling Australia's decision of June 2013 in that context (notwithstanding issues such as whether there was a proper waiver and the mention in the decision of irrelevant Art 15.8), I do not accept that the decision made by Cycling Australia was made under Art 16.5.
- 6.3. The CA Policy Art 16, under the heading "Hearing", deals with decisions following a hearing by the CAS. There was no hearing under CA Policy Art 16 as ASADA accepted that Mr Hill waived his right to a hearing under CA Policy Art 15.7. ASADA determined, whether correctly or not, to accept the waiver from the athlete then made a recommendation as to sanction under CA Policy Art 15.7 and, in the use of its discretion, recommended that sanction. Such a recommendation is usually channelled through the ADRVP. In its decision Cycling Australia accepted the recommendation and made its decision as to the period of ineligibility, which decision Cycling Australia stated it made under CA Policy Art 17.
- 6.4. In ascribing meaning to the provisions, I am persuaded CA Policy Art 16.5 must be read in its context where under CA Policy's Art 16.3, 16.4 before it and Art 16.9 after there is clearly defined the procedure for CAS to follow in making its decision after a hearing on matters related to ADRVs and the imposition of Consequences arising from the ADRV. I accept CA Policy Art 16.5 does not provide a general power to sanction.
- 6.5. The contract, properly construed, gives a power to Cycling Australia under CA Policy Art 17 (incorporating powers under WADA Code Arts 9 & 10) to impose a sanction. In coming to this conclusion, I note that under CA Policy Art 15.8 there is power, if an athlete refuses to respond to an infraction notice, for Cycling Australia to impose a sanction in accordance with CA Policy Art 17. It could not be that it was the intention of the parties to allow a general power to impose a sanction on an athlete who ignores an infraction notice (CA Policy Art 15.8) but not give Cycling Australia the power to impose a sanction on an athlete who admits an ADRV. That power resides CA Policy Art 17.
- 6.6. I accept the submissions of ASADA that the right of appeal to the CAS appeals division under CA Policy Art 19 is only enlivened when there first has been a hearing under CA Policy Art 16. There must also be a decision of the CAS under the CA Policy Art 16.9.
- 6.7. No Art 16 hearing has as yet been given to Mr Hill. There is no CAS decision. ASADA acted, as did Cycling Australia, on the fact that he had waived his right under CA Policy Art 15.7 to have a CA Policy Art 16 hearing.
- 6.8. Under the scheme adopted by Cycling Australia an appeal brought under CA Policy Art 19 must be an appeal from a decision made under CA Policy Art 16.9 by CAS.

- 6.9. Given an athlete retains the right to appeal a decision on sanction and there has been no CA Policy Art 16.9 decision which would allow an appeal under the CA Policy the only way for the dispute as to sanction be heard is before the CAS ordinary division.
- 6.10. Under Art 16 of the CA Policy, the CAS in its Ordinary Division has power to consider sanctions (CA Policy Art 16.3(b)) and other issues properly brought before it for determination (CA Policy Art 16.3(d)).
- 6.11. Mr Hill's dispute should first be brought before the CAS in its ordinary division. Under the scheme agreed by the parties, only after there is a CAS ordinary division decision can the athlete gain access to his right to appeal to the CAS appeal division.
- 6.12. While in such a circumstance there could well be argument as to the value of a waiver of the right to a hearing under CA Policy Art 16 through the application of CA Policy Art 15.7. However, a waiver under CA Policy Art 15.7 only waives the right to a hearing before a sanction is imposed. That waiver cannot be used to support the proposition it also waives an athlete's right to appeal a sanction imposed. The basic right of an athlete to appeal a sanction imposed for the consequences of an ADRV is incorporated into the CA Policy (WADA Code Art 13) and access to such an appeal must be through the provisions of the agreed CA Policy in its present form (CA Policy Art 19)
- 6.13. Mr Villa succinctly summarised the primary dispute as follows:
- "whether Cycling Australia's decision is vitiated as a result of there not having been a CAS hearing in the ordinary division (which raises the question whether or not the right to such a hearing was waived) or was otherwise in error (which raises the question of the application of Art 10.4 and 10.5 of the WADA Code)".*
- 6.14. The dispute should be filed before the CAS ordinary division. There must be a CAS decision before an athlete under the CA Policy can access his right to appeal the Consequences of an ADRV before an independent and impartial tribunal under the agreed arbitration scheme. Any time limit for filing of the dispute in that division should begin from the date of publication of this Award.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The CAS has no jurisdiction to hear Mr Hill's application dated 28 June 2013.
2. (...).