



Arbitration CAS ad hoc Division (O.G. Salt Lake City) 02/005 Troy Billington / Fédération internationale de Bobsleigh et de Tobogganing (FIBT), award of 18 February 2002

Panel: Mr. Robert Ellicott (Australia), President; Mr. Dirk-Reiner Martens (Germany), Mr. Olli Rauste (Finland)

Skeleton

Jurisdiction of the CAS ad hoc Division

Qualification criteria

Allocation of empty slots

CAS cannot have jurisdiction to hear a case when there is no Entry Form for the Olympic Games on which the jurisdiction must be founded (article 1 of the CAS ad hoc Rules).

The Applicant is Troy Billington, an athlete from the Virgin Islands who is seeking an order that he be entered into the Olympic Skeleton Race scheduled for 20 February 2002.

The Respondent is the Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) which opposes his Application.

The Challenge Cup, organized by FIBT, was held at Altenberg, Germany, on 25 and 26 January 2002. The main purpose of the event was to select eight athletes for the 2002 Olympic Winter Games from countries in which the sport of skeleton is not yet very developed.

Under the appropriate rules, to which we will later refer, only one athlete from each such country could be entered. Pursuant to the said rules, those countries whose drivers have been ranked among 1-8 in the Challenge Cup may enter one participant to the Olympic Winter Games.

In the Challenge Cup, the Applicant finished 11th. Among the top eight ranked finishers were two athletes from Latvia and two athletes from the Czech Republic so, pursuant to the Applicant's interpretation, he actually finished 9th in the sense of the qualification criteria for the Olympic Games.

Subsequently, South Africa did not enter its athlete in the Olympic Games, even though he had finished 6th in the Challenge Cup. Pursuant to the Applicant's interpretation, a slot thus became available for him because South Africa dropped out.

The Applicant requested to be “bumped-up” into the vacant slot. The FIBT denied his request on the grounds that it had been decided that no athletes who finished out of the invitation slots 1-8 were to be “bumped-up” even though some countries withdrew from the competition.

The Applicant next turned to the FIBT Internal Court of Arbitration with his request. On 16 February 2002, the FIBT Court dismissed the Applicant's request, finding that the FIBT had acted properly in processing the Applicant's case in accordance with the FIBT Rules, and that the FIBT officials had done so correctly and without favour or bias. The FIBT Court, however, suggested that the Applicant should be invited to ride as a "forerunner" during the skeleton competition at the Olympic Winter Games.

In the meantime, and before the deadline for entry, the Virgin Islands Olympic Committee (the "Virgin Islands NOC") entered Mr. Billington into the Olympic Winter Games, not as an athlete, but as an Administrative Official (AO) for that team for the sole purpose of allowing him to reside in the Olympic Village and prepare himself for the Skeleton event. Mr. Billington was subsequently granted an AO accreditation by the SLOC.

At 1:00 pm on 17 February 2002, the Applicant, supported by the Virgin Islands NOC and the Virgin Islands Bobsleigh and Tobogganing Federation, filed an Application before the CAS ad hoc Division for the Olympic Winter Games in Salt Lake City, requesting that all eight skeleton slots available be filled and, accordingly, that he be "bumped-up" one place and permitted to compete in the Skeleton event.

The Applicant also requested two items of preliminary relief, namely:

1. That an athlete's credentials be issued to him, and
2. That an order be issued permitting him to train pending the outcome of the case.

On 17 February 2002, the President of the CAS ad hoc Division appointed as arbitrators Mr. Robert Ellicott (Australia), President of the Panel, Mr. Dirk-Reiner Martens (Germany) and Mr. Olli Rauste (Finland).

The parties were summoned to appear for a hearing at 9:00 pm on 17 February 2002. The representatives of the Applicant, the Virgin Islands NOC and the FIBT attended the hearing, while the representatives of the International Olympic Committee (IOC), the Director for Legal Affairs, Mr. Howard Stupp, and the Director for Sports Affairs, Mr. Gilbert Felli, were heard by phone during the hearing.

At 1:30 am on 18 February 2002, after the hearing had been concluded and the Panel had deliberated upon the case, the Panel issued its award to the parties dismissing the application indicating it would give its reasons in writing later that day.

LAW

1. These proceedings are governed by the CAS Arbitration Rules for the XIX Olympic Winter Games in Salt Lake City (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (“ICAS”) on 5 November 2001. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PIL Act”). The PIL Act applies to this arbitration as a result of the express choice of law contained in art. 17 of the CAS ad hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of arbitrators, pursuant to art. 7 of the CAS ad hoc Rules.
2. Under art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute “pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”.
3. According to art. 16 of the CAS ad hoc Rules, the Panel has “full power to establish the facts on which the application is based”.
4. Rule 1 of the FIBT International Skeleton Rules provides, *inter alia*, that the FIBT as well as its ordinary members (national federations) and its extraordinary members (clubs) are the only representatives qualified to organise international competitions.
5. Among the competitions with which Rule 1 deals are the Olympic Winter Games.
6. Sub-rules 1.2.1 and 1.2.2 provide:

1.2.1 Admission

Only the athletes entered by the members are entitled to participate in the competitions according to 1.1.1, 1.1.2 and 1.1.3.

They must fulfil the following conditions

- a) *Be citizens of the nation of the national association, or*
- b) *have official residence status of the nation in question.*
- c) *Competitor has changed citizenship or official residency and has obtained the release from his former member federation and acceptance by the new federation. In such case, the competitor may elect to represent one of but not both.*
- d) *Right to take part in the Olympic Winter Games is the sole purview of the IOC and is governed by its IOC Rules.*

1.2.2 Starting Permission

1.2.2.1 Olympic Winter Games

- a) *Only drivers who have taken part in at least 5 international competitions classified in articles 1.1.1, 1.1.2 or 1.1.3 of the International Rules, spread over the two preceding racing seasons before the Olympic Winter*

Games and on at least three different tracks, all with ranking results, may take part in the Olympic Winter Games.

b) *Their nation classified during the current World Cup ranking by nations:*

- Men = best 12 nations
 - Ladies = best 8 nations

or if they are ranked in the individual ranking of the Challenge Cup of the current season as follows :

- Men = Rank 1-8
 - Ladies = Rank 1- 4

c) *One male, resp.female driver form the country organizing the Olympic Winter Games may participate if the organizing country is not already represented by qualified active participants.*

In each case the drivers have to satisfy the conditions of art.1.2.2.1 a)

d) *The number of qualified drivers per nation is based on the ranking by nations of the current World Cup and on the individual ranking of the Challenge Cup in the Olympic Winter.*

World Cup

<i>Men :</i>	<i>nation</i>	<i>1-3</i>	<i>=</i>	<i>3 participants</i>
		<i>4-6</i>	<i>=</i>	<i>2 participants</i>
		<i>7-12</i>	<i>=</i>	<i>1 participant</i>
<i>Ladies</i>	<i>nation</i>	<i>1-3</i>	<i>=</i>	<i>2 participants</i>
		<i>4-8</i>	<i>=</i>	<i>1 participant</i>

Challenge Cup

<i>Men :</i>	<i>1-8</i>	<i>=</i>	<i>1 participant</i>
<i>Ladies :</i>	<i>1-4</i>	<i>=</i>	<i>1 participant</i>

- Under the Articles of Association of FIBT relevant to the International Skeleton Rules, the FIBT recognises two Courts of Arbitration - the Internal Court of Arbitration and the Court of Arbitration for Sport (CAS) – Appellate Arbitration Division (*see* Article 14 FIBT Articles of Association).
- The Internal Court of Arbitration is constituted as the Court of first instance and is given the task with certain exceptions, of resolving any disputes arising from activities within the competence of FIBT (*see* Articles I 14 and I 14.1) .
- Pursuant to Article I 14.6, the FIBT recognizes the competence of the Appellate Division of CAS as the Court of last instance after all internal remedies have been exhausted.
- As stated earlier in this case, the Applicant appealed to the Internal Court of Arbitration of FIBT. It heard the appeal and delivered its decision, rejecting the Applicant's appeal, on 16 February 2002.

11. It is this decision and the decision of FIBT of 28 January 2002 which the Applicant challenges in this Appeal.
12. Rule 49.1 of the Olympic Charter (the “Charter”) provides:
 1. *Only NOCs recognized by the IOC may enter competitors in the Olympic Games. The right of final acceptance of entries rests with the IOC Executive Board .*
13. Bye-law to Rule 49 of the Charter provides for the procedures and the deadline for the entry of competitors. For the Winter Games 2002, the deadline was 28 January 2002. As the Entry Form states:

Please Note: SLOC must receive this form no later than 28 January 2002.
14. Bye-Law 5 to Rule 49 of the Charter requires that the Entry Forms state the text of the eligibility conditions and separate declarations by competitors (Bye-Law 5.1) and by coaches, trainers and officials (Bye-Law 5.3). Each of these declarations requires the agreement of the competitor, on the one hand, or the coach, trainer or official, on the other, to comply with the provisions of the Charter, including arbitration before CAS (Rule 74 of the Charter).
15. In this case, the Applicant signed an Entry Form as an official, which contained the declaration pursuant to Bye-Law 5.3 and was, the Panel was informed, lodged by the Virgin Islands NOC on or prior to 28 January 2002.
16. The issues raised by the parties were two-fold.
 1. Does the Panel have jurisdiction to entertain the Applicant's Application. The Respondent strongly contended that the Panel has no jurisdiction and relied on the decision of the ad hoc Panel in Gaia Bassani-Antivari v. IOC (CAS OG 02/003). The Applicant contended to the contrary.
 2. If the Panel has jurisdiction, is the Applicant entitled to an order directing that he be entered into the Skeleton Competition commencing Wednesday, 20 February 2002? The Applicant contended that, because the South Africa Olympic Committee had not , as it was entitled, entered an athlete in the Skeleton races pursuant to the rankings 1-8 in the Challenge Cup, he was entitled, having the 9th position in the sense of the qualification criteria in those rankings, to be “bumped up” a position. The FIBT, on the other hand, strongly contended that the Challenge Cup was, under its rules, only held to determine the best eight individual qualifiers provided they came from different nations and that only those eight were qualified for entry into the Games.
17. The Panel shall deal in turn with each of these issues.
18. Rule 74 of the Charter provides:

“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-related Arbitration”.

19. Article 1 of the CAS ad hoc Rules under which the ad hoc Division of CAS is established provides:

*“The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes **covered by Rule 74 of the Olympic Charter and by the arbitration clause inserted in the entry form for the Olympic Games** (the “OG”), insofar as they arise in the host country of the OG between 1 February 2002, and 24 February 2002” (emphasis added).*

20. The words underlined in Article 1 are relied upon by FIBT to found an argument that this Panel can only have jurisdiction to deal with this Application if the Applicant has signed an Entry Form as a competitor. It is not sufficient that he signed an Entry Form as an official. The reason for this is that the dispute arises in relation to his qualification to be entered as a competitor. There is no dispute about his entry as an official.
21. FIBT agrees that CAS in its ordinary appellate jurisdiction (art. R47 of the Code of Sports-related Arbitration) would have jurisdiction to entertain an appeal by the Applicant from its Internal Court of Arbitration. However, it argues this proceeding is not such an appeal and it does not consent to it being treated as such. Because this Panel is constituted under the CAS ad hoc Rules for these Olympic Winter Games, it says, its jurisdiction must be based on Rule 74 of the Charter read with Article 1 of those Rules. It argues that Article 1 governs the question of jurisdiction and that to have jurisdiction the dispute in question must be covered by Rule 74 and by the arbitration clause in a relevant Entry Form.
22. FIBT relies heavily on the decision of the ad hoc panel in Gaia Bassani-Antivari. In that case, the Panel discussed the relation between those two provisions and held that the word "and" in Article 1 of the CAS ad hoc Rules is used in a conjunctive sense and that the dispute must be covered by an Entry Form as well as Rule 74 of the Charter. The following paragraphs of the Panel's reasons set out its views and findings:

The debate before the Panel on this issue of jurisdiction centers on the word “and” in art. 1 of the CAS ad hoc Rules. Is the word used in a disjunctive or conjunctive sense? If the word is used in a disjunctive sense, it is not necessary for the Panel even to consider the necessity of a valid entry form since, argues the Applicant, Rule 74 by itself confers jurisdiction on the ad hoc Division of CAS. If, on the other hand, the word is used in a conjunctive sense, the jurisdiction of the Panel is founded both on the provisions of Rule 74 and on the arbitration clause contained in a validly submitted entry form.

The Panel has no difficulty, in the context of the Olympic Games, in finding that the word “and” is used in the conjunctive sense. The Panel finds support for its conclusion in the use of words “ainsi que” in the French text of the Article. It would be illogical to confer jurisdiction for a competitor on the CAS ad hoc Division (as opposed to the regular CAS procedure) to resolve any dispute arising on the occasion of, or in connection with, the Olympic Games only on the basis of Rule 74 without a link to these Games, such as the arbitration clause contained in a validly endorsed entry form. Consequently, the Applicant’s first argument in respect of this issue must fail.

23. The meaning of the word “and” in the relevant part of Article 1 of the CAS ad hoc Rules raises a difficult question of construction. This Panel considers that it should follow the decision in Gaia Bassani-Antivari and hold that the word “and” is used in a conjunctive sense and that, therefore, if it is to have jurisdiction to deal with this Application, it must involve a dispute arising under an Entry Form as a competitor for these Winter Games. There is no such Entry Form and, therefore, this Panel lacks jurisdiction. The Applicant sought to rely on his Entry Form as an official. However, no dispute is covered by that Entry Form because there is no dispute about his qualification as an official. It is a dispute about his qualification and eligibility to be a competitor and there is no Entry Form which covers this dispute.
24. The construction of Article 1 of the CAS ad hoc Rules adopted in Gaia Bassani-Antivari, which the Panel has decided to follow, may give rise to unfairness and hardship for athletes claiming the right to be entered as competitors in Olympic Games. Due to the late holding of the Challenge Cup, the Applicant has had to operate within a restricted timeframe which, in reality, prevented him from having a valid competitor’s Entry Form submitted by his National Olympic Committee (NOC) before the closing date for entries. If, contrary to what we shall hold, he had had a right to have the FIBT endorse him as qualified for entry into the Games, he would nevertheless have been prevented from enforcing that right because the FIBT refused to acknowledge his qualification which in turn would have prevented the lodging of a valid competitor’s Entry Form by his NOC.
25. There could well be other instances. For instance, an athlete who was discriminated against within Rule 2.2 of the Charter by his or her NOC and who for this reason alone was not entered would have no right to apply to the ad hoc Panel. In the light of the above, the Panel recommends that the contents of Article 1 of the CAS ad hoc Rules be reconsidered.
26. As is stated above, the Panel is of the opinion that CAS has no jurisdiction to hear the present Application because there is no Entry Form for the Applicant as a competitor on which the jurisdiction must be founded (article 1 of the CAS ad hoc Rules).
27. But even if CAS had jurisdiction, the Panel would dismiss the appeal on the merits.
28. According to the Applicant
*“(T)he sole issue for consideration is :
Does the FIBT have the power to bump-up a qualified athlete into a vacant invitation
Olympic Games slot?”*

The Panel agrees with this assessment of the issue. However, the Panel does not agree with the Applicant’s further submission that

*“there are no rules governing the present question of bumping-up an athlete into a recently vacated slot
... “.*

According to the Applicant, there is an “absence of law” and the lacuna has to be filled by CAS. The Panel is not of that view.

29. Art. 12.2.1 of the “International Skeleton Rules” states in relevant part :

1.2.2. *Starting Permission*

1.2.2.1 *Olympic Winter Games*

a) *Only drivers ..., may take part in the Olympic Winter Games.*

b) *Their nation classified during the current World Cup ranking by nations*

- *Men* = *best 12 nations*

- *Ladies* = *best 8 nations*

or if they are ranked in the individual ranking of the Challenge Cup of the current season as follows :

- *Men* = *Rank 1 - 8*

- *Ladies* = *Rank 1 - 4*

30. There is no disagreement between the parties that the Applicant does not fall within the group of athletes who qualify through the ranking of their respective nations in the World Cup. As regards the qualification through the Challenge Cup, the above quoted provision - even though not perfect from a grammatical point of view – makes it sufficiently and tolerably clear that the eight best placed individual athletes in the Challenge Cup qualify for participation in the Olympic Games. For purposes of the 2002 Winter Games, the Challenge Cup was held on 25 and 26 January 2002 in Altenberg, Germany and the Applicant (after deleting, as was required by the rules, those who came from the same country as an athlete ranked higher) was ranked 9th in this competition. Contrary to what has been submitted by the Applicant, there is no “absence of law” with regard to a “bump-up”. According to the FIBT Rules the eight best placed individual athletes qualify and there are no “slots” to be filled by whoever comes next. Absent a rule to the contrary, i.e. absent a “bump-up rule” it is the Panel’s view that an athlete who is ranked 9th cannot move up to 8th place if one of the athletes ranked before him does not participate in the Games. If the “draftsperson” had wanted to provide otherwise, he or she would have added a provision to the effect that athletes placed below the 8th position can move up, in order to replace athletes in the top eight who do not participate.

31. This reading of the relevant provisions in the FIBT Rules does not rely on the testimony given by Messrs Felli and Stupp on behalf of the IOC and confirmed by the Respondent, according to which the IOC and the FIBT made an (oral) agreement on a “no bump-up” policy in relation to Skeleton. Even without such an affirmative statement, the Rule in question makes it reasonably clear that only the eight best placed individual athletes qualify for the Games. The Panel has no problem distinguishing the case in hand from the situation in the women’s halfpipe competition during these Olympic Games where there appears to have been an agreement between the IOC and FIS that two athletes are allowed to move up to places not used by higher ranked athletes. It is not for the CAS to second guess why the IOC agreed on a “bump-up” policy in the halfpipe competition and failed to do so in the case in hand even though this attitude may have been prompted by the proximity of the dates of the Challenge Cup (25/26 January 2002) and the registration deadline for these Olympic Games (28 January 2002).

32. Also, the Panel has no problem distinguishing the case in hand from the situation where the Respondent allowed the 13th placed women's bobsleigh team to replace one better placed team which decided not to participate. The FIBT Rules regarding participation in the bobsleigh competitions during the Olympic Games are based on a single ranking with no strict quota. This is not comparable with the Skeleton rule in question which has a two-tiered qualification system, the second one being based on the ranking of individual athletes from countries less developed in skeleton and on a strict quota.
33. In summary therefore, the Panel is of the view that absent a rule to the contrary, the FIBT Rules for Skeleton do not allow for a "bump-up" of athletes.

The CAS ad hoc Division rules:

The application is dismissed.