



**Arbitration CAS ad hoc Division (O.G. Atlanta) 96/001 US Swimming / Fédération Internationale de Natation Amateur (FINA), award of 22 July 1996**

Panel: Mr. Jan Paulsson (France), President; Mr. Luc Argand (Switzerland); Mr. Hugh Fraser (Canada)

*Entry of an athlete for an event after the entry deadline*

- 1. The FINA Rules provide that entries for the Olympic Games must be made by NOCs “on or before the date determined” by the IOC, but do not state whether the concept of “entry” refers only to the identification of an athlete and his or her sport, or if it extends to the specific event.**
- 2. The current practice of the IOC in matter of entry deadlines is clear: the IOC is flexible with regard to formally deficient entries, as for example when an athlete properly entered for an event wants to enter for another event after the deadline. The IOC's Guide to Entries for Sports Competitions and Accreditation provides a textual basis for this practice.**

US Swimming seeks to obtain a ruling from the CAS ad hoc Division to the effect of prohibiting the entry of S. of Ireland in the 400 meter freestyle event for which qualifying heats are to be held on 22 July 1996.

US Swimming accepts that S. was entered into the Olympic Games before the 5 July 1996 entry deadline established by the IOC. US Swimming contends however that S. was entered for five specific events not including 400 meter freestyle, and that the Irish NOC did not have the right to seek, as it did on 17 July, to substitute S. in the place of another Irish swimmer who had been entered in the 400 meter freestyle event.

FINA's Swimming Commission initially concluded (on 18 July) on the basis of FINA Rule BL 6.3.2 that this substitution was not admissible, coming as it did after 5th July. This conclusion was confirmed by the FINA Bureau.

On 19th July, the IOC wrote a letter to FINA stating as follows:

*“The IOC has set a deadline up to 5th July 1996 to register athletes. For special cases for example, athletes who reach the standard after this deadline, alternates etc. the IOC has agreed to register these athletes up to 24 hours before the beginning of the competition. If the problem arises where athletes already registered under the conditions described above, wish to change events or to be entered into additional events, we consider this a technical matter which should always be settled for the benefit of the athlete”.*

On 20 July, FINA reversed its initial conclusion and decided to allow S. to participate. On 21 July, FINA informed the protesting federations (of Germany, the Netherlands, the USA) by letter as follows:

*“RE: Protest against entry of [S.], IRL, in Women's 400m Freestyle at the XXVI Olympics in Atlanta 1996.*

*This entry was accepted following a letter received from IOC Sports Director on July 19th, 1996. FINA has no right to interfere with the decisions taken by the IOC in matters regarding the organization of the Olympic Games.*

*The FINA Bureau is not entitled to deal with this matter. The protest fee goes back to the protester”.*

This is the decision which US Swimming wants the ad hoc Division to reverse. The request for arbitration was sent by US Swimming to the Court of Arbitration for Sport (CAS) by fax at 6:10 pm on 21 July 1996.

The Panel of arbitrators convoked US Swimming and FINA for a hearing at 11 pm which lasted until 12:30 am. It also notified the Irish Team Leader and the IOC, as potentially interested parties, of the hearing and invited them to attend and state their views. The same invitation was extended to the German and Netherlands Team Leaders, given the fact that they had also sought to have S. deleted from the starting list.

## LAW

1. These proceedings are governed by the Rules for the Resolution of Disputes Arising During the Olympic Games (the “ad hoc Rules”) of CAS enacted by the International Council of Arbitration for Sport (ICAS) on 28 September 1995. 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 because the seat of the ad hoc Division and of its panels of Arbitrators was established as Lausanne, Switzerland, by a decision issued by the President of the ad hoc Division on 11 July 1996.
2. The jurisdiction of the ad hoc Division arises out of Rule 74 of the Olympic Charter.
3. Under Article 17 of the ad hoc Rules, the Panel must decide a 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”*.
4. According to Article 16 of the ad hoc Rules, the Panel has *“full power to review the facts on which the application is based”*.
5. US Swimming bases its application on Article 6.3.2 of the FINA By-Laws, which provides that entries for the Olympic Games must be made by NOCs *“on or before the date determined”* by

the IOC. The decision in this case therefore hinges on whether or not the participation of S. in the 400 metres freestyle event would violate this rule.

6. The representative of FINA argued in the course of the hearing that US Swimming was acting against the wrong party, in that the decision not to exclude the athlete had been taken by the IOC and that the matter was out of FINA's hand.
7. The Panel does not accept this argument. The decision being challenged is FINA's decision to reject the protest against the participation of S. This decision emanates from FINA, and FINA is accordingly answerable therefore. Whether or not the position taken by the IOC provides any justification for FINA's decision is another matter; it may provide a defense for FINA, but it does not dispense FINA of the need to defend its decision.
8. Turning first to Article 6.3.2 of the FINA By-Laws, the Panel notes that it does not state whether the concept of "entry" refers only to the identification of an athlete and his or her sport, or if it extends to the specific event. This means that it does not address (let alone resolve) the consequences of a timely identification of an individual which fails to state the relevant event.
9. The IOC's Guide to Entries for Sports Competitions and Accreditation (January 1995 edition) contains the following sentence on page 20: "*These deadlines (for return of entries) are firm, unless otherwise approved by each International Federation and the IOC Executive Board*".
10. According to the IOC Sports Director, the frequent practice of the IOC is indeed to make exceptions, particularly with respect to athletes from countries whose federations are not as highly structured as others or with which it is difficult to communicate. He stated that "*probably a thousand applicants*" could not compete in the Atlanta Olympic Games if the IOC were not to allow any exceptions after the 5 July deadline.
11. He also affirmed that in his view the correspondence between the IOC and FINA in this case reflects the making of an exception as contemplated by the above-quoted passage from the Guide to Entries.
12. The representative of the NOC of Ireland stressed that entries are not communicated by national federations to FINA, but by NOCs to organizing committees. He stated that on July 5, in a meeting with two officials of ACOG, he was advised that changes of events for athletes already entered in the Games could be made as late as 20 July. The Irish representative further submitted that Ireland acted in good faith in making the changes on July 17 on the advice and in the presence of ACOG officials. His testimony on this point was not contradicted and is accepted by the Panel.
13. The members of this Panel are fully aware that last minute changes of events for competitors well after their Entry by Name has been a frequent occurrence in the past. It appears from the record submitted with the application in this case that FINA's Swimming Commission would prefer to adopt a stricter regime. The Panel can see that there may be considerable advantages

to stricter arrangements, particularly in terms of predictability, but the fact is that current practice is more flexible. The fact is also that current practice is not clearly proscribed by the applicable rules.

14. It may well be that FINA would be in a position to impose a regime of strict adherence to deadlines for event-specific entries irrespective of the rules and practice of the IOC or of the Organizing Committee for the Games. But as of now, the only provision of FINA's own By-Laws relied upon by the Applicant in this case refers generally to the "*official forms delivered to the Organizing Committee*". It does not matter whether or not event switching has been allowed in the past in the particular sport of swimming. As long as the applicable regulations are the general Rules that cover all entries for the Games, the Panel must follow the general regime. Current practice is clear; exceptions are frequently made by the IOC with regard to formally deficient entries. Moreover, the IOC Guide to Entries provides a textual basis for this practice.
15. Perhaps this practice is too lax, or perhaps to the contrary flexibility is required in order to accommodate a wide variety of sports and a wide variety of NOCs. But if there is to be a change, it should be the result of calm policy deliberations, and not an abrupt exclusion which penalizes an unsuspecting and blameless athlete. It may be that a strict regime may one day be unambiguously enacted and applied. If and when that day arrives, the Panel expects that team officials will conduct their affairs in consequence.
16. The consequence of upholding the application in a case such as this could be devastating for excluded athletes. Nor can it be said that this is a case of negligence or other failure to obey the rules on the part of team officials; the Irish NOC and Swim Team acted in a manner which they reasonably believed was acceptable under the Rules. Finally, the Panel does not consider that a flexible application of the rules creates unacceptable prejudice for other competitors.

**The CAS ad hoc Division rules:**

1. For the reasons stated above, the ad hoc Division of the Court of Arbitration for Sport decides that US Swimming has not demonstrated that the participation of S. in the 400 metres freestyle event would, in the circumstances of this case, violate a clear requirement of applicable rules.
2. The Application of US Swimming is therefore rejected.