

**Advisory opinion CAS 98/215 International Baseball Association (IBA), 4 January 1999**

Sole Arbitrator: Mr. Olli Rauste (Finland)

*Baseball*

*Change of nationality*

*Waiting period (application of the Olympic Charter)*

**Introduction**

1. This matter comes before the Court of Arbitration for Sport (“CAS”) pursuant to the provisions concerning Advisory Opinions of the Code of Sports-related Arbitration. The International Baseball Association (“IBA”) has filed a request for an Advisory Opinion in order to resolve a problem before it.
2. A baseball player with dual Brazilian-German nationality, P., has represented Brazil in an IBA tournament in 1996 at the age of 15 years. He has now relocated to his other home nation Germany and applies for a permission to represent Germany in future international tournaments. All the parties concerned seem to unanimously support P.’s application. There is, however, uncertainty of whether the IBA rules – and the Olympic Charter by reference – allow such a change of nationality in sports context.
3. Article R60 of the Code of Sports-related Arbitration provides, *inter alia*, that the International Federations may request an advisory opinion from the CAS about any legal issue with respect to the practice or development of sports or any activity related to sports. The CAS has consequently jurisdiction in this matter.
4. There are no express provisions as to the applicable regulations and the rules of law for Advisory Opinion proceedings in the Code of Sports-related Arbitration. The question submitted to the CAS must therefore be addressed on the basis of the IBA Constitution and the Olympic Charter, as requested by the IBA.
5. This Advisory Opinion is based solely on the written materials submitted to the CAS by the IBA. No hearing has been organized in this matter.

**The question put to the CAS**

6. The question submitted to the CAS was originally formulated by the IBA as follows:  
*“Given the above information, and the Rules of the IBA and the IOC, can Player P. play for Germany (in IBA tournaments and/or the Olympic Games)?”*

7. Pursuant to Article R61 of the Code of Sports-related Arbitration, it is for the President of the CAS to formulate the questions submitted to the Panel. The question finally submitted is as follows:

*“On the basis of the IBA Regulations, the Olympic Charter and the documents submitted by the IBA, can Player P. play for Germany (in IBA tournaments and/or the Olympic Games) and, if yes, since which date?”*

## **Facts**

8. P. was born on 19 January 1981 in Sao Paolo, Brazil.
9. In 1996, at the age of 15 years, P. was invited to become a member of the Brazilian Junior National Team. At that time he already had dual Brazilian-German nationality. Because P. was a minor, the permission to represent Brazil was granted by P.’s father. P. participated in the IBA World AA Championships as a member of the Brazilian Team.
10. P. has later relocated to Germany due to educational reasons. He now seeks permission to play for Germany in future international tournaments.
11. The President of the Brazilian Baseball and Softball Federation has on a letter dated 21 May [the year of the letter has not been announced] confirmed that P. is free to play for Germany “as of today”. Pursuant to the letter, P. has no further obligations or commitments within the Brazilian Federation. The President of the Brazilian Federation announces his federation’s support to “*any decision of term reduction by IBA to enable [P.] to play for Germany already in 1997*”.
12. The Secretary General of the National Olympic Committee for Germany has on a letter dated 11 March 1998 supported P.’s application. Pursuant to the letter, the NOC for Germany asks “*for a repeal of the waiting period and a release for the German Baseball and Softball Federation*”.
13. The Vice President and Secretary General of the National Olympic Committee for Brazil has on a letter dated 15 July 1998 also supported P’s application to represent Germany in future international tournaments.

## **Legal instruments**

14. Article 57 of the IBA Constitution provides as follows:

### *“CHAPTER V PERTAINING TO THE NATIONALITY*

*Article 57.- Any player playing for his national team in a competition under the jurisdiction of the IBA must have the nationality of the country whose Federation, Association or Organization included him in their line up.*

*In any case, the right of an IBA affiliated Federation, Association or Organization to register a player shall, as regards to his nationality, be determined by what is stated in the By-Law about rule 46 “Nationality of competitors” in the prevailing Olympic Charter”.*

15. Rule 46 of the Olympic Charter and the relevant By-Laws to Rule 46 provide as follows:

“NATIONALITY OF COMPETITORS

1. *Any competitor in the Olympic Games must be a national of the country of the NOC which is entering him.*
2. *All disputes relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board.*

BY-LAW TO RULE 46

1. *A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognized by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality.*
2. *A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognized by the relevant IF, and who has changed his nationality or acquired a new nationality, shall not participate in the Olympic Games to represent his new country until three years after such change or acquisition. This period may be reduced or even cancelled with the agreement of the NOCs and IF concerned and the approval of the IOC Executive Board.*
3. *[...]*
4. *In all cases not expressly addressed in this By-law, in particular in those cases in which a competitor would be in a position to represent a country other than that of which he is a national, or to have a choice as to the country which he intends to represent, the IOC Executive Board may take all decisions of a general or individual nature, and in particular issue specific requirements relating to nationality, citizenship, domicile or residence of the competitors, including the duration of any waiting period.”*

**The right to change nationality**

16. The first question to be addressed is the player’s right to change his nationality. P. has dual Brazilian-German nationality. He – or his father – has once chosen to play for Brazil in international tournaments. Is P. bound by his previous selection forever, or is he allowed to change his mind if the circumstances so require?
17. The CAS has addressed questions relating to athletes with dual nationality several times before. In two of its decisions the CAS has interpreted the nationality rules of the International Basketball Federation (see CAS 92/80 in *Digest of CAS Awards 1986-1998*, Staempfli Editions, Berne 1998 (hereafter: *Digest*), p. 297 ff. and CAS 94/123 in *Digest*, p. 317 ff.). In one of these decisions the CAS defined the distinction between the concepts of legal nationality and sporting nationality as follows:

*“It is necessary first to clarify the confusion which the appellant makes between his «legal nationalities» and his «basketball nationality» ... The CAS wishes to stress that two different notions are involved: the first concerns the personal status deriving from the citizenship of one or more states; the second is a uniquely sporting concept,*

*defining the eligibility rules of players with a view to their participation in international competitions. One is therefore presented with two different legal orders – one of public law, the other of private law – which do not intersect and do not come into conflict?* (see CAS 92/80 quoted above).

18. In a third decision the CAS has interpreted the nationality rules of the IBA and – by reference – the Olympic Charter (see CAS 95/132 in *Digest*, p. 53 ff.). That case concerned a baseball player who had dual Puerto Rican-American nationality. The difference with this case now before the CAS was that the player had not represented either one of these two countries in international competitions. The panel concluded as follows:  
  
*“In the circumstances of having dual nationality, the choice of the NOC for which he wishes to compete is a matter for election by the athlete, subject to certain variations when an election has been made, either overtly, or by implication, through participation in certain defined competitions. It is common ground that C. had, in 1994, not competed in any such competitions for Puerto Rico, nor for the U.S. He remained free, therefore, in 1994, to elect for which of the two countries he wished to play. It might have been otherwise, had he played in any such competitions. His election, made twice in writing, was to play for the [U.S.]. That was a choice which was open for C. to make under Rule 46 (Bye-law 1) of the Olympic Charter as well as the identical provision under the Eligibility section of the IBA Organizational Norms for Official Tournaments”.*
19. The purpose of these proceedings is to evaluate whether a player with dual legal nationality may change his sporting nationality if he once has made his choice but later becomes dissatisfied with it. This question has not been addressed in the previous case law by the CAS. There is no direct answer to that question in the Olympic Charter either. It must therefore be resolved by interpretation.
20. I begin my deliberation by noting that there is no rule in the Olympic Charter which would prevent an athlete from changing his sporting nationality in principle. On the contrary, paragraph 2 of the By-law to Rule 46 *expressly allows* an athlete who once has represented one country in international competitions to change his nationality and to represent a new country in following competitions.
21. Paragraph 2 of the By-law to Rule 46 which allows the change of sporting nationality applies only to athletes who have changed their legal nationality or acquired a new legal nationality. Athletes who originally have two or more legal nationalities do not fit within this definition. Athletes with dual legal nationality are separately dealt with in paragraph 1 of the said By-law.
22. Pursuant to paragraph 1 of the By-law to Rule 46, an athlete with dual legal nationality *“may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality”*. This wording could well be interpreted to deny an athlete with dual legal nationality the opportunity to change his sporting nationality forever when he once has made his election (this interpretation is mentioned in the request for an advisory opinion filed by the IBA). The above sentence could be read to say that the change of sporting nationality is allowed only to those athletes who have either changed their legal nationality or acquired a new legal nationality. Neither of these pre-requisites apply to players P. who has had dual legal nationality already before he has represented any nation in international competitions.

23. The wording in paragraph 1 can, however, be interpreted in another way also. Pursuant to this second interpretation paragraph 1 simply refers to the *general conditions* for a change of sporting nationality which are described in more details in paragraph 2 of the By-law. Pursuant to this interpretation, the reference to paragraph 2 in paragraph 1 means that also athletes who originally have had dual legal nationality may change their sporting nationality, subject to the same conditions which apply to athletes who have changed their legal nationality or acquired a new legal nationality.
24. Already a technical approach reveals to me that the latter, more liberal interpretation must prevail. Paragraph 1 of the By-law deals exclusively with athletes who have dual legal nationality. Those athletes who have either changed their legal nationality or acquired a new legal nationality are dealt with in paragraph 2. They have already been provided with the possibility of change of their sporting nationality in paragraph 2. The reference to paragraph 2 in paragraph 1 would be meaningless if the change of sporting nationality were to be totally ruled out from athletes with dual legal nationality. Consequently, the only reasonable interpretation of the reference sentence in paragraph 1 is that its purpose is to refer to the *general conditions* under which also athletes with dual legal nationality may change their sporting nationality.
25. More importantly, adopting the strict interpretation of the rule would, in my opinion, lead to unacceptable consequences. Athletes with dual legal nationality would be put in a disadvantage in comparison with athletes who have only one legal nationality. An athlete with only one legal nationality is always free to change his sporting nationality, if he fulfils the conditions set forth in paragraph 2 of the By-law. But an athlete who originally has had more than one legal nationality were to be denied the possibility to change his sporting nationality when he once has made his choice. Representing the country with which the athlete might have close ties were to be excluded forever, as the case of P. well illustrates. Sports world would not be served by such a rule.
26. Moreover, it must be kept in mind that dual legal nationality is usually a quality which has been given to a child by his parents and not chosen by the person himself. I see no reason why such an athlete should be put in a disadvantage in sports just because of a quality which the athlete's parents have given to their child and which most of the athletes do not have.
27. Moreover, the concept of dual nationality is mainly just an illusion in sports. This is due to the fact that legal nationality and sporting nationality are two different concepts, as the CAS has noted in its previous decisions. A person may have two or more legal nationalities, but every athlete can only have one sporting nationality. Dual nationality in sports may only exist in an early phase of an athlete's career before he is called upon to represent any country in an international competition for the very first time. When the athlete has made his choice as to his sporting nationality, the possible benefits of dual nationality will disappear in sports. Consequently, there is no reason to treat athletes unequally in sports depending on whether an athlete has one or more legal nationalities.

28. I therefore conclude that the possibility to change sporting nationality must remain open to every athlete regardless of whether the athlete has one or more legal nationalities. This opportunity is, however, subject to the general requirements of a waiting period as imposed by the Olympic Charter.
29. Consequently, the first part of the question submitted to the CAS must be answered as follows: *Player P. can play for Germany in IBA tournaments and in the Olympic Games.*

### **The waiting period**

30. The second question to be addressed relates to the conditions under which an athlete with dual legal nationality may change his sporting nationality. Pursuant to paragraph 2 of the By-law to Rule 46 of the Olympic Charter, any change of sporting nationality is subject to a three years waiting period. How is the length of the waiting period to be calculated, when the athlete like P. has had two legal nationalities already before he has represented any country in international competitions?
31. The conditions for a change of sporting nationality are imposed in paragraph 2 of the By-law to Rule 46 of the Olympic Charter. Pursuant to the paragraph, an athlete who has changed his legal nationality or acquired a new legal nationality may not represent his new country “*until three years after such change or acquisition*”.
32. In sports law literature, two objectives have generally been connected with this rule (see, for example, Massimo COCCIA, “The Athletes’ Nationality in Law and Sports”, in: *Sport Laws and Regulations in Europe*, II Juridical Seminar of the Association of the European National Olympic Committees AENOC (1993), p. 126-129; Thomas SUMMERER, *Internationales Sportrecht vor dem staatlichen Richter in der Bundesrepublik Deutschland, Schweiz, USA und England* (1990), p. 131-138). First, the waiting period serves the fairness and integrity of international competitions. These could be endangered if athletes could suddenly and unexpectedly change their nationalities and teams without any time limits at all. And secondly, the waiting period serves to deter unethical “commerce of nationalities” (see COCCIA, p. 129). National federations can safeguard their economic interests in athletes by requiring that the athlete may not represent another federation unless three years has elapsed or the athlete has reimbursed his previous federation for all the costs which were incurred during the athlete’s training and education.
33. In normal cases the application of the waiting period rule does not cause any problems. The waiting period begins on that date when the athlete acquires his new legal nationality. The athlete is free to represent his new country three years after such an acquisition.
34. The said principle cannot, however, be applied in a similar manner to athletes who already have dual legal nationality. In many cases an athlete with dual legal nationality has had more than one nationality already before he has started his sporting career. If paragraph 2 of the By-law to Rule 46 were to be applied literally also to such athletes, they would be free to change

their sporting nationality from day to day without any waiting period at all. For example P. could play for Brazil today, for Germany tomorrow and for Brazil again the day after tomorrow. Such sudden changes in athletes' sporting nationalities would seriously endanger the fairness and integrity of sports competitions. Such an application of the waiting period rule would not correspond to the objectives which lie behind the rule.

35. Consequently, such a literal application of the rule cannot be accepted with regard to athletes with dual legal nationality. The date of acquisition of the other legal nationality cannot serve as the starting point of the waiting period for athletes like P. who already have had more than one legal nationality before the athlete has represented any country in international sports competitions.
36. There are, however, at least two other alternatives as to the starting point of the waiting period for athletes with dual legal nationality. The first alternative which could come into consideration is the date on which the athlete notified his International Federation of his intention to change his sporting nationality. The second alternative could be the date on which the athlete has represented his previous country in an international competition for the last time. I now turn to evaluate how these alternatives would correspond to the objectives behind the waiting period rule.
37. I cannot find any reasons why the notification date could not serve as the starting point of the waiting period for athletes with dual legal nationality. Such a solution has already been adopted in the rules of the International Basketball Federation (see CAS 92/80 quoted above). In this alternative, the athlete with dual legal nationality who wishes to change his sporting nationality must notify his International Federation of his intention. The athlete would then be free to represent his new federation in international sports competitions when three years had elapsed since his notification.
38. In this alternative, the fairness and integrity of sports competitions would not be endangered any more than what the rules currently in force already allow. Even under paragraph 2 of the By-law to Rule 46 of the Olympic Charter, it is possible that an athlete who has acquired a new legal nationality may continue to compete for his old federation during the waiting period if he has not lost his old legal nationality. Such an athlete just changes his sporting nationality when the waiting period has elapsed, without any interruption in his participation in sports competitions. Adopting the notification date as the starting point of the waiting period for athletes who have dual legal nationality would lead to the same situation.
39. The economic interests of the athlete's previous national federation would not be endangered either by such a rule. The previous federation could safeguard its economic interests during the three years waiting period by using its power to select and register athletes to international competitions. This is the opportunity which also paragraph 2 of the By-law to Rule 46 gives to the national federation of an athlete who has acquired another legal nationality without losing his old legal nationality and who announces his intention to begin to represent his new federation after the waiting period.

40. Consequently, I conclude that an athlete with dual legal nationality may represent a new national federation in international competitions at least when three years has elapsed since the athlete notified his International Federation of his intention to change his sporting nationality.
41. The other alternative as to the starting point of the waiting period for athletes with dual legal nationality could be the date on which the athlete has represented his previous country in an international competition for the last time. In this alternative, the athlete with dual legal nationality could change his sporting nationality simply by notifying his International Federation if at least three years has elapsed from the last international competition in which the athlete has represented his previous federation. He would then be free to represent his new federation immediately after the notification.
42. I cannot find any reasons either why also this alternative could not be accepted. The fairness and integrity of international competitions could not come into question if the athlete had not represented any national federation at all in international competitions during the last three years. The economic interests of the athlete's previous national federation could not be endangered either if that federation has not had any use of the athlete's services in international competitions during the last three years.
43. Consequently, I conclude that an athlete with dual legal nationality may represent a new national federation in international competitions also if he has not represented any national federation at all in such competitions during the last three years and he notifies his International Federation of his intention to begin to represent a new national federation. In such a case, the athlete may begin to represent his new federation immediately after the notification has been made.
44. Putting these two alternatives together, I come to the following conclusion of a general nature:

An athlete with dual legal nationality may represent a new national federation in international competitions when either:

- three years has elapsed since the athlete notified his International Federation of his intention to change his sporting nationality, or
- the athlete has not represented any national federation at all in international competitions during the last three years and he notifies his International Federation of his intention to begin to represent a new national federation. In this case, the athlete may begin to represent his new federation immediately after the notification has been made.



45. As these general principles are applied to this particular case of P. now before the CAS, I come to the following conclusion:

*Player P. can play for Germany in IBA tournaments and in the Olympic Games at least when either:*

- *three years has elapsed since P. has notified the IBA of his intention to begin to represent Germany, or*
- *three years has elapsed since P. has represented Brazil in an international competition for the last time.*

### **Reduction of the waiting period**

46. Paragraph 2 of the By-law to Rule 46 of the Olympic Charter allows the three years waiting period to be reduced or even cancelled with the agreement of all the parties concerned. Pursuant to the said paragraph, *“this period may be reduced or even cancelled with the agreement of the NOCs and IF concerned and the approval of the IOC Executive Board”*.
47. It seems to me that the reference to the IOC Executive Board in paragraph 2 relates only to questions concerning athletes’ participation in the Olympic Games. The IOC can hardly be seen to have any interest in controlling athletes’ nationality in competitions other than the Olympic Games. The questions relating to athletes’ nationalities in other international competitions should remain within the sole discretion of the International Federation concerned. Consequently, paragraph 2 of the By-law to Rule 46, as applied as a part of the IBA regulations by reference, must be interpreted to mean that the NOCs concerned may by a mutual agreement reduce or even cancel the waiting period of an athlete in IBA tournaments, subject to the approval of the IBA.
48. In the case of P. both the National Olympic Committee for Brazil and the National Olympic Committee for Germany have announced their support for the cancellation of the waiting period. In addition, the Brazilian Baseball and Softball Federation has confirmed that P. is free to play for Germany “as of today”.
49. Pursuant to paragraph 2 of the Bye-law to Rule 46, it is now the duty of the IBA to decide whether the waiting period of P. can be reduced or even cancelled.
50. With regard to the Olympic Games, the approval of the IOC Executive Board must, in addition, also be requested to P’s representation of Germany if the three years waiting period as defined above will not elapse before the next Olympics.
51. When considering its approval to the reduction or cancellation of the waiting period, the IBA should give consideration to the objectives behind the waiting period rule. The economic interests of P.’s previous national federation have already been safeguarded by the national federation itself. As the President of the Brazilian Baseball and Softball Federation has confirmed, P. has no further obligations or commitments within the Brazilian Federation. This objective of the waiting period rule has therefore been satisfied.

52. The other objective behind the waiting period rule is to guarantee fairness and integrity in international sports competitions. Sudden and unexpected changes in athletes' nationalities might endanger this objective. It is the duty of the International Federation to maintain that this objective will not be endangered when the IF considers its approval to the mutual agreements between national federations and NOCs.
53. In the case now before the CAS, P. has once, at the age of 15 years, represented Brazil in the IBA World AA Championships in 1996. It is difficult to see how the fairness or integrity of international baseball could be threatened if the agreement between the NOCs of Brazil and Germany were to be approved by the IBA and P. were to be allowed to begin to represent his other home nation Germany in IBA tournaments immediately. This decision is not, however, up to the CAS to make. It is a decision to be finally made by the IBA as imposed in paragraph 2 of the By-law to Rule 46 of the Olympic Charter.

#### **The meaning of minority**

54. In its request for an advisory opinion, the IBA has given consideration also to the fact that P. was a minor when he represented Brazil in an IBA tournament, and, consequently, the permission to represent Brazil was granted by his father and not by P. himself.
55. This fact alone would not, however, authorize P. to disregard the choice of sporting nationality once made on his behalf by his father. It is a generally acknowledged legal principle that minors are judicially represented by their parents. The judicial acts taken by P.'s father on his behalf will bind P. in the same manner as they were taken by P. himself. P. may take his own acts and decisions when he will reach the age of majority, but until that date he will be legally bound by the decisions and choices made by his parents as his legal representatives.

#### **The CAS hereby gives the following advisory opinion:**

1. On the basis of the IBA Regulations, the Olympic Charter and the documents submitted by the IBA, Player P. can play for Germany in IBA tournaments and in the Olympic Games.
2. Player P. can play for Germany in IBA tournaments and in the Olympic Games at least when either:
  - three years has elapsed since P. has notified the IBA of his intention to begin to represent Germany, or
  - three years has elapsed since P. has represented Brazil in an international competition for the last time.

3. With the approval of the IBA, Player P. can begin to play for Germany in IBA tournaments even earlier as described above, even immediately if the IBA so decides. In the Olympic Games, however, also the approval of the IOC Executive Board will be required if Player P. were to play for Germany before the three year period will elapse.