



**Arbitration CAS 2000/A/260 Beashel and Czislawski / Australian Yachting Federation Inc. (AYF), award of 2 February 2000**

Panel: Mr. Malcolm Holmes QC (Australia), Sole Arbitrator

*Yachting*

*Selection dispute*

*Nomination of athletes to the 2000 Australian Olympic Team*

*Implementation of nomination criteria*

- 1. The present selection dispute is not a case where the CAS is being asked to determine which of two crews is better performed or which is more likely to win a medal. They are matters which under the rules are given to appropriately qualified persons within the federation concerned.**
- 2. In the case of a very close contest for selection, the athletes are entitled to expect that the ultimate decision will be one where the Nomination Criteria have been properly complied with. The non-compliance with the Nomination Criteria related to the weight to be given to the performance in the Nominated Regattas. The nature of the breach was such that for an evenly balanced decision, such as the present, it is not possible to say that it would not have made a difference between the Appellants being selected or not selected. In the particular circumstances, the decision challenged could have been different if the particular non-compliance had not occurred.**

In January 1999 the Australian Yachting Federation (AYF) and the Australian Olympic Committee Inc (IOC) entered into an agreement whereby the AYF agreed to only nominate to the AOC for selection as members of the 2000 Australian Olympic Team those athletes who had met the relevant Nomination. These Nomination Criteria had been drafted “*in consultation with the AOC coaches, Olympic Class Administrators, AYF board members and legal advisers*”. At the time the AYF stated that it desired “*to have certainty in the Selection Criteria for Athletes and to ensure that its Athletes and Officials are aware and have a clear understanding of the manner by which it will decide to nominate Athletes and Officials to the AOC for selection*”.

The Nomination Criteria involves a two-stage process. First an AYF Nomination Panel is constituted. The Nomination Panel comprises the Chief Executive Officer, the AYF High Performance Manager and one member of the AYF Board (clause 8.1). The Nomination Panel is required to form an opinion as to which of the competitors “*have the best prospects of winning medals in their Class at the Sydney 2000 Olympic Games*” (clause 2.2). Before forming this opinion the Nomination Panel is obliged to consult with the National Coaching Manager and also the Coach for the relevant Class (clause 8.1). The Nomination Panel is also obliged in forming its opinion to take into account

a number of factors including in particular performance in the Nomination Regattas. The composition of the Panel is the result of a considered decision taken by the AYF and the members of the Panel can be assumed to be those thought most appropriate for the task by the AYF. The Panel comprises persons of undoubted expertise, qualification and integrity for carrying out this task. Subject to one matter the weight to be given to the various matters that the Nomination Panel takes into account and how the various matters are to be evaluated is left to their expertise experience and discretion. The one matter is the performance of the Athletes in the Nomination Regattas. The Nomination Panel is obliged to take that matter into account “in particular” (clause 2.3) and the performance is to be treated by the Nomination Panel as “*a significant but not necessarily determinative factor*” (clause 2.4).

Of particular significance in these proceedings was the obligation on the Nomination Panel to comply with the provisions of clauses 2.3 and 2.4 of the Nomination Criteria. These clauses provide:

“2.3 In forming its opinion on medal prospects, the AYF Board and the AYF Nomination Panel will take into account a number of factors, including in particular performance in the Nomination Regattas.

2.4 Performance in the Nomination Regattas will be a significant but not necessarily determinative factor. Schedules A, B and C set out the method of assessing performance in the Nomination Regattas for each Class. However, the AYF Board and the AYF Nomination Panel may also take into account the surrounding circumstances, including the size and competitiveness of the fleets in the Nomination Regattas sailing conditions, crew changes and performance in other regattas.”

Once the Nomination Panel has formed its opinion as to who has the best prospects of winning medals in their Class at the Sydney 2000 Olympic Games the Nomination Panel is required to make a recommendation to the AYF Board.

Having received the recommendation the AYF Board is obliged to consider that recommendation and may or may not accept the recommendation. The Board is obliged to make its own decision on nomination based on its own opinion as to who has the best prospects of winning medals in their Class at the Sydney 2000 Olympic Games. The recommendation of the Nomination Panel is but one of a number of matters it must consider. The Board, like the Nomination Panel before it, is obliged to take into account a number of factors including in particular performance in the Nomination Regattas. The Board, like the Nomination Panel, is also required to comply with clauses 2.3 and 2.4 set out above.

These proceedings arise out of an appeal from the AYF’s decision to nominate two athletes for the 49er Class Yacht as members of the 2000 Australian Olympic Team.

The Nomination Regattas for the 49er Yacht Class were, first the Kiel Week Regatta in Germany in June 1999, second, the Sydney National Regatta in October 1999, and third, the Sydney International Regatta in December 1999. The process of selection was undertaken following the completion of these Regattas. Following a recommendation by the Nomination Panel, the Board of the AYF on 22 December 1999 made its decision to nominate Chris Nicholson and Daniel Phillips for the 49er Yacht Class.

Under the Nomination Criteria any dispute regarding non-nomination of competitors by the AYF to the AOC was to be dealt with by a two tier appeal process. The first stage was an appeal to the Australian Yachting Federation's Appeal Tribunal (the Tribunal) with any subsequent Appeal to be heard by the Court of Arbitration for Sport. The Nomination Criteria provide that (clause 6.1(2)): "*The sole grounds for any Appeal are that the Nomination Criteria have not been properly followed and/or implemented*". The Tribunal comprises three persons, a Chairman being a barrister or solicitor and two other people with thorough knowledge of sailing, who preferably have had international competition in sailing and experience and skills suitable to the function of the Tribunal.

Following the decision of the AYF Board to nominate Chris Nicholson and Daniel Phillips (the Nominees), Adam Beashel and Teague Czislawski (the Appellants) appealed to the Tribunal against the decision. The Nominees with the consent of the AYF and the Appellants intervened and became parties to the proceedings.

Following a hearing on 2 and 3 February 2000, the Tribunal dismissed the appeals. The Tribunal in its decision on 4 February 2000 found that whilst "*there were flaws in the procedures that were followed*", the Tribunal did not think "*that this made the difference between [the Appellants] being selected or not selected*". The Tribunal stated that:

*"We are acutely conscious of the fact that both the Appellants and the Nominated Competitors are highly skilled and talented sailors who have for a considerable period of time been sailing at the highest international levels. Each crew is regarded by the coaching staff, we were told, as capable of winning a medal at the Sydney 2000 Olympic Games. Their respective achievements in World Championships and other international regattas in the 49er Class over the last 3 years appear to provide support for this assessment. The choice between them is a most unenviable one. We have given detailed and anxious consideration to all that has been put to us but we have not been able to conclude that the Nomination Criteria were not properly followed and/or implemented."*

The matters which the Tribunal regarded as "flaws in the procedures" related to events that occurred both during and after Race 2 of the final Nomination Regatta. The Tribunal found that it was clear that the Nomination Panel had been influenced in part by its conclusions about both the events of this race and the subsequent protest hearing. The Tribunal found that the Nomination Panel came to the view that the Appellants should probably have been disqualified from the race. The Tribunal noted that had that occurred the overall points at the end of the Nomination Regattas rather than favouring the Appellants with a score of 84 points compared to 81 for the Nominees would have favoured the Nominees by 81 to 78.

Material was placed before the Tribunal giving version and counter version of what had occurred both during the race and during a subsequent protest which was heard by an International Jury. The Tribunal was not asked by any party to attempt to establish where the truth lay. Nevertheless the Tribunal agreed with the Appellants' submissions that the circumstances surrounding Race 2 should not have played any part in the formation of the opinion of the Nomination Panel or of the Board of the Australian Yachting Federation.

The Tribunal found that the consideration of the circumstances of Race 2 was one matter taken into account but it was not the only one. Further, the Tribunal found that it had no reason to doubt that the ultimate opinion of the Nomination Panel and of the Board of the AYF as to the best medal prospects were held *bona fide*. The Tribunal was of the view that it would not have made the difference between the Appellants being selected or not selected. Ultimately the Tribunal found that it was not able to conclude that the Nomination Criteria were not properly followed and/or implemented.

Following the Tribunal's decision the Appellants then appealed to the Court of Arbitration for Sport.

It was the common position of both the Appellants, the AYF and the Nominees that in order for the Appeal to be upheld by the Court, the Appellants must first show that the Tribunal was in error, and then secondly show that the Court, upon a review, should find that the Nomination Criteria have not been properly followed and/or implemented.

The Appellants contended that the Tribunal was correct in finding that the circumstances surrounding Race 2 should not have played any part in the formation of the opinion of the Nomination Panel or of the Board of the AYF but erred in finding that it made no significant difference. On the other hand the primary position of the AYF and the Nominees was that the Tribunal erred in finding that the circumstances surrounding Race 2 should not have played any part in the formation of the opinion. Further the AYF went so far as to say that as the opinion of the Nomination Panel and the Board was that the Nominees had the best prospects of winning medals and as that these were *bona fide* opinions, it did not matter what route the Nomination Panel or the Board took in forming those opinions. In the alternative the AYF and the Nominees submitted that even if an irrelevant matter had been taken into account, this did not amount to a failure to "properly" comply with the Nomination Criteria.

The hearing of the appeal was expedited and it was in the interests of all parties that a decision be given as a matter of urgency. The preparation and training for the Olympic Games requires long and careful planning and competition at international events overseas between now and the Games. Further, all parties submitted that if the Appellants were successful the Court should remit the matter of the nomination of the 49er Yacht Class back to the AYF with appropriate directions for that matter to be considered in accordance with the Nomination Criteria and taking into account the reasons for any decision. In these circumstances it was in the interests of all parties to know not only the outcome but also the reasons as a matter of urgency.

## LAW

1. The two issues to be determined on the appeal are whether or not the Tribunal was in error and if so whether of the Nomination Panel and AYF Board have failed to properly follow and/or implement the Nomination Criteria. These two issues do not involve any impugning

of the opinions of the Nomination Panel, the National Coaching manager the coach of the 49er Class or of the Board of the AYF. I accept the evidence before the Court about the opinions which are held and their *bona fides*.

2. This is not a case where the Court is being asked to determine which of two crews is better performed or which is more likely to win a medal. They are matters which under the rules are given to appropriately qualified persons within the AYF. The members of the AYF, however, have agreed that the sole grounds for any appeal from such a decision is that the Nomination Criteria have not been properly followed and/or implemented. Accordingly, I accept as a corollary that it is a term of the agreement containing the Nomination Criteria that the Nomination Panel and the Board of the AYF have an obligation to properly follow and/or implement the Nomination Criteria.
3. As to the first issue, I agree with the finding of the Tribunal that where a matter has been dealt with by an International Jury, it “*was not the function of the Nomination Panel or any of the coaching staff to proceed thereafter upon a private view of the circumstances or any perceived deficiency in the hearing of the protest*”. Where those matters had been determined by the International Jury in accordance with specifically formulated and well established rules and procedures on the materials then presented and where all concerned had thereafter acted in accordance with the decision of the International Jury, it could not have been intended by those drafting the provisions of the Nomination Criteria that the Nomination Panel or the Board could ignore such a ruling. Further clause 2.4 of the Nomination Criteria provides that Schedule A set out the method of assessing the performance in the Nomination Regattas. It provides that the top placed boat in the Nomination Regattas will be the boat with the highest accumulated points score which is to be determined in accordance with the procedure which is set out. Points are allocated on the basis of a number of matters including the overall finishing place. It would be capricious for the Nomination Panel or the Board to proceed on a different finishing place to that achieved at one of the Nomination Regattas following a ruling by an International Jury at the time. For these reasons I do not accept the submissions of the AYF or the Nominees that as a matter of the proper construction of the provisions of the Nomination Criteria, the Nomination Panel and the AYF were entitled in forming their opinion as to which competitor had the best prospects of winning medals at the Sydney 2000 Olympic Games to proceed as if the International Jury had made a different determination to that which it had made at the time.
4. I also do not accept that it is an answer to a complaint that the Nomination Criteria have not been properly followed and/or implemented that there is no need for compliance or non-compliance with the procedures in the Nomination Criteria if ultimately the opinion formed by the Nomination Panel or the AYF is that the Nominees have the best prospects of winning medals in their class at the Sydney 2000 Olympic Games. If this were so then there would be no need for provisions such as clauses 2.3 and 2.4 relating to the factors to be taken into account and the weight to be given to performance in the Nomination Regattas and how that performance was to be assessed. If that were the intention of the parties to the agreement all that would need to be contained in the agreement would be a simple provision along the lines that the Nomination Panel will make a recommendation to the AYF Board as to the

competitors who, in its opinion, have the best prospects of winning medals in their class at the Sydney 2000 Olympic Games.

5. Accordingly, I agree with the Tribunal that there were “*flaws in the procedures that were followed*” by the Nomination Panel and the AYF Board.
6. The question then arises is whether or not these flaws in the procedures amount to circumstances which demonstrate that the Nomination Criteria have not been “properly” followed and/or implemented. The Tribunal noted that the Nomination Panel and the Board had also correctly taken other matters into account. The Nomination Panel and the Board of the AYF had considered the performance of the two crews in a number of other major international regattas and took into account the views of the coaches about medal prospects. The Tribunal took the view that whether or not there had been “proper” compliance required a consideration of whether or not the non-compliance in the procedures which it had identified was such that it led to the formation of an unreliable opinion upon the decisive issue, namely which of the competitors had the best prospects of winning medals in their Class at the Sydney 2000 Olympic Games.
7. Here I have given anxious consideration to the matters identified by the Tribunal in reaching its decision that it was not satisfied that the Nomination Criteria were not properly followed and/or implemented and I have reached a contrary conclusion. The circumstances which lead me to a contrary view relate to the nature of the “flaw” identified by the Tribunal and also to a feature which was identified itself by the Tribunal.
8. The flaw related to the performance in the Nomination Regattas which is to be regarded as “*a significant but not necessarily determinative factor*”. This performance in the Nomination Regattas is a factor which the Board and the Nomination Panel are obliged to taken into account “*in particular*”. It is the only factor which is also required to be regarded as “*significant*”. It is also the only factor which is to be assessed in a specific way i.e., in accordance with the formula set out in Schedule A. The flaw related to the Nomination Panel and the Board’s consideration of the Appellants’ performance in the Nomination Regattas. The written reasons provided by the Nomination Panel included the statement that “*the circumstances surrounding race 2 of the SIRS 92 regatta caused the Nomination Panel to form the view that the overall winning points score (in the Nomination Regattas) achieved by Adam Beashel and Teague Czislowski should carry lesser weight than it might otherwise have been accorded in determining which crew should be nominated*”. This statement demonstrated that the flaw had a relevant operative effect in that it caused the weight given to the performance of the Appellants in the Nomination Regattas to be decreased.
9. The feature identified by the Tribunal was that it was “*a very close contest for selection*”. The Tribunal was acutely conscious of the fact that both the Appellants and the Nominees were “*highly skilled and talented sailors who have for a considerable period of time been sailing at the highest international levels*”. Both were regarded “*as capable of winning a medal at the Sydney 2000 Olympic Games*”. The Tribunal with all its expertise saw support for this assessment in “*their respective achievements in world championships and other international regattas in the 49er Class over the last three years*”. The Tribunal regarded the choice as a “*most unenviable one*”. Both the Nominees and the

Appellants are entitled to expect that in these circumstances the ultimate decision will be one where the Nomination Criteria have been properly complied with. The non-compliance with clauses 2.3 and 2.4 related to the weight to be given to the performance in the Nominated Regattas. The nature of the breach was such that for an evenly balanced decision, such as the present, it is not possible to say, as the Tribunal did, that it would not have made a difference between the Appellants being selected or not selected. I am satisfied that in the particular circumstances of this case the decision of the AYF Board could have been different if the particular non-compliance had not occurred. Accordingly the decision is therefore unreliable.

10. For these reasons I uphold the appeal and make an award in favour of the Appellants. The parties were agreed that in the event that the appeal succeeded the appropriate course would be to remit the matter to the AYF to make a further decision in accordance with the Nomination Criteria and taking into account these reasons and accordingly I so award.
11. Under Article R59 of the Rules of the Court of Arbitration for Sport the award shall be made public unless all parties agree that it should remain confidential. The parties have not agreed that the award should remain confidential and are in agreement that the award and the accompanying reasons be made public.

**The Court of Arbitration for Sport hereby rules that:**

1. The Appeal is upheld.
2. The matter shall be remitted to the AYF to make a further decision in accordance with the Nomination Criteria and taking into account the above reasons.
3. The award and the accompanying reasons shall be made public.