Arbitration CAS 2002/A/361 Berchtold/Skiing Australia Limited (SAL), award of 19 February 2002

Panel: Mr. John Boultbee, President (Australia); Mr. Malcolm Holmes QC (Australia), Mr. Alan Sullivan QC (Australia)

Alpine skiing
Eligibility for selection as a member of a national Olympic team
Interpretation of the selection agreement

1. **The criteria of the Selection Agreement issued by Skiing Australia Limited are not absolute and fixed but rather are subject to an overarching discretion in extenuating circumstances.**

2. **The selection Panel in failing to consider the exercise of their discretion and whether the circumstances amounted to extenuating circumstances were not properly following and/or implementing their obligations under the Selection Agreement. The nomination criteria have not been properly followed and/or implemented, notwithstanding that there is abundant evidence establishing that the selection Panel and Skiing Australia Limited were at all times acting in good faith and with the best interests of the athlete at heart.**

3. **The decision whether or not to nominate the athlete is not a decision which this Panel can or should consider. The matter must be remitted to the Selection Panel for their determination as to whether, taking into consideration all matters which they consider to be relevant, the athlete has achieved "the required competition result standard" as envisaged by the Selection Agreement.**

The Appellant was an elite athlete who had dedicated her life in recent years to the sport of mogul skiing. She was a full time skier supported financially by the Respondent and the Australian Olympic Winter Institute of Sport and it was agreed that she only worked in a non-skiing occupation when her skiing program permitted her to do so.

She competed in the sport from 1997 to 2000 notwithstanding a left knee reconstruction in 1997 and a right knee reconstruction in 1999.

The Appellant competed in the World Championships in Whistler, Canada from 17 to 19 January 2001 notwithstanding that she was recovering from knee surgery, achieving a 27th place.

In the World Cup events for the 2001/2002 season she has subsequently achieved a ranking of 26th as a result of her performances in the events up to 19 January 2002. The two Australians who have been nominated, and selected, to represent Australia in mogul skiing at the Salt Lake Olympics are ranked 33rd and 37th.

On 23 January 2002, after the Appellant was not nominated the Respondent wrote to the Appellant and advised her that it was unable to nominate her as she had not met either of the criteria referred to in paragraph 3 of Annexure A to the Selection Agreement although the Respondent had requested the AOC to exercise its discretion to amend the selection criteria, but the AOC declined.

On 25 January 2002, an application was lodged by Manuela Berchtold (the Appellant) with the Oceania Registry of the Court of Arbitration of Sport in the Appeals Division, seeking to appeal from a decision of Skiing Australia Limited (the Respondent), not to nominate the Appellant to the Australian Olympic Committee (AOC) for selection as a member of the Australian Olympic team to compete in the mogul skiing events at the Winter Olympic Games in Salt Lake City in 2002.

The appeal arises from an agreement made between the AOC and the Respondent on 12 March 2001 (the Selection Agreement). Under the Selection Agreement, the Respondent nominates to the AOC for selection those members who have been chosen by it as being "those Athletes who will achieve the best possible results at the 2002 Olympic Games".

Under clause 7.2 of the Selection Agreement, any dispute regarding an athlete's non-nomination to the AOC was to be dealt with by way of a two-tier appeal process. Any appeal was to be first heard by the Respondent's internal appeal tribunal with any subsequent appeal to be heard by the CAS. The sole grounds for any appeal "are that the nomination criteria have not been properly followed and/or implemented".

In view of the imminence of the 2002 Olympic Games the Appellant and the Respondent agreed to bypass the first tier of the appeal process and to have the Appellant's appeal heard by the CAS.

The Panel convened a preliminary telephone conference on Friday, 1 February 2002.

During the conference the parties confirmed their agreement to the jurisdiction of the CAS to determine the appeal in accordance with the Code of Sports-related Arbitration. It was agreed that the seat of the arbitration was Lausanne, Switzerland, but that the law of the merits being the substantive law to be applied by the Panel in determining the appeal would be the law of the State of New South Wales.

The parties agreed that the Respondent would endeavour to file its submissions in reply and any evidentiary material by 5 p.m. on 1 February 2002.

During the preliminary telephone conference the question of whether the AOC may possibly be affected or involved was raised, in view of the fact that the AOC was a party to the Selection Agreement and that the Appellant included in her submissions to the CAS correspondence seeking that the AOC exercise its discretion to reconsider the selection criteria agreed between the

Respondent and the AOC. The parties agreed that the AOC should be invited to participate in a further preliminary conference which was to take place at 5 p.m. that day.

At 5 p.m. on 1 February 2002, a second preliminary conference was convened by the Panel.

The AOC advised the Panel that it had advised the Salt Lake Organising Committee (SLOC) of the appeal proceedings and that the final entry time in respect of members of the team would be at the time of the team captain's meeting which was to occur in Salt Lake City on 4 February 2002. In view of this deadline the court with the agreement of the Appellant and the Respondent fixed the hearing of the appeal for 2 p.m. on Saturday, February 2, 2002. In addition, in view of the urgency of the matter, this statement of the circumstance of the proceedings is necessarily brief.

At the commencement of the hearing the parties signed an Order of Procedure confirming the jurisdiction of CAS and the Panel to determine the appeal in accordance with the Code of Sports-Related Arbitration.

LAW

1. The Appellant has made an application to join the AOC as a party to these proceedings. The application is informal in nature but we attach no present significance to that lack of formality. Likewise we assume for present purposes that we have the power to entertain such an application, although we have been unable to find an express provision to that effect in the provisions of the Code of Sports-related Arbitration.

2. We regard the application as one we cannot accede to, for the following reasons. First, these proceedings are an appeal from a decision of the Respondent not to nominate the Appellant to the AOC for selection.

3. Secondly, the AOC was not a party to the decision of the Respondent not to nominate the Appellant for selection.

4. Thirdly, the sole ground of appeal is whether the Respondent properly followed and implemented the nomination criteria.

5. Therefore, in these proceedings, the AOC is neither a necessary nor appropriate party.

6. Further, the application to join the AOC relates to an alleged failure by the AOC to 'select' the Appellant and seeks to invoke the provisions of clauses 7.3 and/or 10.3 of the Selection Agreement, which clauses, although they relate to the arbitration of disputes, do not relate to appeal proceedings.

7. We say nothing about the merits of any such contentions, except that we are firmly of the opinion that the matters sought to be raised against the AOC could only constitute a separate and distinct dispute from that in the proceedings that are currently before us.

8. Accordingly, whilst it would obviously be highly desirable to avoid a multiplicity of proceedings and to seek to finally determine all issues between all relevant parties at the one time before the cut-off date for the late nomination of athletes, we do not believe we have the power to hear and determine that separate dispute with the AOC under the present reference, absent the consent of all relevant parties, including the AOC, and the AOC has made it plain that it will not so consent.

9. In those circumstances we feel compelled to dismiss the application, and we intend to proceed to hear the appeal with the sole parties being the present appellant and Skiing Australia Limited as the sole respondent.

10. The Selection Agreement required the Respondent to only nominate to the AOC those athletes who had met the relevant nomination criteria and "achieved the competition result standard required under the selection criteria" (clause 4.1(2)).

11. Annexure A to the Selection Agreement set out the selection criteria and relevantly provided:

> 2. These selection criteria may be amended by the AOC in its absolute discretion and by notice to Skiing Australia Ltd.
>
> 3. In order to be nominated to and selected by the AOC for membership of the 2002 Australian Winter Olympic Team ("Team") … each athlete must have satisfied … nomination criteria … [in Annexure B] and achieved the required competition result standard in that the athlete must have:
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> a) competed in the FIS Freestyle Mogul Skiing World Championship … and achieved a top 60% of field result …; or
>
> b) achieved a top 50% of field result in at least 50% of … World Cup events held during the season of the Games.

12. Annexure B to the Selection Agreement sets out the nomination criteria and relevantly provided:

> **2.4 Illness/Misadventure/Extenuating Circumstances**
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> 2.4.1 In considering the performances of athletes at events … required under this policy, the selection Panel may in their discretion give weight to extenuating factors …
>
> 2.4.4 In the case of … extenuating circumstance, a decision will be made by the selection Panel on an individual basis.

13. In our view, on the proper construction of the Selection Agreement, the criteria in clause 3 of Annexure A to the Selection Agreement are not absolute and fixed but rather are subject to an overarching discretion in extenuating circumstances, which discretion is conferred by

clause 2.4 of Annexure B to that Agreement, which clause would otherwise be otiose. The Selection Panel are obliged to consider the exercise of this discretion where there are extenuating circumstances under clause 2.4 known to them at the time of nomination.

14. It is clear from the email from the Chairman of the Skiing Australia Limited Freestyle Skiing Committee, who is a Selector, dated 21 January 2002 that the Selection Panel knew of an extenuating circumstance relating to the Appellant's performance in the 2001 World Championships, namely that "she was not 100% capable at that time" because of a knee injury. It is also clear from the letter of 23 January 2002 from the Chief Executive Officer of Skiing Australia Limited (another Selector) that the reason for non-nomination was "that Skiing Australia is unable to nominate you to the AOC as you have not met either of the criteria's [sic] as detailed above".

15. The criteria described as "detailed above" were sub-paragraphs (a) and (b) of clause 3 of Annexure A. We infer from that letter that the Selection Panel did not take into account that they had a discretion to decide that the "required competition result standard" had been reached notwithstanding that neither subparagraph (a) or (b) of clause 3 of Annexure A to the Agreement was literally complied with.

16. The fact that the Respondent through the Chairman of the Freestyle Skiing Committee sought that the AOC exercise a discretion to vary the selection criteria on these very grounds is a further basis for inferring that the Selection Panel did not believe that they had any independent discretion by reason of those extenuating circumstances under clause 2.4.

17. In this case, the Selection Panel made a decision not to nominate the Appellant on the basis that the Appellant had not met either of the objective criteria set out in paragraphs 3 (a) and (b) of Annexure A to the Agreement. The Selection Panel in failing to consider the exercise of their discretion and whether the circumstances amounted to extenuating circumstances were not properly following and/or implementing their obligations under the Selection Agreement.

18. We therefore find that for these reasons the nomination criteria have not been properly followed and/or implemented, notwithstanding that there is abundant evidence establishing that the Selection Panel and Skiing Australia Limited were at all times acting in good faith and with the best interests of the athlete at heart.

19. The decision whether or not to nominate the Appellant is not a decision which this Panel can or should consider. The matter must be remitted to the Selection Panel for their determination as to whether, taking into consideration all matters which they consider to be relevant, the Appellant has achieved "the required competition result **standard**" (our emphasis) as envisaged by clause 3 when read together with clause 2.4.

20. Doubtless the Selection Panel will be able to use their expertise to determine from all the performances of the Appellant whether she has reached this standard and therefore should be nominated in accordance with the objective in clause 1 of Annexure B to the Agreement "to

identify and nominate to the AOC those athletes who will achieve the best possible results at the 2002 Games".

The Court of Arbitration for Sport hereby rules:

1. The Appeal is allowed.

2. Remit the matter to the Skiing Australia Limited Selection Panel for reconsideration of the nomination of the Appellant in accordance with these reasons.