



**Arbitration CAS 2008/A/1502 AOC & AWU v/ FILA, award of 8 May 2008**

Panel: Mr Otto De Witt Wijnen (the Netherlands), President; Mr Michael Beloff QC (United Kingdom); Prof. Denis Oswald (Switzerland)

*Wrestling*

*Eligibility of Oceanian wrestlers to be allocated a quota place for the 2008 Olympic Games*

*Discretion of FILA in selecting athletes from Oceania*

*Interpretation of the Olympic Qualification System for Oceania*

- 1. Where a question relating to the interpretation of a provision of the Olympic Qualification System is not answered by the Olympic Qualification System itself and/or by any of the applicable other applicable rules and regulations such as the concerned International Federation Constitution, it has to be considered in the light of Swiss law.**
- 2. The “Olympic Qualification System Principles” cannot be interpreted subjectively, i.e. in the light of the intention of the Parties.**
- 3. Due to the fact that the “Olympic Qualification System Principles” provides a special treatment for the selection of Oceanian athletes, the FILA Committee in charge of selection for the OG has discretion in selecting athletes from Oceania. More specifically, it did not have to take into account the requirement that an athlete should have participated in the World Championships 2007 and the Continental Championships 2008 in the same weight category, the whole concept of guaranteeing the integrity of other Continental Championships as a route to Olympic qualification by the same weight rule being inappropriate to Oceania and its special circumstances.**

The Appellants are the Australian Olympic Committee (AOC or the “first Appellant”) and the Australian Wrestling Union (AWU or the “second Appellant”).

The AOC is the National Olympic Committee of Australia. Its objectives are, *inter alia*, to promote the representation and participation by Australia at the Olympic Games and to do all matters incidental thereto, including the selection of all members of the teams to represent Australia at those Games.

The AWU is the national federation for the sports for wrestling in Australia. Its objectives are, *inter alia*, to provide for representation of its members at the Olympic Games.

The Respondent, the Fédération Internationale de Lutttes Associées (FILA or the “Respondent”), is an association formed under the laws of Switzerland with headquarters in Corsier-sur-Vevey (Switzerland), recognised by the Olympic Committee (IOC) as the international federation governing the sport of wrestling worldwide.

In April 2006, FILA issued a document (the “Olympic Qualification System”) setting forth the wrestling qualification rules for the 2008 Beijing Olympic Games. It would have been approved by the IOC in accordance with IOC’s usual practice.

The Olympic Qualification System specifically provides that a total of 344 athletes may qualify for the eighteen categories, each National Olympic Committee (NOC) being allowed to enter into the Olympic Games no more than one athlete in each category.

The Olympic Qualification System further specifies different phases that will enable the qualification of the athletes in summary, as follows:

- 1<sup>st</sup> Phase: 2007 World Championships (144 athletes)
- 2<sup>nd</sup> Phase: 2008 Continental Championships (72 athletes, i.e. 18 categories for 5 continents). In the event that a wrestler who already qualified at the World Championships is at the top of this ranking, the next highest ranked wrestler in each weight category will qualify. In relation to Oceania, a quota of 7 places shall be allocated to the various events by a special FILA commission and the Oceania Continental Committee.
- 3<sup>rd</sup> Phase: 1<sup>st</sup> 2008 qualification tournament (64 athletes, the wrestlers who qualified at the World and Continental Championships are not allowed to take part in the 3<sup>rd</sup> Phase).
- 4<sup>th</sup> Phase: 2<sup>nd</sup> 2008 qualification tournament (50 athletes, the wrestlers who qualified at the World and Continental Championships and the 3<sup>rd</sup> Phase are not allowed to take part in the 4<sup>th</sup> Phase).
- Places allocated to the host country: Priority given on the quota of 7 remaining places set out below to the host country.
- Final qualification places: The 7 places remaining to reach the quota of 344 will be at FILA’s disposal to guarantee universal and continental representation.

The 2008 Oceania Continental Championships took place between 8 and 10 February 2008 in Canberra, Australia.

The first-ranked athletes in the 16 weight categories were:

- Kyla Bremner of Australia in the 48kg Female category;
- Maria Dunn of Guam in the 63kg Female category;
- Desiree Craike of New Zealand in the 72 kg Female category;
- Elgin Elwais of Palau in the 55kg Greco Roman category;

- Corey O'Brien of Australia in the 66kg Greco Roman category;
- Hassan Shabsavan of Australia in the 74kg Greco Roman category;
- Faamunu Aele of Samoa in the 84kg Greco Roman category;
- Ivan Popov of Australia in the 96 kg Greco Roman category;
- Farzad Tarash of Australia in the 55 kg Freestyle category;
- Corey O'Brien of Australia in the 60kg Freestyle category;
- Gentian Balashi of Australia in the 66 kg Freestyle category;
- Ali Abdo of Australia in the 74 kg Freestyle category;
- Sandeep Kumar of Australia in the 84kg Freestyle category;
- Ian Wardell of Australia in the 96kg Freestyle category;
- Eoghn Julian-Tivoli of Australia in the 120kg Greco Roman category;
- Florian Skilang Temengil of Palau in the Freestyle category.

On 18 February 2008, FILA published its allocation of the Oceania region quota places on its website. The decision states:

*"The seven qualified wrestlers for the Olympic Games were selected by a special commission formed of the Oceania Committee and the FILA Technical Delegate, Mister Ik-Jong Kim, that is:*

- *Sandeep Kumar, Australia, 84kg Freestyle;*
- *Hassan Shabavan, Australia, 74kg Greco Roman;*
- *Ali Abdo, Australia, 74kg Freestyle;*
- *Kyla Bremner, Australia, 48kg Female Wrestling;*
- *Maria Dumn, Guam, 63kg Female Wrestling;*
- *Elgin Elwais, Palau, 55 kg Greco Roman;*
- *Florian Skilang Temengil, Palau, 120kg Freestyle".*

On 20 February 2008, the AOC wrote to the FILA disputing the eligibility of Temengil of Palau and Aele of Samoa to an Oceania quota place to participate to the 2008 Olympic Games on the basis that Aele and Temengil failed at the 2007 World Championships to participate in the category in which they were stated to be qualified for the Olympic Games.

The AOC asked for an urgent review of the quota allocation.

By letter dated 27 February 2008, FILA indicated that it agreed to review the allocation in part and made the following decision:

*"1. The selection of the 120kg FS wrestler from Palau will be maintained, because if he did not wrestle in the*

*same category, he participated in Baku and distinguished himself at the Oceania Championship by winning a gold medal in freestyle and a silver medal in Greco Roman.*

2. *The 84kg wrestler from Samoa will be replaced by the 74kg FS Australian wrestler, Mr Ali Abdo, who got the highest number of classification points of the remaining Australian wrestlers”.*

By letter dated 28 February 2008, the First Appellant wrote to FILA, *inter alia*, maintaining its objection to the allocation of an Oceania quota place to Temengil.

Further letters were exchanged by the parties, in which both maintained their respective positions.

On 7 March 2008, AOC & AWU filed with the Court of Arbitration for Sport (CAS) a statement of appeal against the FILA with respect to the decision published on its website on 18 February 2008 and confirmed in a letter dated 27 February 2008.

On 20 March 2008, AOC & AWU filed their appeal brief.

On 1 April 2008, FILA submitted its answer brief.

No hearing was held as both parties confirmed their preference for the Panel to issue an award solely on the basis of the written submissions.

## LAW

### Jurisdiction and Applicable law

1. The competence of the CAS to act as an appeal body in this dispute is based on art. R47 of the Code of Sports-related Arbitration (“the Code”) which provides that:

*“A party may appeal from the decision of a federation, association of sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body”.*

2. Article 36 of FILA Constitution provides as follows:

*“a) Introduction*

*In order to deal with legal disputes in sporting matters which cannot be settled by FILA's judicial bodies, an arbitration institution called the “Court of Arbitration for Sport” (CAS) has been created under the aegis of the International Council of Arbitration for Sports (ICAS).*

*b) Procedure*

*In the event of an infringement of the FILA Constitution, Wrestling Rules and other Regulations, a*

*case will be opened and measures taken. FILA's disciplinary bodies are as follows:*

- *The FILA attorney*
- *The Sporting Judge – the only judge*
- *The FILA Sporting Appeal Commission (three members)*

*Members are nominated to these posts by the FILA Bureau at the suggestion of the FILA President, The FILA judicial bodies decide whether leave to appeal the first decision will be given. Affiliated National Federations and all the FILA members (FILA Bureau members, wrestlers, coaches, referees, doctors and leaders), through their FILA membership, can appeal only to FILA in the event of disputes arising from the current Constitution and all the FILA Regulations or of all sporting conflicts which can arise between them and which they cannot settle amicably.*

*c) Appeal against the decision*

*Conflicts between FILA and one of its members or between members among themselves which are not resolved by the FILA Sports Judge, Disciplinary Commission or FILA Bureau will be submitted to the CAS for judgment, any state jurisdiction being excluded. As a last resort, the “Court of Arbitration for Sport” (CAS) will decide and judge all the valid appeals which are submitted to it by the affiliated National Federation or one of the FILA members against the decision(s) made by the FILA Sports Judge, the Disciplinary Commission or the FILA Bureau.*

*The appellants must be willing to conform exclusively to the CAS Constitution and Regulations and to the decision it makes”.*

3. In their written submissions of 20 March 2008, the Appellants have accepted that this provision establishes CAS' jurisdiction to determine this matter and that there are no avenues of appeal within FILA from FILA's decisions regarding allocation of quota places for the 2008 Olympic Games.
4. The jurisdiction of the CAS is not disputed by the Respondent.
5. It follows that the CAS has jurisdiction to decide the present dispute.
6. According to Article R58 of the Code:  
*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*
7. The Panel notes that the parties both refer to the Olympic Qualification System and the FILA Constitution. The Panel also notes that the FILA has its administrative headquarters in Switzerland.
8. As a result, the Panel holds that the present dispute must be decided applying primarily the Olympic Qualification System and FILA Constitution and complementarily, Swiss law and general principles of law.

## Merits

9. The crucial provision for the resolution of this dispute (as both parties acknowledge) is the provision on the 2nd Phase of the Olympic Qualification System. This provision (“the Provision”) reads in full as follows.

“2<sup>nd</sup> phase: 2008 Continental Championships (according to programme)

*In this phase, the wrestlers will be qualified as follows:*

*The first-ranked wrestler at the European, Asian, African and Pan-American Continental Championships in each weight category will qualify for the Beijing Games.*

*In the event that a wrestler(s) who already qualified at the World Championships is at the top of this ranking, the next highest ranked wrestler in each weight category will qualify.*

***N.B.** Countries are obliged to participate in the 2007 World Championships in order to participate in the 2008 Continental Championships. They will be able to participate in the Continental Championships only in the weight categories in which they participated in the World Championships. This provision guarantees the integrity of the Continental Championships' results. To take into account the small number of NFs from Oceania, the continent will not be attributed a place by weight category, but a quota of 7 places (sex not specified) will be allocated to the various events and categories by a special FILA commission and the Oceania continental committee, at the end of the Oceania Continental Championships” (Arbitrators’ underlinings).*

10. The critical question is how should the Provision be interpreted.
11. In essence the Appellants submit that the part that is underlined i.e. the last sentence of the N.B. is dependent on the preceding part. If that be right, no place can be allocated to an athlete from Oceania if such athlete has not participated in the Continental Championships in the same weight category in which he or she has participated in the earlier World Championships.
12. In essence, the Respondent submits that on the contrary the said part of the NB should be interpreted in a manner wholly independent of the preceding part of the NB giving the Commission and Committee therein referred to a discretion to make an appropriate allocation unaffected by whether such athlete has participated in the Continental Championships in such same weight category.
13. We first address what the legal criteria for the interpretation of a text of this nature should be. That raises the question what the legal character of such rules and regulations such, which depends upon identification as the “Olympic Qualification System Principles”. Is it an ordinary contract freely negotiated between the parties concerned? Or is it more in the nature of a statute, bye-law or legislative code imposed by one party on another?
14. This question is not answered by the Olympic Qualification System itself and/or by any of the applicable other rules and regulations such as the FILA Constitution. Therefore, it has to be considered in the light of Swiss law.

15. It seems to be well recognised that under Swiss law in the interpretation of contracts, one first has to look at the text; if the text is not clear, then at what the parties intended; if that cannot be established, then how the contract should be interpreted in an objective manner<sup>1</sup>.
16. There is less unanimity, it seems, in Swiss doctrine and case law whether statutes or similar instruments should be interpreted in a like manner. But it is the Tribunal's impression that the better and more prevalent view is that the same criteria should, so far as possible, apply.
17. As was said in a recent CAS award:

*“Under Swiss law there is some controversy regarding the method of interpretation that applies to the rules of an association, i.e. whether they should be interpreted using the method applicable to provisions of law or using the method applicable to contracts. However, in practice the principles of interpretation overlap to a large degree and both methods converge considering that the literal meaning (the wording) of the provision or clause is the starting point”*<sup>2</sup>.
18. If the text of statutes, or similar instruments, is not clear and unambiguous, and if the intention of the “parties” to such instruments cannot be established, the focus of interpretation must be on what the party subject to such statutes, rules or regulations (as distinct from the maker thereof) could reasonably expect the meaning thereof to be.
19. Generally, as it is said in SCIBOZ & GILLIÉRON, “Code Civil Suisse et Code des Obligations Annotés”<sup>3</sup>:

*“Les statuts doivent être interprétés selon le principe de la confiance, le sens que les membres peuvent raisonnablement attribuer aux dispositions statutaires d'après les règles de la bonne foi étant déterminant et la règle, qu'un texte doit être interprété contre celui l'a rédigé étant applicable, ATF 87 JT 1961 I 529”*.

This is – as in contract law – often referred to as the principle of confidence (“*Vertrauensprinzip*”)<sup>4</sup>.
20. Another principle that is accepted under Swiss law for the application and interpretation of statutes and cognate instruments is the “*contra proferentem*”-principle<sup>5</sup>.
21. It is the view of this Panel that the text of such rules and regulations as the “Olympic Qualification System Principles” cannot be interpreted subjectively, i.e. in the light of the intention of the Parties. When these regulations were drafted the athletes to whom the principles apply, were not privy thereto. The System containing conditions to qualify for the

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<sup>1</sup> Cf. CR CO I-WINIGER, Basel 2003, art. 18 CO, N. 133 et seq.

<sup>2</sup> CAS 2007/A/1377.

<sup>3</sup> SCIBOZ & GILLIÉRON, Code civil suisse et Code des obligations annotés, 7<sup>th</sup> ed., Lausanne 2004, note ad art. 60 al. 1, p. 72.

<sup>4</sup> PERRIN, Droit de l'association, 3<sup>rd</sup> ed., Geneva et al. 2008, p. 38 et seq.; ZEN-RUFFINEN, Droit du sport, Zurich 2002, N. 169; Decision of the Federal Tribunal, 27 June 2002, 5C.328/2001/min. (Kroatische-Kulturverein/Jovic et alia).

<sup>5</sup> ATF 87 II 89 JT 1961 I 1529, SCIBOZ & GILLIÉRON. *op. cit.*, p. 72, Decision of the Federal Tribunal, 25 February 2003, 4C.350/2002/ecl. (Dame B contre X).

Olympic Games was simply imposed.

22. It is the view of this Panel that the text of such rules and regulations as the “Olympic Qualification System Principles” cannot be interpreted subjectively, i.e. in the light of the intention of the Parties. When these regulations were drafted the athletes to whom the principles apply, were not privy thereto. The System containing conditions to qualify for the Olympic Games was simply imposed.

23. In the light of these considerations, the Panel has first of all analysed the text of the 2nd Phase Provision quoted above.

24. It concludes that, on that text, it is clear that Oceania will receive a special treatment. The first relevant paragraph of this Provision:

*“The first-ranked wrestler at the European, Asian, African and Pan-American Continental Championships in each weight category will qualify for the Beijing Games”,*

addresses all the Continents but Oceania; consequently and logically the second paragraph:

*“In the event that a wrestler(s) who already qualified at the World Championships is at the top of this ranking, the next highest ranked wrestler in each weight category will qualify”,*

equally does not include Oceania.

25. In conclusion nothing in the Provision before the NB can apply to Oceania at all, since it is not mentioned expressly or by implication.

26. The same must be true, logically, for the third, fourth and fifth sentences of this Provision continued in the parts prefaced NB. These stipulate, we repeat for convenience:

*“Countries are obliged to participate in the 2007 World Championships in order to participate in the 2008 Continental Championships. They will be able to participate in the Continental Championships only in the weight categories in which they participated in the World Championships. This provision guarantees the integrity of the Continental Championships' results”.*

27. These gloss or elaborate the first two sentences: it is the matters alluded to in the third, fourth and fifth sentences that one must note well in considering the first two sentences. We shall call what they prescribe the “same weight rule”. Their clear purpose is to ensure that the Continental Championships are a true test of merit and that first ranked wrestler truly merits an Olympic place.

28. The first (and only) reference to Oceania comes in the last sentence of the Provision, the third sentence of the NB. This stipulates, we repeat again for convenience:

*“To take into account the small number of NFs from Oceania, the continent will not be attributed a place by weight category, but a quota of 7 places (sex not specified) will be allocated to the various events and categories by a special FILA commission and the Oceania continental committee, at the end of the Oceania Continental Championships”.*

29. We drew attention to a striking difference between the strict rules of the parts of the Provision referring to the more populous continents and the flexibility towards Oceania in the part which refers to it alone. There is no reason to conclude, without any clear indication to the contrary, that this reference to Oceania should be read in strict conjunction with the preceding text, or even that it should be construed in the light thereof.
30. Indeed while the part of the NB referring to Oceania could be read in conjunction and consistently with the first sentence, it could not be read in conjunction with the second sentence at all for if Oceania is not to be attributed a place by weight category at all, it would not be logical to oblige athletes to participate in the preceding Continental and World Championships in the same weight category.
31. We are not told that anyone protested about Mr. Temengil's participation in the Continental Championships in the 120 kg category, (although it must have been known that he had not participated in that category in the Baku World Championship in 2007), and will assume that no-one did. The explanation may well be that, contrary to the contentions of the Appellants, it was well recognised in the wrestling community that different rules applied to Oceania. The whole concept of guaranteeing the integrity of other Continental Championships as a route to Olympic qualification by the same weight rule is inappropriate to Oceania and its special circumstances.
32. Thus, we conclude the special FILA committee had discretion in selecting the athlete from Oceania specifically. It did not have to take into account the requirement that an athlete should have participated in the World Championships 2007 and the Continental Championships 2008 in the same weight category. Mr. Temengil was not ineligible to be allocated an Oceania quota place in 120 kg Freestyle category at the 2008 Olympic Games.
33. In a recent case also about Olympic qualification and also emanating from Australia, another Panel stressed the importance of the principle that an international federation would not abandon at will Olympic qualification criteria upon which athletes had relied<sup>6</sup>. In this instance the Respondents, we have found, were applying, not disapplying, those criteria: and our decision complements, rather than contradicts, its predecessor.
34. The relief requested by the Appellants should be denied.

### **The Court of Arbitration for Sport rules:**

1. The relief requested by the Australian Olympic Committee and the Australian Wrestling Union in the Annexure B to their Statement of Appeal at 1 (a), (b) and (c) is rejected.

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<sup>6</sup> CAS 2008/O/1455, esp. paras 6.1 – 6.17.