Arbitration CAS 2014/A/3473 Michael Rishworth and Luke Laidlaw v. Ski and Snowboard Australia (SSA), award of 4 February 2014 (operative part of 28 January 2014)

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

Alpine skiing
Allocation of quota places
Principles applicable to the construction of a clause

According to the laws applicable in all Australian states, both the individual clauses of a contract, and the agreement as a whole, must be construed objectively. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

1. PARTIES

1.1 Mr Rishworth (the First Applicant) and Mr Laidlaw (the Second Applicant) are athletes wishing to represent Australia in Alpine Skiing at the 2014 Sochi Winter Olympic Games.

1.2 Ms Emily Bamford (the First Affected Party) and Ms Lavinia Chrystal (the Second Affected Party) are athletes who have been nominated by Ski and Snowboard Australia Ltd CAN 063 859 423 (the Respondent, or SSA) to the Australian Olympic Committee (the Interested Party, or AOC) for selection to the Australian Olympic Team in Alpine Skiing at the 2014 Sochi Winter Olympic Games.

2. JURISDICTION

2.1 All parties agree that they are bound by the AOC Olympic Team Selection By-Law (the By-Law). Clause 13 of the By-Law relevantly provides that if an Athlete in the position of the Applicants, wishes to appeal from the SSA's decision not to nominate the Athlete, then *"the appeal will be determined exclusively by the Appeals Arbitration Division of CAS"*.

2.2 On Thursday 23 January 2014, the First Applicant and the Second Applicant filed applications pursuant to Clause 13 of the By-Law in the Appeals Arbitration Division of CAS disputing the decision by the SSA not to nominate them to the AOC for selection to the Australian Olympic Team for the 2014 Sochi Winter Olympic Games which are to commence on 7 February 2014.

2.3 Pursuant to Clause 13.1(8) the parties agreed that the CAS, for the purposes of the arbitration would be constituted by a Sole Arbitrator. The applicants asked that both applications be heard together by the Sole Arbitrator. The Sole Arbitrator, the Respondent, the Affected Parties and the Interested Party have agreed that both applications should be heard together.

3. ORDER OF PROCEDURE

3.1 On Friday 24 January 2014 a teleconference was held between the Sole Arbitrator and the representatives of the parties and an Order of Procedure was agreed. The parties confirmed their agreement that the arbitration will be conducted by CAS according to the By-Law and the Code of Sports-related Arbitration (the Code), and in particular the provisions relating to the Appeals Division, Art. R47 and following.

3.2 To the extent of any inconsistency between the By-Law and the Code, it was agreed that the CAS would apply the By-Law in preference to the Code as the By-Law embodies the basis of the agreement to arbitrate and that any provisions in the By-Law relating to confidentiality or costs shall prevail over provisions in the Code relating to confidentiality or costs. Pursuant to Clause 13.1(12) the parties consented to the Ground of Appeal, the name of the arbitrator and the date of the hearing being made public and the award and the reasons being made public.

3.3 The parties agreed that the decision of the CAS will be binding on all parties and no party will institute or maintain proceedings in any court or tribunal in relation to the dispute, except as permitted under the By-Law. No party, including an affected or third party will have the right of appeal under the Commercial Arbitration Act of any of the Australian States or to apply for the determination of a question of law under any such Act.

3.4 The parties agreed that the seat of the arbitration is in Lausanne, Switzerland.

3.5 The parties agreed on a timetable for the filing and serving of evidence and written submissions and it was agreed that an oral hearing would take place on Tuesday 28 January 2014.

3.6 It was noted that it was necessary to know the result of the applications, as the AOC advised that the final selection of the Alpine Skiing team by the AOC must be made by the end of Tuesday 28 January 2014.

3.7 The parties agreed that the Sole Arbitrator could give an oral award at or shortly after the conclusion of the hearing with a written award and reasons to be published later.

4. APPLICATIONS FOR ORDERS UNDER ART. R44.3 OF THE CODE

4.1 On Monday 27 January 2014 at 3.46pm the First Applicant by email applied for an order pursuant to Art. R44.3 of the Code (which applies pursuant to Art. R57) requiring Mr Lachlan

Clark, the SSA Alpine Committee Chairman, to attend the hearing and give evidence, alternatively the First Applicant said that the SSA *"may consent to us speaking with Mr Clark"*. At 6.24pm all parties were advised that the Sole Arbitrator would not consider the application until all parties had an opportunity to be heard on the issue. All parties were advised that if they wished to make any submission, they were directed to do so no later than 10.00am on Tuesday 28 January 2013.

4.2 On Monday 27 January 2014 at 9.29pm the First Applicant by email applied for an order pursuant to Art. R44.3 of the Code requiring Mr Nils Coberger, the Coach of the First Applicant to attend the hearing and give evidence.

4.3 The evidence of Mr Clark and Mr Coberger was said to be relevant and necessary to enable the Applicants to meet the Affected Parties' defence of estoppel, which was only made known to the Applicants in the material filed by the Affected Parties in reply.

4.4 The Second Applicant supported the applications. The SSA objected to the applications and advised that it had no objection to any party discussing the matter with Mr Clark. The Affected Parties also objected to the applications.

5. HEARING

5.1 A hearing was held on 28 January 2014. At the commencement of the hearing the application in relation to Mr Clark was dismissed as the SSA had advised that it had no objection to any party speaking to Mr Clark. The application in relation to Mr Coberger was dismissed as he was apparently a third party resident in New Zealand and there was no power to compel his attendance. The SSA advised that he was currently under contract to the SSA but that the SSA had no objection to any party speaking to him. The Applicants advised that they had not spoken to Mr Clark or Mr Coberger since learning that they were connected to the SSA and confirmed that their evidence in any event was only relevant to the estoppel defence. No orders were made and the Applicants were at liberty to speak to Mr Clark and Mr Coberger.

5.2 As the proceedings appeared to involve two discrete issues; one relating to the construction of the nomination criteria, and second, the estoppel issue which involved disputed factual evidence, the parties were invited to consider dealing with each issue separately. After some discussion, a ruling was made to proceed to a hearing of the construction issue first. If, after a hearing of the construction issue, it was held that the construction of the Nomination Criteria relied upon by the Applicants was incorrect, it was accepted that the applications would be dismissed and that it would not be necessary to continue to deal with evidence and arguments relating to the estoppel issue.

5.3 A hearing of the first issue then took place. Each party was invited to indicate the evidence which they relied upon. Objections were taken to some of the evidence. Some evidence was rejected and some evidence was admitted subject to relevance. All parties agreed to proceed to

a decision notwithstanding decisions as to relevance would not be made before the evidence and submissions had been completed.

5.4 The Applicants confirmed that the sole ground of appeal which was relied upon by the Applicants, was under Clause13.1(5)(a) which relevantly provided that *"the applicable Nomination Criteria have not been properly followed and/or implemented"*.

5.5 Shortly after the conclusion of the hearing the Sole Arbitrator issued an oral award dismissing both applications and reserving the issues relating to costs. What follows are the reasons for the final award save as to costs.

6. REASONS

6.1 The Applicants and Affected Parties are outstanding young Australian athletes who have dedicated most of their lives pursuing the sport of Alpine Skiing and each of whom has achieved a great deal of success. The dispute between these athletes arises out of a decision by the SSA to nominate the Affected Parties to the AOC for selection in the Australian Olympic Team in the sport of Alpine Skiing at the 2014 Sochi Winter Olympic Games and not to nominate the Applicants.

6.2 The nomination and selection of these athletes to the Australian Olympic Team is regulated by the terms of three interrelated standard form documents prepared by the International Ski Federation (the FIS) as the International Federation governing the sport of Alpine Skiing, by the AOC as the National Olympic Committee (NOC) for Australia, and by the SSA as the National Federation governing winter sports including Alpine Skiing in Australia, which all parties agreed contractually bound the parties.

6.3 The FIS had allocated five places to the AOC for Alpine Skiing at the Sochi Olympics. The SSA had nominated two men (Ross Peraudo and Dominic Demschar) and three women (Greta Small and the Affected Parties) to fill the five places. The Applicants claimed that the applicable criteria for the nomination of Alpine Skiing had not been properly followed and/or implemented by the SSA. The Applicants asserted that the two places filled by the Affected Parties were not gender specific and that, based on a comparison of their rankings and results, they should have been nominated by the SSA to the AOC to fill these two places. The Applicants did not dispute the nomination of the other athletes.

6.4 An Appeal Panel of CAS operating under the Code, in the absence of the By-Law, would normally conduct a *"complete hearing on the merits"* exercising its powers under Art. R58 of the Code. In the present case the parties, by agreeing to the By-Law, have added a contractual provision to their arbitration agreement, that the sole ground of appeal is that the Nomination Criteria have not been properly followed and/or implemented. This provision restricts the powers of the Appeal Panel in the present case to a determination of this issue (CAS 2008/A/1574, at [40]-[49]).

6.5 The starting point must be the identification of the applicable Nomination Criteria referred to in Clause 13.1 of the By-Law. The words *"Nomination Criteria"* are defined in Clause 1.1 as meaning *"the criteria in respect of a particular sport adopted by the National Federation controlling that sport in Australia for the nomination of Athletes to the AOC for selection as a member"* of the Australian Olympic Winter Team. A National Federation is required under Clause 6.1 of the By-Law to obtain the prior written approval of the AOC to its proposed Nomination Criteria before adoption by the National Federation. The National Federation *"must not alter or amend any Nomination Criteria without the prior written approval of the AOC"* (Clause 6.3).

6.6 The SSA, as the National Federation controlling the sport of Alpine Skiing in Australia, in late 2012 submitted its proposed Nomination Criteria for the 2014 Sochi Games to the AOC for its approval under the By-Law. The Nomination Criteria proposed by the SSA, was approved by the AOC in January 2013.

6.7 In about May 2013, the SSA amended the Nomination Criteria with the prior approval of the AOC. All athletes seeking nomination and selection in the sport of Alpine Skiing in the Australian Olympic Team were notified of the changes.

6.8 In about July 2013, the SSA again amended the Nomination Criteria with the prior approval of the AOC. All athletes seeking nomination and selection were again notified. The Applicants assert that the terms of this version of the Nomination Criteria were not properly followed and/or implemented. The issue between the parties was the proper construction of the terms of this document. No party sought to identify the time when any of the Applicants or the Affected Parties entered into a contract containing these terms. All parties accepted these Nomination Criteria contained the same relevant terms in their contracts and the only question is whether they had been followed and/or implemented.

6.9 The proper construction of these contractual terms is governed by the laws applicable in New South Wales (see Clause 6 of the Nomination Criteria and Clause 16 of the By-Law). Relevantly to the present issue of the proper construction of a contract, the same principles of construction apply in all states.

6.10 The principles to be applied to the process of construction are well established, and may be succinctly stated. Both the individual clauses, and the agreement as a whole, must be construed objectively. In Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 at [41] the High Court observed that: *"This Court … has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction"*.

6.11 It is understandable that no party sought to identify the time when each of the Athletes and the Affected Parties entered into a contract with the SSA and the AOC imposing obligations upon each of them and conferring contractual rights to participate in the nomination and selection process to be members of the Australian Olympic Team at the Winter Olympics at Sochi. At the time of contracting, each of these parties is not in the position or circumstances that face business parties when entering a commercial transaction. They are athletes who have given years of their life training and participating in the sport of Alpine Skiing in the hope of being chosen to represent their country at the Winter Olympics. The objective meaning of the terms of the standard form documents issued by the SSA and the AOC requires *"the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract"* (Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 185 ALR 152 at [11]). A reasonable person at the time of entering such a contract would know that other athletes would be entering similar contracts and that all athletes competing for the honour of representing one's country would be under the same obligations and have the precisely the same rights to compete. It was not submitted that any conversations or the particular surrounding circumstance of any individual contract was material to its construction. All parties sensibly concentrated on the same set of standard forms. These three contractual documents were, it appears, readily available for all athletes to take home or access, and discuss with family, friends and advisors before agreeing to their terms. The one qualification is that an early, and superseded, version of the Nomination Criteria, first published by the SSA in January 2013 erroneously remained accessible from the AOC's Sochi Games website at the time of the hearing. However no party sought to make any submission on the continued availability of this document.

6.12 The evidence of the terms of the Nomination Criteria relied upon by the Applicants is found in a document issued by the SSA which is Annexure 2 to the Reasons for Appeal by Michael Rishworth. The relevant provisions of the Nomination Criteria are found in Clause 2 which relevantly provides:

"2 Nomination of Athletes

For the purpose of nomination to the AOC of Athletes for Selection to the Australian Olympic Team Ski & Snowboard Australia will:

(1) nominate the male Athlete(s) and female Athlete(s) (relevant to the number and gender of any quota places for Australia) with the highest ranking on the Olympic FIS Points List in any Alpine discipline excluding Super Combined (Down Hill, Slalom, Giant Slalom, Super-G and) as published by FIS on 20th January 2014,

(2) In the event of a tie in rankings, the Athlete with the next highest ranking in another Alpine discipline, excluding Super Combined, according to the Olympic FIS Points List on 20th January 2014 will be nominated,

(3) …

(4) only nominate Athletes who have met the qualification standard set out in the Qualification System

…

6 Interpretation

…

(2) In this Nomination Criteria the following words and phrases have the following meanings:

…

(d) ***Qualification System*** *means the 2014 FIS Qualification System issued and approved by the IOC".*

6.13 The Respondent, and the Affected Parties accepted that this version of the Nomination Criteria contained the relevant terms and asserted that they had been properly followed when the decision was made to nominate the Affected Parties and to not nominate the Applicants. Nevertheless in addition, the Respondent led evidence that when the version of the Nomination Criteria containing these terms was approved and adopted by the SSA, the changes made to the existing terms of the Nomination Criteria were as follows (see paragraphs 30 and 31, and annexure 18 of the written statement of Michael Kennedy made on 27 January 2014):

*"**2 Nomination of Athletes***

For the purpose of nomination to the AOC of Athletes for Selection to the Australian Olympic Team Ski & Snowboard Australia will:

(1) nominate the male Athlete(s) and female Athlete(s) (relevant to the number and gender of any quota places for Australia) with the highest ranking on the Olympic FIS Points List in any Alpine discipline excluding Super Combined (Down Hill, Slalom, Giant Slalom, Super-G and ~~Super Combined~~) as published by FIS on 20th January 2014, ~~However, Athletes ranked outside the top 100 for the Super Combined FIS Points List on 20th January 2014 will not be eligible for nomination based on the Super Combined ranking alone~~;

(2) In the event of a tie in rankings, the Athlete with the next highest ranking in another Alpine discipline, excluding ~~rankings outside the top 100 for~~ Super Combined, according to the Olympic FIS Points List on 20th January 2014 will be nominated,

(3) …

(4) only nominate Athletes who have met the qualification standard set out in the Qualification System

…

6 Interpretation

…

(2) In this Nomination Criteria the following words and phrases have the following meanings:

…

(d) ***Qualification System*** *means the 2014 FIS Qualification System issued and approved by the IOC".*

6.14 The SSA sought to rely on the factual background and development of the drafting of the Nomination Criteria, and of Clause 2 in particular, as an aid to its proper construction. This

evidence was useful in the interests of transparency in the development and operation of the nomination and selection process of athletes to represent Australia at the Sochi Winter Olympics but it is not necessary to consider this material in detail on the issue of the proper construction of the agreement regulating the nomination and selection process. As outlined below, the ordinary and natural meaning of the relevant contractual provisions is clear on their face and there is no ambiguity in the language used in the contract. It is also not necessary to consider the influence on the drafting of the terms caused by SSA's understanding, and that of FIS, of the operation of the contractual provisions. The Applicants, and other parties to varying degrees, also sought to rely on material extraneous to the documents containing the contractual terms. This material included; communications between the FIS and the SSA, the FIS Qualification System and the SSA Nomination Criteria for cross country skiing, and material relating to the nomination and selection process at the Vancouver Olympics. Such material is of little, if any, weight and is beside the point. In the circumstances of the issue to be addressed, irrelevant. Finally as mentioned above, each of the Applicants and the Affected Parties has achieved considerable success in Alpine Skiing, as is apparent from the evidence before me. Having regard to my views on the proper construction of the Nomination Criteria, it is not necessary to undertake the invidious task of comparing their respective outstanding achievements.

6.15 The FIS had issued the Qualification System referred to in the Nomination Criteria in respect of the sport of Alpine Skiing for the 2014 Winter Olympics in September 2012 and placed on the FIS website. All parties accepted that each of the three interrelated documents; the SSA Nomination Criteria, the FIS Qualification System and the AOC By-Law, were applicable and binding on the parties during the nomination process by the SSA.

6.16 Clause 6.2 of the By-Law relevantly provided that the Nomination Criteria *"will be at all times subject to … the applicable Qualification System … [and in] the event that the Nomination Criteria are inconsistent in any way with the applicable Qualification System ... the latter will prevail to the extent of the inconsistency"*.

6.17 The FIS Qualification System was the method by which quotas of places for athletes to compete at the Winter Olympics were allocated by FIS to each country's NOC. The AOC under the By-Law required the SSA, as the National Federation for the sport of Alpine Skiing, to adopt Nomination Criteria for the SSA to follow in the nomination of athletes to the AOC for selection to fill the places allocated to AOC for members of the Australian Team at the Winter Olympics.

6.18 The applicable FIS Qualification System for Alpine Skiing for the 2014 Winter Olympics relevantly provided:

*"**1. EVENTS***

MEN

Downhill
Super-G
Giant Slalom
Slalom
Super Combined

WOMEN

Downhill
Super-G
Giant Slalom
Slalom
Super Combined

2. ATHLETE / NOC QUOTA

ATHLETES QUOTA	*320 (maximum quota)*
MAXIMUM NOC QUOTA	*22 per NOC*
	A maximum of 14 males or 14 females
	Maximum per event
	4 athletes

3. QUALIFICATION SYSTEM

3.1 ***A Qualification Standard***

Competitors are eligible who are ranked within the top 500 in the respective event of the Olympic FIS Points List published at the end of the qualification period on 20.01.2014. The table under 3.5 defines eligibility in the different competitions:

3.2 ***B Qualification Standard***

NOCs that do not have one competitor who meets the above qualification criteria, may enter one male competitor and one female competitor ('basic quota') in only the Slalom and Giant Slalom events, respectively NOCs that have only one male or one female competitor who meets the above qualification criteria, may enter one competitor of the other gender, on the condition that the male and/or female competitor(s) concerned has maximum 140 FIS points in the respective event on the Olympic FIS Points List published on 20.01.2014.

The Olympic FIS Points List is calculated using the average of five competition results for technical events (giant slalom and slalom) and three events for speed events (downhill, super g and super combined).

3.3 ***Host Nation***

The host nation is expected to enter competitors into all events. If the host nation has no competitor who complies with the qualification conditions laid down in clause 3.1, it will in any case be allocated a B qualification standard quota spot for one male competitor and one female competitor ('basic quota') in the slalom and giant slalom events. Nevertheless the competitors must be eligible according to 3.2. For the speed events (downhill, super g and super combined), the host nation will be allocated a quota spot for one male competitor and one female competitor, whereby the competitors must have less than 80 FIS points on the Olympic FIS Points List in the event concerned (see table under 3.5). All competitors must have been entered as part of the allocated NOC quota.

3.4 ***Allocation of Quotas***

Within the maximum of 22 competitors per NOC and up to a maximum of 320 Alpine Skiing places, quotas will be allocated per nation as follows:

3.4.1 Basic Quota

The basic quota for one male and one female competitor will be assigned to all NOCs with competitors that qualify according to 3.2.

3.4.2 Competitors in top 500 of the Olympic FIS Points List

Each NOC with at least one male and/or one female competitor ranked in the top 500 of the Olympic FIS Points List in any event (Downhill, Super-G, Super Combined, Giant Slalom, Slalom) will be allocated one male and/or female quota place (in addition to the basic quota defined in 3.4.1).

3.4.3 Competitors in top 100 of the Olympic FIS Points List

Each NOC with at least one male and/or one female competitor ranked in the top 100 of the Olympic FIS Points List in any event (Downhill, Super-G, Super Combined, Giant Slalom, Slalom) will be allocated one quota place per male and/or female quota place each (in addition to the qualified competitors per 3.4.2 and the basic quota per 3.4.1).

3.4.4 Competitors in top 30 of the Olympic FIS Points List

Each NOC with competitor(s) ranked in the top 30 of the Olympic FIS Points List in any event (Downhill, Super-G, Super Combined, Giant Slalom, Slalom) will be allocated additional quota places up to a maximum of four:

- *one quota place per male competitor ranked in the top 30 in one event, or*
- *two quota places for one male competitor ranked in the top 30 in more than one event or two or more male competitors ranked in the top 30,*

and

- *one quota place per female competitor ranked in the top 30 in one event, or*
- *two quota places for one female competitor ranked in the top 30 in more than one event or two or more female competitors ranked in the top 30.*

3.4.5 Allocation of remaining quotas places

The remaining quotas places up to a maximum total of 320 including the host nation quota will be allocated to NOCs based on the Olympic Quota Allocation List published on 20.01.2014.

The allocation will be made by assigning one quota place per competitor, from the top of the standings downwards until the maximum quota of 320 is reached. During this process once a NOC has achieved the maximum total number of 22 places its remaining competitors will no longer be counted and the next eligible NOC on the Olympic Quota Allocation List will be allocated a place.

The Olympic Quota Allocation List referred to in clause 3.4.4 is a global list of all competitors in the top 500 in their best three events including both male and female competitors.

…

3.4.6 For the allocation of quota places, a competitor will only be counted once either as 3.4.1 Basic Quota, 3.4.2 Top 500 or 3.4.3, Top 100 of the Olympic FIS Points List or 3.4.4 Top 30 of the Olympic FIS Points List using the most favourable option for the NOC to obtain the maximum possible number of quotas places.

3.5 …

4. PROCESS AND TIMELINE FOR NOC COMMUNICATION OF QUOTA PLACES

4.1 The quotas will be calculated after the FIS World Cup events taking place on 19.01.2014 and communicated to the National Ski Associations and NOCs through publication on the FIS Website, as well as to Sochi 2014 on 20.01.2014. The list of quotas will also be published on the FIS Website.

…".

6.19 It can be seen from these provisions of the FIS Qualification System that the allocation process allocates quota places to the NOCs, and not to individual athletes. The basic quota in 3.4.1 is *"assigned to all NOCs …"*, the next quota relating to competitors in the top 500 in 3.4.2 states that *"[e]ach NOC … will be allocated …"*, the next quota relating to competitors in the top 100 in 3.4.3 states that *"[e]ach NOC … will be allocated …"*, the next quota relating to competitors in the top 30 in 3.4.4 states that *"[e]ach NOC … will be allocated additional quota places …"* and the final allocation in 3.4.4 states that the *"remaining quota places … will be allocated to NOCs …"*.

6.20 Clause 3.4.1 clearly gives the first and basic quota places for one male and one female competitor to NOCs on a gender specific basis and each NOC on being allocated these two places must fill the places with one male athlete and one female athlete. The AOC was allocated two basic gender specific places under Clause 3.4.1. All parties accept that the basic quota places are gender specific and must be filled by one athlete of each gender. No issue arises in relation to the SSA's nomination to the AOC of one male and one female competitor to fill these two places.

6.21 The next quota places are given to a NOC under clause 3.4.2 and are dependent upon the NOC having athletes who achieve a ranking in the top 500 of the Olympic FIS Points List. An entitlement to one or two of these quota places arises when an NOC has *"at least one male and/or one female competitor ranked in the top 500 of the Olympic FIS Points List"*. That NOC is then *"allocated one male and/or female quota place"*. The ordinary and natural meaning of the words used in clause 3.4.2 is that on an athlete of a specific gender achieving the required ranking, the NOC is

allocated a gender specific quota place. The NOC may be given one or two such places. On a female athlete achieving the required ranking, the NOC is allocated a gender specific quota place for a female athlete and must select a female athlete of the requisite ranking to fill the place. On a male athlete achieving the required ranking, the NOC is allocated a gender specific quota place for a male athlete and the NOC must select a male athlete of the required ranking to fill the place. The Applicants assert that if a NOC had a male athlete and a female athlete, each with the required ranking in the top 500, then the NOC would be allocated two places which were not gender specific, and which could be filled by two males or two females. I do not agree. Such a construction of the language of this clause is not open either when considered according to its terms or in the context of the Qualifying System as a whole. On a proper construction of clause 3.4.2 when a NOC earns an entitlement by a male or a female athlete achieving the required ranking, the quota place then allocated to the NOC is gender specific and must be allocated to an athlete of the gender that qualified the NOC for the quota place. On a proper construction of clause 3.4.2, the AOC was allocated two gender specific places, which the AOC must fill by a male athlete and a female athlete.

6.22 The next quota places are given under clause 3.4.3 and are dependent upon a NOC having athletes who achieve a ranking in the top 100 of the Olympic FIS Points List. An entitlement to one or two of these quota places arises when an NOC has *"at least one male and/or one female competitor ranked in the top 100 of the Olympic FIS Points List"*. That NOC is then *"allocated one quota place per male and/or female quota place each"*. There is a slight difference in the wording of clauses 3.4.2 and 3.4.3 in that 3.4.3 speaks of *"one quota place per male and/or"* whereas 3.4.2 speaks of *"one male and/or"*. The difference is not material. The intent of both clauses is clear on its face. Again, on the ordinary and natural meaning of the words used in clause 3.4.3, on an athlete of a specific gender achieving the required ranking, the NOC is allocated a gender specific quota place. The NOC may be given one or two such places. On a female athlete achieving the required ranking, the NOC is allocated a gender specific quota place for a female athlete and again must select a female athlete of the requisite ranking to fill the place. On a male athlete achieving the required ranking, the NOC is allocated a gender specific quota place for a male athlete and again the NOC must select a male athlete of the required ranking to fill the place. The Applicants assert that if a NOC had a female athlete, with the required ranking in the top 100, then the NOC will be allocated one place, which could be filled by a male. I do not agree. Such a construction of this clause flies in the face of the words used. On a proper construction of clause 3.4.3 when an NOC earns an entitlement by a male or a female athlete achieving the required ranking, the quota place which is then allocated to the NOC, is gender specific and must be allocated to an athlete with the required ranking and of the gender that qualified the NOC for the quota place. Contrary to the Applicants' submissions, the AOC was allocated one gender specific place under clause 3.4.3 for a female athlete.

6.23 The next quota places are allocated under clause 3.4.4 to a NOC with a competitor or competitors ranked in the top 30, up to a maximum of four. The clause is set out above. Again it is clear on the ordinary and natural meaning of the words used, that when the quota places are earned by an athlete of a specific gender achieving the requisite ranking, the NOC is given a gender specific quota place which must be filled by athletes of the same gender. There are slight differences in the language used against each of the bullet points but the intent is clear.

The quota places awarded are gender specific. The AOC was not allocated any places under clause 3.4.4.

6.24 The final allocation of remaining places is made under clause 3.4.5. In contrast to clauses 3.4.2, 3.4.3 and 3.4.4, an entitlement to an allocation of these places is on the basis of ranking irrespective of gender. The Applicants and other parties agreed that this allocation was not gender specific.

6.25 The intention of the clause as a whole is clear. All allocation of quota places under clause 3.4 of the FIS Qualifying System is gender specific except an allocation of the remaining quota places under clause 3.4.5. As a result the FIS Qualifying System allocated 5 places to the AOC which were gender specific. Three places were allocated to the AOC for female athletes of the requisite ranking and two places were allocated for male athletes of the requisite ranking. It follows that the Applicants' submission that *"nowhere does the FIS Qualification System require that NOCs follow a gender specific procedure in making its nomination …"* must be rejected.

6.26 The Nomination Criteria was subject to the FIS Qualifying System (see Clause 6.2 of the By-Law). The SSA could not apply the Nomination Criteria to override the FIS Qualifying System and nominate athletes of a different gender to fill the five gender specific quota places allocated to the AOC for Alpine Skiing athletes. The Applicants accepted that if this construction was found to be the proper construction of the FIS Qualifying System their Applications must fail.

6.27 It was not necessary in reaching the conclusion that the quota places allocated by the FIS Qualifying System to the AOC were gender specific, to have regard to any policy considerations such as gender equality and the Mission Statement published by the Olympic Movement which requires the IOC to encourage and support the promotion of women in sport at all levels and in all structures with a view of implementing the principle of equality of men and women. If policy was a relevant consideration, it would be contrary to the interests of the sport as a whole to allow the sport's top female competitors to earn extra quota places for the AOC that are then allocated to men, on the basis of a broad comparison of a male athlete's ranking in the list of male athletes, to a female athlete's ranking in the list of female athletes which are based on competing in different events not open to the other gender. Athletic performance in all sports, with the notable exception of equestrian events, takes place and is measured on a gender basis of the athlete. The protocols and standards for women's events are not measured against protocols and standards set for men's events.

6.28 An alternative argument was advanced that independently of the FIS Qualifying System allocating gender specific places to the NOCs to be filled by athletes of particular gender, on a proper construction of the provisions of the amended Clause 2 of the Nomination Criteria required that quota places earned by male and female athletes, be filled by nominating a male or female athlete respectively.

6.29 Mr Ward representing the Applicants submitted that the words in brackets were *"illustrative and not determinative. If you want to say something in a rule, say it expressly. If you want to put it in brackets, the reader according to the old maxims of syntax and English construction is told that's an illustration"*. On the

other hand the SSA and the Affected Parties' argument firstly focussed on the mandatory wording of the clause in that the SSA *"will"* nominate the male Athlete(s) and female Athlete(s). Their argument then focussed on the words in parenthesis, namely *"relevant to the number and gender of any quota places for Australia"*. This reference is not illustrative. The reference to the *"gender of any quota places for Australia"* is a clear reference to the fact that the quota places being allocated to the AOC were gender specific. Australia was not a country which any reasonable person would expect to be currently involved in the allocation of the remaining places on a gender neutral basis. The natural and ordinary meaning of these words in parenthesis and of clause 2 as a whole, is that the SSA is also obliged under the express terms of the Nomination Criteria to nominate athletes according to the gender of the quota places earned for Australia.

6.30 For these reasons the applications were dismissed. As no party had the opportunity to consider or address on costs, the questions of cost were reserved.

ON THESE GROUNDS

The Court of Arbitration for Sport orders that:

1. The Applications are dismissed.

(…).