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Duval, A.

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ARTICLE

Getting to the games: the Olympic selection drama(s) at the court of arbitration for sport

Antoine Duval[1]

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Abstract For many athletes around the world there is just one sporting competition that truly matters: the Olympic Games. Unfortunately, the available spots are scarce. In many sports it does not suffice to be second, you need to be the best amongst your countrymen. It is obvious that the decision to let someone go or not to the Games is a fruitful source of disputes. In the present article, I focus on the role of the Court of Arbitration for Sport (CAS) in resolving selection disputes. The ambition is to provide a practical guide for the disputes ahead and to showcase the CAS as a useful avenue to resolve them. While there is some literature on the case law of national courts, the work of the CAS on selection disputes remains largely unchartered. I will first introduce the selection system in vigour at the Olympic Games, highlighting the various responsibilities of the relevant Sports Governing Bodies (SGBs). Thereafter, I will show under which conditions the CAS is susceptible to be seized with this type of disputes. Finally, I aim to provide a comprehensive overview of the jurisprudence of the CAS in selection disputes.

Keywords Olympic Games · Court of arbitration for sport · Lex Sportiva · Sports Law · Estoppel · Good Governance

1 Introduction

For many athletes around the world there is just one sporting competition that truly matters: the Olympic Games. As pointed out by a CAS *ad hoc* Panel, taking part in the Olympic Games "is the peak of every athlete's career".[1] In other words, "the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition".[2] Yet, as another panel noted, it "is an expensive process to take an athlete to the Olympic Games and competition for places is fierce".[3] The Olympic Games matter because they constitute a unique global event offering invaluable economic and social opportunities to the athletes taking part. In many sports, it is the sole competition in which one can truly make history and become a living legend. Undoubtedly, this illustrious prospect is limited to the happy few, *la crème de la crème*. Simply participating in the Games is probably a dream shared by all athletes around the world. But the available spots are scarce. In many sports it does not suffice to be second, you need to be the best amongst your countrymen. Thus, it is obvious that the decision to let someone go or not to the Games is a fruitful source of disputes. It has been

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'The important thing in the Olympic Games is not to win, but to take part'Pierre de Coubertin.

✉ Antoine Duval
a.duval@asser.nl

[1] International and European Sports Law, T.M.C. Asser Institute, R.J. Schimmelpennincklaan 20-22, 2517 JN The Hague, The Netherlands

[1] CAS OG/06/002 *Andrea Schuler v. Swiss Olympic Association & Swiss-Ski* (2006), para 39.

[2] CAS 2011/O/2422 *United States Olympic Committee v. International Olympic Committee* (2011), para 40.

[3] CAS 2008/A/1540 *Andrew Mewing v. Swimming Australia Limited* (2008), para 26.

such since the Games became a mega-event on display all-around the globe.[4] National courts have had to deal with angry athletes contesting the decision of their National Federations (NFs) or National Olympic Committees (NOCs) for not selecting them for years.[5] Even the Court of Justice of the EU had to weigh in on a selection dispute in its *Deliège* ruling, though not directly related to the Olympics, it held that "although selection rules […] inevitably have the effect of limiting the number of participants in a tournament, such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted".[6] The Court concluded that these "rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 59 of the Treaty".[7] With the 2016 Olympic Games in Rio de Janeiro coming closer, selection disputes will necessarily occupy the mind of judges and arbitrators in the months to come.

In the present article, I choose to focus on the role of the Court of Arbitration for Sport (CAS) in resolving selection disputes broadly speaking. In doing so, beyond selection disputes *stricto* sensu pitching athletes against NFs and NOCs, I also refer when appropriate to eligibility/qualification disputes implicating International Federations (IFs) or the International Olympic Committee (IOC). My ambition is to provide a practical guide for the disputes ahead and to showcase the CAS as a useful avenue to resolve them. Indeed, while there is some literature on the case law of national courts, the work of the CAS on selection disputes remains largely unchartered.[8] Thus, I closely scrutinize what others have referred to as the "jurisprudence"[9] of the CAS on this question. What is meant by the jurisprudence of CAS is that despite the fact that arbitrators are not strictly bound to earlier decisions rendered by CAS panels, they tend to defer to the solutions previously adopted. I will first introduce the selection system in vigour at the Olympic Games, highlighting the various responsibilities of the relevant Sports Governing Bodies (SGBs). Thereafter, I will show under which conditions the CAS is susceptible to be seized with this type of disputes. Finally, I aim to provide a comprehensive overview of the jurisprudence of the CAS in selection disputes.

2 Introducing the selection system to the Olympic Games

What is the selection process to be followed to participate to the Olympic Games? Who decides who gets to go to the Games? These questions are decisive for thousands of athletes wishing to take part in the Olympics. The Olympic Charter distributes the responsibilities for the selection processes to various institutions, IFs, NOCs and NFs have all a respective role to play.

The foundational principles underlying the selection process to the Olympic Games are enshrined in rule 40 of the Olympic Charter (OC). It stipulates:

> "To participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter and World Anti-Doping Code, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, team official or other team personnel must be entered by his NOC."

As provided by paragraph 1 of the bye-law to rule 40 OC, it is an IF's task to establish "its sport's rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter". These criteria have to be submitted to the IOC Executive Board for approval. Paragraph 2 adds that the "application of the qualification criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities". In practice this means that the IFs provide minimum eligibility requirements that each competitor must meet to access the Olympics. More precisely, "qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question."[10] The IOC itself only imposes requirements based on the nationality of the competitor, who "must be a national of the country of the NOC which is entering such competitor".[11] Any dispute arising from this rule is to be resolved by the IOC

[4] At the antic Olympic Games, however, Greek athletes would by themselves renounce taking part in the Games over fear of the shame of ending last, see Crowhter (1996).

[5] On the German jurisprudence, see Monheim (2009) and Weiler (2003). On the American jurisprudence, see Mitten and Davis (2008). On the Canadian jurisprudence, see Findley and Corbett (2002).

[6] Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée* [2000] ECR I-02549, para 64.

[7] Ibid.

[8] Matthieu Maisonneuve is the only one to cover systematically (in French) the basic case law of the CAS in this regard, see Maisonneuve (2011), pp 498–508.

[9] See on this question Kaufmann-Kohler (2007) and Maisonneuve (2011).

[10] CAS 2011/O/2422 *United States Olympic Committee v. International Olympic Committee* (2011), para 33.

[11] Rule 41 of Olympic Charter 2015 [hereinafter referred as 'OC'].

Executive Board. Additionally, as indicated by Rule 44 paragraph 1 OC: "[a]ny entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds". The Olympic Charter is adamant that "[n]obody is entitled as of right to participate in the Olympic Games."

Therefore, the modalities to participate to the Games vary greatly amongst the IFs. There is a radical pluralism in terms of the process followed and the conditions applicable for each sporting discipline represented at the Olympics.[12] Moreover, these requirements are implemented in a decentralized fashion by the NFs. Each national regulatory context is specific. Many NFs are inclined to adopt tougher selection criteria than the qualification rules of the IFs. The NFs are tasked with suggesting competitors to the NOCs,[13] which are sole competent to register the athletes to participate in the Games with the Organising Committee for the Olympic Games (OCOG). In case there is no NF covering a particular sport in a specific country, an individual competitor can be entered by the NOC only after approval by the IOC and the competent IF.[14] Decision-making is thus split between different institutional actors, located at different levels of sport's regulatory pyramid. Each actor is susceptible to face complaints by an athlete for not having been allowed to compete in the Olympic Games. Indeed, each phase of the chain leading up to the non-participation of an athlete is vulnerable to legal quarrels. This concerns the definition of qualification criteria by IFs and NFs, as well as their practical (and particular) implementation by NFs and NOCs. The only mainly passive actor in this process and, thus, unlikely to face direct challenges, though it cannot be categorically excluded, is the IOC. In the past, CAS awards were rendered over selection disputes broadly speaking (including eligibility/qualification disputes) between athletes and IFs,[15] NFs,[16] NOCs[17] and even the IOC,[18] between NFs and IFs,[19] between NOCs and OCOGs.[20]

The question to which judicial institution to submit a complaint against a non-selection is key for athletes and will condition their chances to succeed and the costs they will incur to do so. In this paper, I choose to focus on the role of the CAS in selection disputes. Therefore, I will concentrate my attention on the three procedures that could be used to get to the CAS in a selection dispute.

3 Getting to the CAS in selection disputes

Why focusing only on the CAS? The role of national courts in the selection process has already been charted in various (usually national) contributions. Moreover, it is infeasible to provide a comprehensive comparative overview of the

[12] One can easily experience this pluralism by comparing the various selection procedures introduced by the IFs for the 2016 Rio Olympics. http://www.rio2016.com/en/news/news/follow-the-race-to-qualify-for-the-rio-2016-olympic-games. Accessed 11 September 2015.

[13] "An NOC shall only enter competitors upon the recommendations for entries given by national federations."; Rule 44, para 4 OC.

[14] Para 6 of Bye-Law to Rule 44 OC.

[15] CAS OG/02/005 *Troy Billington v. Fédération internationale de Bobsleigh et de Tobogganing* (2002); CAS OG/08/003 *Rainer Schuettler v. International Tennis Federation* (2008); CAS OG/12/02 *Joseph Ward v. International Olympic Committee, International Boxing Association & Association of National Olympic Committees* (2012); CAS OG/14/02 *Clyde Getty v. International Ski Federation* (2014).

[16] CAS OG/06/002 *Andrea Schuler v. Swiss Olympic Association & Swiss-Ski* (2006); CAS 2008/A/1540 *Andrew Mewing v. Swimming Australia Limited* (2008); CAS 96/153 *Watt v. Australian Cycling Federation (ACF) and Tyler-Sharman* (1996); CAS 2000/A/284 *Sullivan v. The Judo Federation of Australia Inc. and al* (2000); CAS 2000/A/260 *Beashel and Czislowski v. Australian Yachting Federation Inc.* (2000); 2000/A/278 *Chiba/Japan Amateur Swimming Federation* (2000); CAS 2002/A/361 *Berchtold v. Skiing Australia Limited* (2002); CAS OG/06/008 *Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano & Federazione Italiana Sport Invernali* (2006); CAS 2008/A/1549 *Luke Michael v. Australian Canoeing* (2008); CAS OG/12/01 *Alexander Peternell v. South African Sports Confederation and Olympic Committee & South African Equestrian Federation* (2012); CAS OG/12/06 *Angel Mullera Rodriguez v. Royal Spanish Athletics Federation, Spanish Olympic Committee & Superior Sports Council* (2012); CAS 2014/A/3473 *Michael Rishworth and Luke Laidlaw v. Ski and Snowboard Australia* (2014); CAS OG/14/01 *Daniela Bauer v. Austrian Olympic Committee & Austrian Ski Federation* (2014); CAS OG/14/03 *Maria Belen Simari Birkner v. Comité Olimpico Argentino & Federacion Argentina de Ski y Andinismo* (2014).

[17] Ibid, *Andrea Schuler*, *Isabella Dal Balcon, Angel Mullera Rodriguez, Alexander Peternell, Daniela Bauer, Maria Birkner*; CAS 2008/A/1539 *Nicholas D'Arcy v. Australian Olympic Committee* (2008); CAS 2008/A/1574 *Nicholas D'Arcy v. Australian Olympic Committee* (2008); CAS 2008/A/1605 *Chris Jongewaard v. Australian Olympic Committee* (2008); CAS OG/10/004 *Claudia Pechstein v. Deutscher Olympischer Sportbund & International Olympic Committee* (2010).

[18] Ibid, *Claudia Pechstein*; CAS OG/12/02 *Joseph Ward v. International Olympic Committee, International Boxing Association & Association of National Olympic Committees* (2012); CAS OG/02/003 *Bassani-Antivari v. International Olympic Committee* (2002).

[19] TAS 2004/A/544 *Confédération Brésilienne de Hippisme v. Fédération Equestre Internationale* (2004); CAS 2008/O/1455 *Boxing Australia v/AIBA* (2008); CAS 2008/A/1615 *Hellenic Modern Pentathlon Federation v. Union Internationale de Pentathlon Moderne, Australian Olympic Committee, Modern Pentathlon Australia & Angela Darby* (2008); CAS 2008/A/1502 *AOC & AWU v/FILA* (2008).

[20] CAS OG/02/006 *New Zealand Olympic Committee v. The Salt Lake Committee for the Olympic Winter Games of 2002* (2002).

national court's case law on this matter. Finally, the CAS (and especially the *ad hoc* Division for the Olympics) has been facing a growing number of selection disputes in recent years and I aim to show that it is a fruitful, albeit challenging avenue to resolve in a denationalized process these highly emotional controversies.

3.1 Ordinary and appeal proceedings

As many readers versed in international sports arbitration will know there are two main procedural routes in front of the CAS: the ordinary procedure and the appeal procedure.[21] This dichotomy is also relevant in the context of selection disputes.

3.1.1 CAS appeal procedure

Here is not the appropriate place to re-state in excruciating details the procedural subtleties of the CAS appeal procedure.[22] Suffice it to remind the basics of the CAS's appeal jurisdiction enshrined in article R47 of the CAS Code stipulating:

> "An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body."

The key question for the purpose of this paper is whether a specific arbitration clause has been introduced to allow an appeal of a decision denying access to the Olympic Games rendered by NFs, IFs, NOCs or the IOC to the CAS. This is naturally extremely context dependent. Decisions taken by the IOC are appealable to the CAS as rule 61 para. 2 OC famously entails that:

Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.

Yet, IOC decisions in this matter are extremely rare and many disputes involve decisions adopted by IFs, NFs or NOCs. As far as IFs are concerned, their decisions are usually subjected to a CAS arbitration clause and can be directly appealed to the CAS. However, the NFs and NOCs bear the brunt of selection disputes as they play a decisive role in choosing who is deemed of adequate sporting level to represent a country in the most coveted competition in the world. Due to the considerable number of NFs involved in selecting Olympic athletes, it is impossible to determine precisely which of them have introduced CAS arbitration clauses into their regulations susceptible to lead to appeals in selection cases. It is well known, based on the existing jurisprudence of the CAS, that the Australian NFs and NOC have done so.[23] Yet, this country seems to remain an exception in light of the relatively few selection disputes submitted to the CAS via the appeal procedure. Athletes could play a decisive role at national level in pushing for the introduction of a CAS review over selection disputes. This would have the advantage of detaching the final decision from national arbitral bodies or courts that might be under greater influence of the NFs or NOCs. In the absence of such an appeal opportunity, it remains possible to opt for arbitrating such a dispute via the ordinary procedure.

3.1.2 CAS ordinary procedure

Another possibility to bring a selection dispute to the CAS would be to use the alternative of the CAS ordinary procedure. The CAS ordinary procedure is the sporting equivalent of a traditional commercial arbitration procedure. The parties before or after a selection dispute arose can agree that this specific dispute will be subjected to CAS arbitration. In this case, different rules specific to the CAS ordinary procedure, enshrined in articles R38 to R46 of the CAS Code, will apply. In selection cases this procedure has rarely been used and is unlikely to be used in the future, as NFs or NOCs will often be reluctant *ex post facto* to subject their decisions to any "judicial" review.[24]

3.2 CAS *ad hoc* division

Finally, and this is probably the most important development in CAS arbitration as far as disputes related to the participation to the Olympic Games are concerned, athletes can turn to the CAS *ad hoc* Division for the Olympic Games to challenge their non-selection.[25] This is a relatively new possibility. Indeed, for a while its jurisdiction was derived only from the signing of the entry form to the

[21] The ordinary procedure is subject to arts R38 to R46 of the CAS Code 2013 and the appeal procedure is subject to arts R47 to R59 of the CAS Code 2013. http://www.tas-cas.org/en/arbitration/code-procedural-rules.html#c249. Accessed 10 October 2015.

[22] For a complete take on CAS arbitration, see Rigozzi (2005); See also the recent article by article commentaries of the CAS Code by Mavromati and Reeb (2015); Noth et al. (2013).

[23] *Supra* n 17 and 18.

[24] We identified only one exception: CAS 2008/O/1455 *Boxing Australia v/AIBA* (2008).

[25] On the early years of the CAS Ad hoc Division see Kaufmann-Kohler (2001) and McLaren (2001). On the case law of the various CAS Ad hoc divisions at the Olympics see McLaren (2004), Zagklis (2006) and McLaren and Cowper-Smith (2010).

Olympic Games, thus, athletes who were not selected to participate in the Games, and, hence, had not signed the entry form were deprived from the right to have recourse to the CAS *ad hoc* Division. This situation has crystallized in two cases submitted to CAS *ad hoc* panels at the Salt Lake City Winter Olympics.[26] The first case involved an Italian/Granadian national who wanted to represent Granada for the Slalom event. However, despite having the right to do so, the Granada Olympic Committee declined to submit an entry form for Ms. Bassani-Antivari, denying her the possibility to join the Games. The panel held that "[i]t would be illogical to confer jurisdiction for a competitor on the CAS Ad hoc Division (as opposed to the regular CAS procedure) to resolve any dispute arising on the occasion of, or in connection with, the Olympic Games only on the basis of Rule 74 without a link to these Games, such as the arbitration clause contained in a validly endorsed entry form".[27] Hence, as the athlete had not signed a valid entry form, she could not rely on the arbitration clause therein to refer her dispute to the CAS. A few days later, an athlete from the Virgin Islands challenged the decision of the International Bobsleigh and Tobogganing Federation to withhold his admission to compete in the Olympic Skeleton Race. The panel referred to the Bassani-Antivari precedent already discussed, and held that "if it is to have jurisdiction to deal with this Application, it must involve a dispute arising under an Entry Form as a competitor for these Winter Games".[28] Yet, "[t]here is no such Entry Form and, therefore, this Panel lacks jurisdiction".[29] Remarkably, the Panel also added that "[t]he construction of Article 1 of the CAS Ad hoc Rules adopted in Gaia Bassani-Antivari, which the Panel has decided to follow, may give rise to unfairness and hardship for athletes claiming the right to be entered as competitors in Olympic Games"[30] and recommended "that the contents of Article 1 of the CAS Ad hoc Rules be reconsidered".[31]

The panel's recommendation in the Billington case were duly implemented in 2003[32] and led to a change in the CAS *ad hoc* rules materializing in the introduction of a new Article 1 stipulating that the *ad hoc* Division is competent:

> "for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games".[33]

This new legal framework was put to work in the 2006 Winter Olympics in Turin.[34] In a case opposing a Swiss Snowboarder, Andrea Schuler, to the Swiss Olympic Association and Ski Federation over the decision not to select her to compete in the half-pipe event, the CAS *ad hoc* Division was anew confronted with a situation in which an athlete had not signed an entry form to the Olympics. The panel found that "Ms Schuler has not signed an Olympic entry form but under the current CAS Ad hoc Rules this is not required".[35] Instead it had to determine "whether the dispute arose within the period of 10 days preceding 10 February 2006, that is on or after 31 January 2006".[36] Ms Schuler had received a written explanation of her non-selection on 1 February 2006 and decided to appeal the decision to the CAS *ad hoc* Division on 6 February 2006. In the panel's view "it would not be possible to say that a dispute had arisen until Ms Schuler had decided to appeal and had filed notice of her appeal".[37] The panel also controlled whether the dispute had "arisen "on the occasion of" or "in connection with" the Olympic Games, as required by Rule 61 of the Olympic Charter".[38] In the Schuler case, this condition was clearly met "as Ms Schuler has not been included in the Swiss Olympic team and is seeking as relief her selection for, and thus her participation in, the half-pipe snowboard competition of the 2006 Olympic Winter Games".[39] One can easily deduce "that all selection and eligibility disputes do arise "in connection with" the Olympic Games".[40] Hence, the widening of the scope of jurisdiction of the CAS *ad hoc* Division opened the door for the submission of selection disputes arising before the Olympics. Commentators at the time of the decision deduced that the jurisdiction of the CAS *ad hoc* division could theoretically "be expanded to

[26] See in particular CAS OG/02/003 *Bassani-Antivari v. International Olympic Committee* (2002) and CAS OG/02/005 *Troy Billington v. Fédération internationale de Bobsleigh et de Tobogganing* (2002). See also the discussion in Kaufmann-Kohler (2001), p 107.

[27] CAS OG/02/003 *Bassani-Antivari v. International Olympic Committee* (2002), para 23.

[28] CAS OG/02/005 *Troy Billington v. Fédération internationale de Bobsleigh et de Tobogganing* (2002), para 23.

[29] Ibid.

[30] Ibid, para 24.

[31] Ibid, para 25.

[32] Maisonneuve (2011), pp 44–45.

[33] CAS Ad hoc Rules for the Olympic Games. http://www.tas-cas.org/en/arbitration/ad-hoc-division.html. Accessed 10 October 2015.

[34] CAS OG/06/002 *Andrea Schuler v. Swiss Olympic Association & Swiss-Ski*, paras 1-17; CAS OG/06/008 *Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano & Federazione Italiana Sport Invernali* (2006).

[35] CAS OG/06/002 *Andrea Schuler v. Swiss Olympic Association & Swiss-Ski*, para 9.

[36] Ibid, para 13.

[37] Ibid, para 14.

[38] Ibid, para 15.

[39] Ibid.

[40] Rigozzi (2006), p 465.

decisions [rendered 31 (or more)] days before the Opening Ceremony of the Olympic Games".[41]

Nevertheless, this jurisdiction of the CAS *ad hoc* Division in selection cases is not limitless. For example, on one of the many twists to the never-ending Pechstein saga, the CAS *ad hoc* Division at the Vancouver Winter Olympics had to deal with her request to be allowed to compete in the speed-skating competitions of the Vancouver 2010 Winter Olympic Games. The CAS *ad hoc* Division declined jurisdiction, as Claudia Pechstein was unable to point at an appealable decision. Indeed, the CAS award confirming her doping ban was final.[42] In other words, the arbitrators found that "the Applicant [Claudia Pechstein] has not identified any specific decision by the IOC, an NOC, and International Federation or an Organising Committee for the Olympic Games which has arisen during the Vancouver Olympic Games or during a period of ten days preceding the Opening Ceremony of the Games on 12 February 2010 which could be the subject of an appeal to the Ad hoc Division".[43] This is an exceptional case. In normal circumstances the applicants are able to point at an appealable decision to not select them. A more problematic question is whether the relevant dispute arose during the period of 10 days preceding the Games.

The question of the 10 days delay was at issue in the case involving an Irish boxer, Joseph Ward, wanting to participate in the 2012 Summer Olympics in London. The CAS *ad hoc* panel was to determine whether the dispute arose within the 10 days period, starting on 17 July 2012, preceding the Games. The panel found that "at the latest, the "dispute arose" on 11 July 2012, when the Applicant objected formally, based on receipt of the rationale for the decision".[44] To determine the moment at which the dispute arises, "the facts will be examined in each case based on the good faith understanding of the athlete or other aggrieved party and the relevant facts giving rise to when the dispute arose".[45] Moreover, "[a]n applicant to the CAS ad hoc Division cannot rely on the Schuler award to mean that s/he, through an exploration designed to learn the rationale for a decision with which s/he disagrees, can extend the time when a "dispute arose" into the period identified in Rule 1 of the Ad Hoc Rules".[46] Instead, "the Applicant was well aware that a decision had been made as of 28 June and had the full explanation as of receipt of the 2 July letter".[47] Hence, the CAS *ad hoc* panel refused to consider that the situation was akin to the *Schuler* precedent and denied its jurisdiction.

Finally, in the *Birkner* case,[48] the *ad hoc* Division at the Sochi Winter Olympics grappled extensively with the question: "did the dispute arise in the required time frame?"[49] As the panel recognized, this is a "vexing issue".[50] To be receivable the dispute had to arise not earlier than the 28 January 2014, 10 days before the opening ceremony in Sochi scheduled for the 7 February 2014. The panel asserted: "the date when the dispute arose cannot, *per se,* be the date when the Request for Arbitration is filed".[51] It refused to consider the *Schuler* precedent to be applicable in the *Birkner* case for two reasons: the factual situation is different and the reasoning used in Schuler is deemed fundamentally flawed. On the one side, contrary to the *Schuler* case, the panel finds that "[i]n the present case […] the explanation was not given on a date inside the required period, as it was either on 20 January 2014, which is the date of the letter of explanation, or on 22 January 2014, which is the date on which the Applicant says that she received that letter".[52] Both of these dates being well anterior to the 10 days period before the Games, the panel is of the opinion that it lacks jurisdiction. On the other side, the panel is clearly not "convinced by the legal reasoning adopted in the *Schuler* case".[53] Indeed, it considers that "[s]uch conclusion could extend the jurisdiction of the Ad hoc Division outside the precise and limited framework set by the Rules, which this Panel is required to respect and apply".[54] The panel held that "the date when a dispute arises is in general […] the date of the decision with which the Applicant disagrees".[55] However, "[s]uch a date can arise later […] if […] the decision is not self-explanatory and requires some explanation in order for the parties to know with certainty that they are in disagreement".[56] In summary, by considering that the dispute arises at the time when the (clear) reasoning of the challenged

[41] Zagklis (2006), p 51.

[42] CAS 2009/A/1912 *P. v. International Skating Union (ISU) & CAS 2009/A/1913 Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)* (2009).

[43] CAS OG/10/004 *Claudia Pechstein v. Deutscher Olympischer Sportbund & International Olympic Committee* (2010), as quoted in the CAS Bulletin 1/2010, p 143.

[44] CAS OG/12/02 *Joseph Ward v. International Olympic Committee, International Boxing Association & Association of National Olympic Committees* (2012), para 4.9.

[45] Ibid.

[46] Ibid, para 4.10.

[47] Ibid, para 4.12.

[48] CAS OG/14/03 *Maria Belen Simari Birkner v. Comité Olimpico Argentino & Federacion Argentina de Ski y Andinismo* (2014).

[49] Ibid, paras 5.17-5.30.

[50] Ibid, para 5.20.

[51] Ibid, para 5.21.

[52] Ibid, para 5.25.

[53] Ibid.

[54] Ibid, para 5.27.

[55] Ibid, para 5.28.

[56] Ibid.

decision is communicated to the party, it sharply narrowed the interpretation of the scope of jurisdiction of the CAS *ad hoc* division.

The *Birkner* decision reflects the willingness of the CAS *ad hoc* Division to narrow its own scope of jurisdiction. If the parties do not agree to the jurisdiction of the CAS (in practice they might not contest the jurisdiction then there is no reason for the panel to raise the question *ex officio*),[57] it will render more difficult the referral of a selection dispute to the *ad hoc* Division. This interpretation given to the scope of jurisdiction *ratione temporis* of the CAS *ad hoc* Division at the Olympic Games seems to be in contradiction with the overarching aim of the Division, which is to deal swiftly with the disputes intimately connected to the Games. In this light, the more flexible interpretation suggested in the *Schuler* case is preferable. Athletes are no legal experts; they (and sometimes their lawyers) need time to find their way through the jungle of sporting regulations and dispute resolution mechanisms potentially available. Moreover, in many instances the national or federal dispute resolution mechanisms will be lacking independence and the due process rights of the athletes might be jeopardized. The crucial importance of the Olympic Games for an athlete's career calls for an interpretation of the start of the dispute that focuses on the express challenge of the decision. Moreover, any doubts concerning the starting date of the dispute should play in favour of the athlete, unless the time between the date of notification of the motivation of the contentious decision and the submission of an appeal to the CAS *ad hoc* Division is over the usual 21 days provided by the CAS Code. The attack by the *Birkner* panel on the reasoning adopted in *Schuler* is not an anodyne move; in the future it may threaten the access to justice of athletes and their ability to obtain a swift and fair decision in a context where they most urgently need it.

4 The jurisprudence of the CAS in selection disputes

The CAS's baseline position in selection disputes is John Winneke's well-known *obiter dictum* in an award of 1996 stating:

> *The dispute concerning the selection of an athlete rather than another for a particular event at the Olympic Games is not one where the Court of Arbitration for Sport is being requested to make a choice as to which of two athletes is better or which is more likely to win a medal at the Games. They are matters for those properly qualified to make such a choice. Rather, this is a dispute about whether selection procedures have been properly and fairly exercised by the body invested with the power of making the choice.*[58]

The scope for review in selection cases is thus in principle a narrow one and is focused on the selection process rather than on the merits of the decision. This is reflected in the main orientations taken by the CAS jurisprudence on these questions. The CAS's review of selection decision is primarily interested in protecting an athlete's legitimate expectation to be selected. CAS panels have also put an emphasis on the need for selection processes to fulfil the ideal of good governance.

4.1 Reviewing (or rather not) the merit of the selection process

The CAS panels are extremely cautious when they are called to review the selection process to the Olympics. As a single CAS arbitrator put it, he "should be careful not to readily trespass into the selection processes of a professional cycling organization which processes clearly embrace a wealth of experience and expertise that [he] cannot hope to share".[59] The aim of the scrutiny by the CAS of the selection process is admittedly not to "set aside the decision simply because it thinks a better one could have been made".[60] In short, there is a considerable scope of discretion reserved to the SGBs in selection matters as the CAS confers a "significant degree of deference"[61] to their decisions. Therefore, the standard used to review a selection decision for the Olympics is usually the "abuse of discretion".[62] This explains also that in some cases, even where the CAS panel finds that the selection process is procedurally flawed, it prefers to remit the matter to the national federation or Olympic Committee for a new process.[63]

[57] Indeed, "It should not be assumed that the ad hoc panels are required to verify their jurisdiction *ex officio*" in Rigozzi (2006), p 466.

[58] See CAS 96/153 *Watt v. Australian Cycling Federation (ACF) and Tyler-Sharman* (1996). The same quote is found in CAS 2000/A/278 *Chiba/Japan Amateur Swimming Federation* (2000), para 12.

[59] *CAS 96/153 Watt v. Australian Cycling Federation (ACF) and Tyler-Sharman* (*1996*), para 7.

[60] Ibid, para 10.

[61] See Mitten and Davis, p 82.

[62] "Therefore, the applicable standard for our review of FIS's decision is whether it constituted an abuse of discretion". CAS Ad hoc Division (O.G. Salt Lake City) 02/002 *Canadian Olympic Association (COA)/Fédération Internationale de Ski (FIS)* (2002), para 6.

[63] See for example CAS 2002/A/361 *Berchtold/Skiing Australia Limited* (2002), para 19 and TAS 2004/A/544 *Confédération Brésilienne de Hippisme v. Fédération Equestre Internationale* (2004), para 39.

The CAS is adamant that it is not being asked "to determine which of two [yachting] crews is better performed or which is more likely to win a medal".[64] Those are matters "which under the rules are given to appropriately qualified persons within the AYF [Australian Yachting federation]".[65] Yet, in that case, the AYF modified the official results of a regatta. The sole arbitrator considered that 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".[66] The arbitrator also rejected the argument that everything goes in selection matters. He held:

> "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."[67]

Hence, there is a limit to the discretion of sporting federations. The key question is then "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".[68] In the present case, the fact that the official result of a specific regatta was modified by the selection panel "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".[69] The sole arbitrator is "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".[70] This led to the annulment of the original selection decision and the re-submission of the matter to the AYF Board to make a novel decision.

However, when the rules applicable to the selection procedure indicate a clear subjective scope of evaluation, the CAS panels have been reluctant to intervene. This is clear from the *Schuler* case, which was instrumental in opening up the jurisdiction of the CAS Ad hoc Division in Turin.[71] Indeed, the panel found that Ms. Schuler "does not claim that the Respondent acted in bad faith or in a discriminatory manner, so any arbitrariness is excluded" and "did not provide any evidence that the selection process was unfair and that the Decision was unreasonable under the circumstances".[72] Thus, it concluded that the Swiss ski federation "exercised its discretion in a reasonable, fair and non-discriminatory manner and in accordance with the rules in deciding not to select the Applicant".[73] It is solely in case of an unfair, discriminatory or arbitrary exercise of its discretion by an NF or an NOC that the CAS will intervene and annul a decision. This approach was espoused two years later in a case involving an Australian swimmer, Andrew Mewing, challenging his non-selection for the Beijing Olympics. The swimmer was in the eyes of the sole arbitrator "really attacking the merits of the nomination or selection decision by Mr Thompson [the Australian National Head Coach",[74] this was deemed "impermissible in such an appeal".[75] Especially that "[i]n the absence of bad faith, dishonest or perversity, this appeal could only succeed if it could be shown that Mr Thompson, in nominating the relay team, did not give "proper, genuine and realistic" consideration to the "overall needs of the team"".[76] On the contrary, the CAS considered that "[t]he fact that someone else, similarly considering the matter, may have arrived at a different result, or even the fact that his decision is wrong, is insufficient to enable the appeal to be successful as such matters go to the merits of the decision not whether or not the decision-maker gave proper consideration to such matters".[77] Nevertheless, to be successfully invoked by an NF, this scope of discretion must be seen as being exercised. For example, in the dispute opposing Isabella dal Balcon to the Italian winter sport federation [FISI] and NOC in 2006, there was no indication that the federation exercised its discretion. As the panel noted, "the process was made by the DA Snowboard applying the 2-best rule and FISI accepting the recommendation from the DA Snowboard without resort to the

[64] CAS 2000/A/260 *Beashel and Czislowski v. Australian Yachting Federation Inc.* (2000), para 2.

[65] Ibid.

[66] Ibid, para 3.

[67] Ibid, para 4.

[68] Ibid, para 6.

[69] Ibid, para 8.

[70] Ibid, para 9.

[71] See above Sect. 3.2.

[72] CAS OG/06/002 *Andrea Schuler v. Swiss Olympic Association & Swiss-Ski*, para 37.

[73] Ibid, para 38.

[74] CAS 2008/A/1540 *Andrew Mewing v. Swimming Australia Limited* (2008), para 22.

[75] Ibid.

[76] Ibid, para 24.

[77] Ibid.

use of its discretion".[78] In fact, it found that the "FISI accepted the direction of the DA Snowboard albeit on the changed criteria that this Panel has found to be arbitrary and unfair and therefore to be disregarded".[79] Instead of relying on a potential discretion the FISI's selection decision relied on arbitrary objective criteria. This contrasts with the Schuler decision, which "was made using discretion that had been properly preserved to the Swiss National Federation".[80]

This reluctance to intrude in the SGBs decision-making in selection cases extends to the interpretation of the qualification criteria. In a dispute concerning the qualification to the Pentathlon event at the Beijing 2008 Olympic, the Greek Pentathlon Federation was challenging the qualification of an Australian athlete which obtained its qualifying results at a competition that the federation refused to see as an official competition complying with the competition rules set up by the International federation.[81] The panel relied on the official report of the technical observer mandated by the international federation to dismiss the complaint. Thus, highlighting that it "is extremely reluctant to put the (factual) findings of an experienced Technical Observer into question and to completely disregard the First Respondent's recognition of the 2007 Open Australia Championships as a relevant event for eligibility purposes".[82] Here again despite solid evidence otherwise the panel refused to intervene, unless the Appellant would have "demonstrated that the Technical Observer did not provide an accurate report or that the results of the competition have been achieved by undue means or even fraud".[83]

Finally, the CAS found that if the minimum eligibility requirements set by an IF are met, it is not for it to exercise discretion in the selection of athletes for the Olympics. This can be drawn from the *Schuettler* case. Rainer Schuettler, a German tennis player, was selected by the German NF and NOC to take part in the Beijing Olympics. Nevertheless, the International Tennis Federation blocked his selection on the ground that there were better ranked German players to be selected first. The question was "whether the ITF Rules oblige NOCs to nominate players strictly in accordance with the List [the ITF ranking]".[84] Yet, the CAS panel disagreed and recognized that "no ITF Rule has been identified to us that subordinates the NOCs power of selection in that way either expressly or by necessary implication".[85] The discretion in the selection process, once the objective criteria set by the international federations are met, lies with the NOCs.[86] This means also that the NOCs can decide not to select an athlete even though he or she has met the minimum criteria set up by the IF. In fact depending on each IF's eligibility system, NOCs may have more or less discretion in distributing the quotas they have obtained amongst their national athletes. As pointed out by a panel in the *Mewing* case, "being entitled to consideration for nomination and being eligible for nomination is not the same as having a right to nomination".[87] Another panel, in a case opposing two Australian snowboarders to their NF in the context of the Sochi Olympics, highlighted that "the allocation process allocates quota places to the NOCs, and not to individual athletes".[88]

NFs and NOCs often dispose jointly of a wide discretion insofar as the selection of their Olympic team is concerned. This discretion is deemed necessary due to the subjective nature of the evaluation of the ability of an athlete. Nonetheless, it is not without limits, if formal criteria have been devised and publicized, they must be taken seriously by the SGBs. In particular, they might give way to legitimate expectations on which athletes may be able to rely to claim a right to be selected for the Olympic Games.

4.2 Protecting the legitimate expectations of the athletes

One of the oldest tenets of the CAS jurisprudence concerning selection disputes is the necessity to ensure that the legitimate expectations of the athletes are respected. Since the *Watt* case,[89] the first award of the CAS in selection matters, the question of the existence of a legitimate expectation to being selected for the Olympics is central. Kathryn Watt, an Australian cyclist, who was first informed that she was selected to participate in the 1996 Summer

[78] CAS OG/06/008 *Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano & Federazione Italiana Sport Invernali* (2006), para 13.

[79] Ibid, para 18.

[80] Ibid.

[81] CAS 2008/A/1615 *Hellenic Modern Pentathlon Federation v. Union Internationale de Pentathlon Moderne, Australian Olympic Committee, Modern Pentathlon Australia & Angela Darby* (2008), para 16.

[82] Ibid, para 19.

[83] Ibid.

[84] CAS OG/08/003 *Rainer Schuettler v. International Tennis Federation* (2008), para 10.

[85] Ibid.

[86] The decision triggered an angry response by the ITF. See ITF slams decison to let Schuettler compete at Olympics (The Guardian, 4 August 2008). http://www.theguardian.com/sport/2008/aug/04/olympics2008.tennis. Accessed 10 October 2015.

[87] CAS 2008/A/1540 *Andrew Mewing v. Swimming Australia Limited* (2008), para 7.

[88] CAS 2014/A/3473 *Michael Rishworth and Luke Laidlaw v. Ski and Snowboard Australia* (2014), para 6.19.

[89] *CAS 96/153 Watt v. Australian Cycling Federation (ACF) and Tyler-Sharman* (1996).

Olympics in Atlanta was later de-selected by the Australian Cycling Federation (ACF). The panel found that the letter informing the athlete that she would be picked to represent Australia at the Games "amounted to a strong representation by the ACF to the Appellant that she would be ACF's nominated rider for the 3000 m individual pursuit at Atlanta".[90] Indeed, the terms of the letter "were such as to raise in the Appellant the legitimate expectation that she would be the person recommended by the Respondent to the AOC to ride the Pursuit".[91] This guarantee "was given by the Respondent in the knowledge and with the intent that the Appellant would rely upon it and "chart her course" accordingly".[92] In doing so, the federation "was knowingly departing (in favour of the Appellant) from its own published selection policies and procedures".[93] Thus, "the ACF was duty bound to honour its commitment to the Appellant unless circumstances of the type which qualified that commitment came to pass".[94] These exceptional circumstances would entail that another Australian athlete would approximate or beat the time of the world record before the Atlanta Games. The federation claimed that another athlete, Ms. Tyler-Sharman, did so during a training session, to justify Ms. Watt's de-selection. The sole arbitrator disagreed with the justification advanced by the federation, he held that "it would be unreasonable to conclude that the qualification of Watt's "nominated status", referred to in the letter of 22 April 1996, contemplated that the "unlikely aspect of another Australian competitor performing some unique ride—i.e. equalling or near to the new world record" was referring to "training times" or any performances in circumstances other than those required for "world record status".[95] In short, "[i]t is a truism that world records are not created in training".[96] Hence, he concluded:

> "Where a sporting organization, in circumstances deemed by it to be appropriate, chooses to depart from its established rules of selection procedure and to nominate, in advance, a particular athlete as its selected choice for a particular event and, in doing so, creates expectations in and obligations upon that individual, then in my view it should be bound by its choice unless proper justification can be demonstrated for revoking it."[97]

As no proper justification was provided, Ms. Watt was re-instated in Australia's Olympic team for the Orlando Games instead of Ms. Tyler Sharman.

As the Australian Olympic Committee was one of the first to introduce a CAS arbitration clause in its rules applying to the selection process for the Olympics, it is not very surprising that many of the cases discussed concern Australian athletes, as illustrated by a well-known case involving two Australian judokas competing for a spot at the Sydney Summer Olympics.[98] Ms. Sullivan, the appellant, was challenging the nomination of Ms. Raguz, the defendant alongside the national federation and Olympic Committee, and claiming that she should have been selected to represent Australia. Here, the legitimate expectation to be selected did not arise from a previous announcement of the selection to participate in the Games, instead the CAS finds that it stems from the selection criteria communicated beforehand by the Australian federation. The arbitrators "conclude that Athletes vying for selection in the 2000 Olympic Games Team in the sport of Judo have and at all times from 27 September 1999 have had a legitimate expectation that the provisions of the Agreement [containing the selection criteria] would be complied with".[99] In its submission, the Australian federation argued that it had modified the criteria included in the Agreement. But the panel was of the view "that whatever may have been the subjective intention of the First Respondent [Australian Judo Federation] in pursuing a change to the relevant points table the proposed change was not effective until after the three selection events had taken place".[100] Additionally, "[a]ny power to amend must be subject to a limitation that it could not be exercised retrospectively once that "allocation" had been made and once it had been scrutinised and confirmed", and "no indication in writing had been given by the First Respondent [Australian Judo Federation] to any of the potential Olympic nominees for selection that the points table was proposed to be changed prior to the change occurring".[101] Thus, "all Athletes had a legitimate expectation that the issue of the nomination to the AOC would be governed by the documentation existing on 27 September 1999 which had not been amended prior to the selection decision by the Oceania Judo Union".[102] Henceforth, "the Court upholds the Appeal of the Applicant and orders that First Respondent [Australian Judo Federation] nominate to the AOC the

[90] Ibid, para 12.
[91] Ibid, para 14.
[92] Ibid, para 15.
[93] Ibid, para 16.
[94] Ibid.
[95] Ibid, para 25.
[96] Ibid.
[97] Ibid, para 26.

[98] CAS 2000/A/284 *Sullivan v. The Judo Federation of Australia Inc. and al* (2000). See also the failed appeal before the Australian courts *Angela Raguz v Rebecca Sullivan* [2000] NSWCA 240.
[99] Ibid, para 18.
[100] Ibid, para 28.
[101] Ibid.
[102] Ibid, para 29.

Applicant [Ms. Sullivan] in substitution for the Third Party [Ms. Raguz]".[103] As often, the legitimate expectations of one athlete clash with those of another. The CAS noted this unhappy state of affairs and labelled it "a matter of grave concern".[104] Nonetheless, Raguz was de-selected from the Sydney Olympics, she tried to challenge the CAS *ad hoc* award in front of the Australian courts but to no avail.[105]

The idea of ensuring that legitimate expectations of athletes are protected is analogous to the notion of estoppel, which a CAS *ad hoc* panel referred to in a case opposing the New Zealand Olympic Committee and the Salt lake Organizing Committee for the Olympic Winter Games of 2002 (SLOC). In this instance, the SLOC had wrongfully accepted the misleading entry form of two New Zealand skiers. The panel held that "[b]y accepting the entries for the two athletes for both Slalom and Giant Slalom, SLOC induced them to prepare and train for both disciplines for which they were properly entered".[106] Thus, "[t]o exclude them from competing in these two disciplines at this late stage would be unfair and contrary to the […] doctrine of estoppel".[107] Indeed, "[g]iven the interaction of the International and National Federations with the Organizing Committees of Olympic Games (SLOC in this case), both the athletes and the Applicant are entitled to rely on the acts and omissions of SLOC as if they were acts or omissions of FIS [Fédération Internationale de Ski]".[108] Here by accepting the entry forms to the Olympics submitted by the National Olympic Committee and by giving the appearance that they had fulfilled the selection criteria imposed by the FIS, the SLOC had induced legitimate expectations for the athletes and was estopped from blocking the participation of the two skiers to the Salt Lake City Winter Olympics.

Can every athlete that has been informed that he is selected for the Olympic Games rely on his legitimate expectation to take part in the Games to fend off any challenge against his or her participation? Not really, there might be a strong presumption that this is so, but it remains possible to de-select an athlete in exceptional cases. This possibility was tested by CAS panels in cases involving two different Australian athletes on their way to the Beijing 2008 Summer Olympics. These instances involved misbehaviour of the two athletes in their private life. Nicholas D'Arcy, a swimmer, started a brawl in a Sydney Bar and severely injured someone. This led the Australian Olympic Committee to de-select him. At first the decision was taken unilaterally by the President of the AOC, which led to its annulment by the CAS as it did not conform to the procedure enshrined in the AOC's internal rules.[109] Yet, it remitted the matter to the AOC, which in a procedurally adequate way took the decision to remove D'Arcy from the Australian Olympic squad. Asked again to review this second decision, the CAS found that "[t]he conduct of the Appellant [Mr. D'Arcy] on the night in question, putting to one side the allegations of criminal misbehaviour, was serious misconduct".[110] Indeed, "[t]he grossly excessive consumption of alcohol resulting in intoxication, culminating in his involvement in a fracas, was conduct that could form an ample basis for the exercise of discretion to terminate the Appellant's membership of the team".[111] Furthermore, "[t]he extent of the disrepute that the Appellant's behaviour has brought himself is highlighted by the voluminous number of media reports that have accompanied his misconduct".[112] Hence, it cannot be said "that the decision of the AOC Executive was perverse or irrational, or aberrant in the "Wednesbury" sense.[113] In other words, "[t]he sanction was not disproportionate, nor manifestly excessive so as to give rise to a finding of "irrationality".[114] This decision points at the clear limits to the legitimate expectations athletes can rely on to participate in the Olympic Games. A similar question was at the heart of the award in a case opposing another Australian athlete, Chris Jongewaard, to the AOC. The athlete, a cyclist, had caused a car accident and injured another cyclist while driving drunk. The CAS panel found that the athlete "had a contractual obligation to not engage in (publicly known) conduct which, in the absolute discretion of the President of the AOC, brought or would be likely to bring him into disrepute".[115] Instead, "[a]n athlete

[103] Ibid, para 31.

[104] Ibid, para 33.

[105] *Angela Raguz v Rebecca Sullivan* [2000] NSWCA 240.

[106] *CAS OG/02/006 New Zealand Olympic Committee v. The Salt Lake Committee for the Olympic Winter Games of 2002* (*2002*), para 19.

[107] Ibid.

[108] Ibid.

[109] "We are satisfied that Clause 2 of the Membership Agreement does not provide for automatic termination of membership upon a finding of breach of condition. Thus, at the relevant time (and still) it is the AOC which has the discretion, not the President of the AOC. This means that the proper procedure laid down by Clause 2 of the Membership Agreement was not followed. The normal consequence of that finding would be that the decision to terminate be set aside and the matter remitted to the AOC for it to consider the exercise of its discretion to terminate membership of the Team." CAS 2008/A/1539 *Nicholas D'Arcy v. Australian Olympic Committee* (2008), para 12.

[110] CAS 2008/A/1574 *Nicholas D'Arcy v. Australian Olympic Committee* (2008), para 49.

[111] Ibid.

[112] Ibid, para 51.

[113] Ibid, para 52.

[114] Ibid.

[115] CAS 2008/A/1605 *Chris Jongewaard v. Australian Olympic Committee* (2008), para 18.

nominated for the Australian Olympic Team is presumed to be a person of good repute", as he/she "is perceived as both a leader and a role model within the Australian community".[116] Thus, knowing that the athlete had to answer two serious criminal charges, the panel could not "accept that the Decision of the AOC Selection Committee (and the President) that the Appellant has brought himself into disrepute and therefore should not be selected as a member of the Australian Olympic Team can be held to be so unreasonable or perverse as to be "irrational"".[117] On the contrary, it found "the Decision of the AOC (and the President) to be a reasonable Decision".[118] However, these cases are special because the AOC has introduced a specific rule providing for the opportunity to remove an athlete from the Olympic team in case of misbehaviour. On the contrary, if an NF or an NOC does not provide for the possibility to exclude an athlete in case of a doping suspicion, he or she can rely on his legitimate expectation to defend his or her selection for the Olympics.[119]

Finally, the question when a legitimate expectation arises is also key before the CAS. In a recent case, the CAS ad hoc Division had to deal with an athlete claiming that he could rely on the legitimate expectation to be selected for the Sochi Winter Olympics as he had been erroneously informed by an email sent by his national federation of his participation in the Games. However, later the same day, after the athlete confirmed his interest in the spot, the federation received a second email from the FIS stating that the Argentine Federation "does not have an athlete that is eligible to participate in the Aerials men event"[120] and, therefore, cannot get the spot misleadingly offered. Hence, the panel was of the opinion that "FIS never made during the qualification period a representation that Mr Getty was eligible".[121] Moreover, "there is no evidence that during the qualification period Mr Getty received from FIS an individual assurance that he was eligible".[122] Rather, "the fact that COA [Argentinean Olympic Committee] might ultimately obtain a quota place did (and could) not suggest that FIS would waive the minimum individual qualification requirement for any athlete assigned to that quota place".[123] Hence, "no legitimate expectation could be drawn by the email the Applicant received on 24 January 2014 from FASA (not FIS, which did not communicate directly with Mr Getty), as the indication that he might compete at the Sochi OWG was withdrawn only a few hours later".[124] Indeed, "while this Panel would be ready to subscribe to the doctrine of "estoppel" set out in the CAS jurisprudence, the position of the Applicant finds no support in the CAS precedents he invokes, which clearly refer to situations that differ from his case in vital point: in CAS OG 02/06 and in CAS OG 08/02, the athlete had been given specific and individual assurances about his eligibility, which were withdrawn at a very late stage; in CAS 2008/O/1455, the international federation changed its rules with retroactive effects, depriving an athlete of the eligibility that could be assumed on the basis of prior rules".[125]

In any event the CAS "stressed the importance of the principle that an international federation would not abandon at will Olympic qualification criteria upon which athletes had relied".[126] It is willing to secure the right of athletes to participate in the Olympics when they can rely on a legitimate expectation to being selected. In general, this principle fits within a broader concern for good governance and procedural fairness in selection processes.

4.3 Good Governance and selection disputes

One broader concern that runs through the CAS's jurisprudence on selection disputes for the Olympic Games is the idea that selection procedures should live up to the ideal of good governance. In practice, this concern for good governance is embraced in both selection cases and eligibility disputes. CAS panels or single arbitrators have the tendency to deplore the procedural flaws they identify in the various selection processes they are reviewing. Basically, CAS panels have "[…]to determine whether the decision was arrived at fairly […]".[127] This is so, because the right to select the athletes "shall be exercised in good faith and in accordance with the applicable rules and, in particular, with the principles of the Olympic Charter".[128]

[116] Ibid, para 19.

[117] Ibid, para 20.

[118] Ibid.

[119] "In the absence of a clear provision in the selection rules of the relevant national federation or National Olympic Committee entitling either body to exclude an athlete simply on the basis of a suspicion of doping, it is the Panel's opinion that an athlete has a legitimate expectation that, once he has been selected in accordance with the national selection process, he will be permitted to enter and participate in his or her competition absent some new or other reason for excluding him or her from the team." See CAS OG/12/06 *Angel Mullera Rodriguez v. Royal Spanish Athletics Federation, Spanish Olympic Committee & Superior Sports Council* (2012), para 7.6.

[120] CAS OG/14/02 *Clyde Getty v. International Ski Federation* (2014), para 2.9.

[121] Ibid, para 8.17.

[122] Ibid.

[123] Ibid.

[124] Ibid.

[125] Ibid.

[126] CAS 2008/A/1502 *AOC & AWU v/FILA* (2008), para 33.

[127] CAS 96/153 *Watt v. Australian Cycling Federation (ACF) and Tyler-Sharman* (1996), para 10.

[128] CAS OG/12/01 *Alexander Peternell v. South African Sports Confederation and Olympic Committee & South African Equestrian Federation* (2012), para 41.

Ensuring procedural fairness is an overall goal guiding the review of the CAS.

A main concern is the ideal of transparency and publicity of the eligibility criteria and the selection rules. Though, in the latter case it seems inclined to exercise a more restrained control. The CAS is, for example, very critical of the way SGBs miscommunicate (or simply do not communicate) the eligibility criteria applicable for an athlete to get to the Olympics.[129] It has held that "[t]he oral discussion of such criteria are an imperfect method of explaining to athletes what the precise criteria are in order for all athletes to know what they must do and achieve in order to be selected".[130] Furthermore, as pointed out by a single arbitrator, he "would not hesitate to quash the decision, had the selection criteria been established before the selection, but not been communicated to the athletes".[131] Indeed, "a professional athlete, such as the Appellant, has the right to know the criteria established by its National Federation or National Olympic Committee, which he or she must meet in order to qualify for the Olympic Games".[132] Furthermore, "[t]aking into consideration that the decision on the selection of an athlete may constitute the opportunity of a lifetime for an athlete, the Federation and the National Olympic Committee should pursue a policy of transparency and open information".[133] Transparency of the selection and eligibility criteria used is a must. This implies also that an IF cannot depart from the eligibility criteria it has enacted without following the proper legislative procedure enshrined in its statutes.[134] Moreover, "even if the [SGB] had properly and formally enacted a resolution adopting a new qualification system, the Panel is of the opinion that an attempt to alter the Olympic qualification process with retrospective effect at such a late stage—a few months before the Olympic Games—would violate the principle of procedural fairness and the prohibition of venire contra factum proprium".[135] Overall, "crucial considerations of procedural fairness towards its members require international federations to announce at a reasonably early stage the Olympic qualification process and not to alter it when the national federations and their athletes have already started the sporting season leading to the Olympic Games".[136] Additionally, "[p]aramount considerations of legal certainty require that an international federation exercises its normative discretion by adopting resolutions or regulations in proper compliance with the formal procedures set out by its own statutes".[137] A federation willing to change the selection process "should have enacted and publicized such provision at a reasonably early stage and, at any rate, prior to the beginning of the sporting season leading to the Olympic Games".[138] In short, "the policy choices of an international federation must necessarily be translated into rules and regulations, correctly adopted—as to both form and substance—and properly and timeously publicized".[139] Similarly, when a federation imposes "new deadlines for qualification on such short notice that the Appellant could have no hope of being selected to represent his country",[140] it amounts to "an arbitrary and manifestly unfair"[141] way to select an athlete (and in that case his horse). Instead, "applicable deadlines should have been notified publicly and clearly so that any potential nominee had the opportunity to make appropriate arrangements, which may have included selecting alternative qualifying events and/or seeking an extension of the time limit for qualification".[142] The timely publicity and continuous transparency of the eligibility and selection requirements is a fundamental tenet of the CAS when reviewing the selection process to the Olympics. However, one can only regret that this concern for transparency does not seem to be taken as seriously in selection cases *stricto* sensu. Indeed, more recently in Sochi, two separate panels have condoned vague and slightly misleading selection criteria and refused to revoke a non-selection decision on the basis of the discretion enjoyed by the national federations in selecting their athletes.[143] One *ad hoc* panel even held "that it does not condone [the] lack of published qualification criteria that misled the Applicant by failing to

[129] "De même, la FEI n'est pas parvenue à publier une unique version des critères de sélection en vue des JO 2004." See TAS 2004/A/544 *Confédération Brésilienne de Hippisme v. Fédération Equestre Internationale* (2004), para 42.

[130] CAS OG/06/008 *Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano & Federazione Italiana Sport Invernali* (2006), para 7.

[131] CAS 2000/A/278 *Chiba/Japan Amateur Swimming Federation* (2000), para 10.

[132] Ibid.

[133] Ibid.

[134] "In view of the above, the Panel is of the opinion that the Respondent might have legitimately changed the Olympic qualification process for Oceania, if it had done so prospectively and following its proper legislative procedures". CAS 2008/O/1455 *Boxing Australia v/AIBA* (2008), para 22.

[135] Ibid, para 16.

[136] Ibid, para 22.

[137] Ibid, para 35.

[138] Ibid, para 36.

[139] Ibid, para 40.

[140] CAS OG/12/01 *Alexander Peternell v. South African Sports Confederation and Olympic Committee & South African Equestrian Federation* (2012), para 24.

[141] Ibid.

[142] Ibid.

[143] See CAS OG/14/03 *Maria Belen Simari Birkner v. Comité Olimpico Argentino & Federacion Argentina de Ski y Andinismo* (2014) and CAS OG/14/01 *Daniela Bauer v. Austrian Olympic Committee & Austrian Ski Federation* (2014).

provide clear and timely notice of the performance standards she was required to meet in order to be recommended by the ASF for the nomination by the AOC to the Austrian Olympic team".[144] In fact both panels strongly recommended "that the [NFs] establish, identify, and publish clear criteria to enable athletes to determine in a timely manner the Olympic Games qualification standards they are required to meet",[145] but were reluctant to overturn the non-selection decisions.

The selection criteria must also be applied in a non-discriminatory fashion. In the *Chiba* case, a CAS arbitrator reminded that Rule 6 of the Olympic Charter "expresses the idea that sport must be practised without discrimination of any kind".[146] Moreover, "the principles of fair play and non-discrimination are valid for athletes and sports organizations and must be followed in the process of selecting athletes for the Olympic Games".[147] Consequently, "the fairness test requires that the selection criteria be applied equally to all athletes".[148] CAS panels have also regretted the lack of due process in the way selection disputes have been handled by SGBs. The Fédération internationale d'équitation was reprimanded by a CAS panel for unduly delaying its decision.[149] This was worsened by the fact that the final decision adopted did not include a proper motivation. In another instance, the CAS considered that remitting a selection dispute to the same panel that has been deemed biased in a first instance "necessarily infected the second process with bias".[150] Instead, "the question of renomination to the AOC by AC [Australian Canoeing] for selection in the 2008 Australian Olympic Team in the Men's Kayak Flatwater Category should be referred back to a newly constituted AC Selection Panel".[151] The CAS is also unyielding that for an NOC (in that case the South African Olympic Committee) to withdraw from an event to prevent an athlete from being selected to participate in the Olympics "is hardly within the Olympic spirit or the promotion of ethics and good governance in sport".[152] Consequently, the panel did not hesitate to consider "that the decision of SASCOC not to select the Applicant because SASCOC did not receive an explicit recommendation by SAEF is wrong, and shall be annulled"[153] and "finds that the Applicant shall be declared selected to represent South Africa in the Equestrian Eventing discipline at the XXX Olympic Games in London".[154]

Though the CAS panels' concern for good governance translates in a specific attention to the procedural qualities of the selection process, in practice it leads only to a relatively light-touch intervention. Even when they identified clear procedural failures, the arbitrators remained often, though not always, reluctant to strike down a (non-)selection decision mainly because the procedural failure might have as a consequence the de-selection of another athlete who would then be equally harmed.

5 Conclusion: deference is not enough

Selection disputes arising in the context of the Olympic Games constitute a growing part of the CAS's caseload. This is probably inevitable, as a non-selection for the Olympic Games is often the toughest setback faced by an athlete in her career. As I have shown, the CAS has developed a rather coherent case law on the matter, and has proven ready to challenge the decisions of the SGBs in the most outrageous cases. Settling this type of cases is a big part of the *raison d'être* of the CAS *ad hoc* Division for the Olympic Games. The *ad hoc* Division is sometimes the sole trustworthy court an athlete can turn to in case of a selection dispute. These factors should be better reflected in a more flexible interpretation of its temporal scope of jurisdiction that would best accommodate the need to secure the athletes' right to a fair process in the context of selection disputes. This inclusive understanding of the jurisdiction of the CAS *ad hoc* Division is also in the spirit of the Olympic Agenda 2020's claim to put the athletes' interests and needs at the heart of the Olympic Games,[155] as well as of article 1.3 OC stipulating that the athletes' interests "constitute a fundamental element of the Olympic Movement's action".

[144] CAS OG/14/01 *Daniela Bauer v. Austrian Olympic Committee & Austrian Ski Federation* (2014), para 7.16.

[145] Ibid, and CAS OG/14/03 *Maria Belen Simari Birkner v. Comité Olimpico Argentino & Federacion Argentina de Ski y Andinismo* (2014), para 8.3.

[146] CAS 2000/A/278 *Chiba/Japan Amateur Swimming Federation* (2000), para 6.

[147] Ibid.

[148] Ibid, para 12.

[149] See TAS 2004/A/544 *Confédération Brésilienne de Hippisme v. Fédération Equestre Internationale* (2004), paras 41-43.

[150] "It follows that the error of sending the matter back to the same AC Selection Panel necessarily infected the second process with bias and the AC Appeals Tribunal was in error in not so finding in the Second Tribunal Decision." CAS 2008/A/1549 *Luke Michael v. Australian Canoeing* (2008), para 13.

[151] Ibid, para 17.

[152] CAS OG/12/01 *Alexander Peternell v. South African Sports Confederation and Olympic Committee & South African Equestrian Federation* (2012), para 49.

[153] Ibid, para 52.

[154] Ibid, para 53.

[155] Recommendation 18 of the Olympic Agenda 2020 vows "to put the athletes' experience at the heart of the Olympic Games". See Olympic Agenda 2020: 20 + 20 Recommendations. http://www.olympic.org/Documents/Olympic_Agenda_2020/Olympic_Agenda_2020-20-20_Recommendations-ENG.pdf. Accessed 8 October 2015.

Moreover, when reviewing the decisions made by the SGBs, CAS panels should thrive to ensure that the selection process followed is in line with the good governance standards hailed by the Olympic Agenda 2020.[156] It is generally insufficient, as some CAS panels have done in recent years, to openly regret the procedural deficiencies underlying a particular non-selection decision without challenging it. On the one hand, the CAS urges the NFs and NOCs to devise and publish "clear criteria in a timely manner", but, on the other hand, it encourages them not do so by drastically limiting the reviewability of unpublished subjective selection criteria. In short, some Panels openly favour objective and predictable schemes on which athletes can rely, while incentivizing subjective and unpredictable assessments by leaving untouched the very wide scope of discretion of the NFs and NOCs.[157] The paradoxical and irreconcilable nature of these trends should lead the CAS to modify its approach to the selection process. Though it is very understandable that in selection disputes arbitrators are reluctant of de-selecting an athlete due to the irreparable harm it would inflict on her, this might sometimes be a necessary evil to force SGBs to put in place more predictable (and thus less discretionary) selection processes. In any case, effectively enforcing the need for publicly known and clearly defined selection standards and rules is a hallmark of good governance and should be a high priority for all CAS panels.[158] This does not imply that there should be no discretion left for NFs and NOCs. Instead, this discretion should be better framed and controlled. Getting to the Olympics is just too important for athletes to be left at the mercy of the unchecked will of national (and sometimes international) SGBs.

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[156] Recommendation 27 of the Olympic Agenda 2020 vows to "comply with basic principles of good governance". In that regard, it refers to the Basic Universal Principles of Good Governance of the Olympic and Sports Movement. http://www.olympic.org/Documents/Conferences_Forums_and_Events/2008_seminar_autonomy/Basic_Universal_Principles_of_Good_Governance.pdf. Accessed 8 October 2015.

Article 2.2 of these principles indicates:

- All regulations of each organisation and governing body, including but not limited to, statutes/constitutions and other procedural regulations, should be clear, transparent, disclosed, publicised and made readily available
- Clear regulations allow understanding, predictability and facilitate good governance
- The procedure to modify or amend the regulations should also be clear and transparent.

[157] A problem already identified by Rigozzi, who noted in 2006 that "This case law [CAS OG 06/002, CAS OG 06/008] could lead to a switch (back) from selection based on objective criteria to more subjective process. This would be a regrettable evolution. To reduce the risk of dispute, the selecting bodies should enact objective criteria, which are easily intelligible, make sure that they are communicated to (and understood) by the athletes, and avoid any modification of the "rules of the game" during the selection process" in Rigozzi (2006), p 466.

[158] This view is also shared by Mitten and Davis (2008), p 90.