



Arbitration CAS 2009/A/1917 Amaury Leveaux & Aurore Mongel v. Fédération Internationale de Natation (FINA), order of 29 July 2009

Swimming

Provisional measures

Requirements for swimwear approval

Appealable decision of a sport federation

According to the CAS jurisprudence, an appealable decision of a sport association or federation *“is normally a communication of the association directed to a party and based on an ‘animus decidendi’, i.e. an intention of a body of the association to decide on a matter [...]. A simple information, which does not contain any ‘ruling’, cannot be considered a decision”*. In this respect, a ruling confirming a previous decision of an IF Executive Board cannot be considered as a real decision appealable before CAS.

Mr Amaury Leveaux is a 23 year-old French swimmer who won two silver medals at the last Beijing Olympic Games, is the current World record holder on 50m and 100m freestyle and the 2008 European Champion on 50m and 200m freestyle.

Ms Aurore Mongel is a 27 year-old French swimmer who is the 2008 European Champion on 200m freestyle and bronze medallist at the 2008 European Championships on 100m freestyle.

The Fédération Internationale de Natation (FINA) is the international federation which promotes the development of five disciplines of aquatic sports throughout the world. FINA claims a membership of 201 national federations. Founded in 1908, the home office of FINA is located in Lausanne, Switzerland. The 13th FINA World Championships take place in Rome, Italy, and the swimming events started on 26 July 2009.

Mr Amaury Leveaux and Ms Aurore Mongel (the “athletes”) are sponsored by one of the worldwide leading swimwear companies and brands, Company TYR Sport, Inc. (TYR) and were used to wear an all Polyurethane swimsuit with a seamless construction (the “Tracer B8”).

Following the development of those high technology swimsuits, FINA adopted the “Dubai Charter on FINA requirements for swimwear approval” in March 2009 (the “Dubai Charter”).

The Dubai Charter provides amendments to the existing FINA requirements, criteria and definition for swimwear approval. In particular, Section 1.b.ii of the Dubai Charter specifies that *“the application of different materials shall not create air trapping effects”*.

Such specification has been at Article 3.1(c) of the FINA Requirements for Swimwear Approval – Transitory regulation valid until December 31, 2009, according to which *“Air trapping effects: The swimsuit/material shall not be constructed to or include elements/systems which create an air/water trapping effect (tubing, channels etc.) during use”*.

On 18 May 2009, the FINA Commission in charge of the swimwear approval approved 202 swimsuits, rejected 10 swimsuits for not passing the tests of buoyancy and/or thickness, and stated that 136 swimsuits needed to be modified in accordance with the Dubai Charter in order to avoid the so-called “air trapping effects”. Amongst those suits was the Tracer B8 but also TYR’s competitors all Polyurethane swimsuits, Arena’s X-Glide and Jaked’s 01.

On 21 June 2009, TYR was notified by FINA that the FINA Executive has decided, on 19 June 2009, to disapprove the Tracer B8. However, the FINA executive has approved Arena’s and Jaked’s all Polyurethane swimsuits.

As a consequence, the athletes were not allowed to use the Tracer B8 anymore, especially for the World Championship races that started in Rome on 26 July 2009.

The athletes’ Counsel made a request to FINA in order to obtain some clarifications with respect to the Tracer B8’s disapproval. Since FINA did not reverse its disapproval of the Tracer B8 or its approval of the Jaked swimsuit, TYR brought an interim relief action before the Tribunal de Grande Instance of Strasbourg, France. The Strasbourg Court ruled it did not have jurisdiction to hear the case.

On 23 July 2009, TYR’s representative, upon authorization from the athletes, approached FINA to obtain a formal decision from FINA concerning the all Polyurethane swimsuits.

On 23 July 2009, Ms DaSilva, from FINA’s legal department, sent an email to TYR indicating that *“according to my previous email it is clear that FINA have an approved swimsuits list published and therefore the swimmers can only use the swimsuits that are in that list”*.

On 24 July 2009, at 4pm, the Appellants filed a statement of appeal with the Court of Arbitration for Sport (CAS) pursuant to Article R47 of the Code of Sports-related Arbitration (the “Code”) against FINA with respect to the decision taken by FINA on 23 July 2009.

Together with their statement of appeal, the Appellants, pursuant to Article R37 of the Code, requested a stay of FINA’s decision and that the CAS orders the Respondent to entitle the Appellants to wear the Tracer B8 during FINA’s 13th World Championships in Rome, more precisely for the swimming competitions starting on 26 July 2009, without any sanction from FINA.

In support of their application, the Appellants submit that they would suffer an irreparable harm if the Tracer B8 disapproval is upheld as such disapproval would prevent them to reach their goals. Furthermore, they will not receive any money under their sponsorship contract if they do not wear the TYR suit. Also, if they do not wear the TYR swimsuit, they could potentially lose performance-based bonuses. The Appellants also submit that the Tracer B8 disapproval by FINA is arbitrary, non

objective and discriminatory. Finally, the Appellants submit that their chance to successfully compete at the World Championships outweighs the interest of FINA to prevent the Appellants from swimming with their Tracer B8 swimsuits.

Pursuant to Article R37 of the Code, by letter dated 24 July 2009, the Respondent was given the opportunity to express its position in relation to the Appellants' very urgent request for provisional measures. Given the urgent nature of this case, the Respondent was informed that if no response was received from it, pursuant to Article R37 of the Code, the President of the Division would issue an order upon mere presentation of the application, provided that the opponent is heard subsequently.

On 24 July 2009, the CAS Court office did not receive any answer from the Respondent with respect to the Appellants' request for provisional measures. Pursuant to Article R37 of the Code, the CAS proceeded upon the mere presentation of the application.

On 25 July 2009, the parties were advised that, pursuant to Article S21 of the Code, as both the President of the CAS Appeals Arbitration Division and his Deputy have spontaneously disqualified themselves from this procedure, any procedural decisions which need be taken prior to the transmission of this matter to the Panel shall be taken by the CAS President.

On 25 July 2009, the CAS Court office notified the operative part of the Order.

On 25 July 2009 by email and on 26 July 2009 by fax, after the operative part of the present Order had been notified to the parties, the CAS Court office received the Respondent's position in relation to the Appellants' request for provisional measures. For the sake of good order, such position is taken into account but does not change the outcome of the present Order.

LAW

CAS Jurisdiction

1. In accordance with the Swiss Private International Law (Article 186), the CAS has power to decide upon its own jurisdiction.
2. The extent of the jurisdictional analysis at this point is to assess whether on a *prima facie* basis the CAS can be satisfied that it has jurisdiction to hear the appeal. The final decision on jurisdiction will be made by the Panel.
3. Article R47 of the CAS Code states that, "*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the*

legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.

4. According to Article C12.9 of the FINA Constitution:
“C12.9.1 A Member, Member of a Member or individual sanctioned by the Executive may appeal to the Bureau.
C12.9.2 An appeal shall be submitted by the appealing party to the FINA Office within twenty-one (21) days from the date of receipt of the decision.
C12.9.3 An appeal against a decision by the Bureau (...) shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 12.9.2 (...).”
5. Moreover, Article 6 of the FINA Requirements for Swimwear Approval – Transitory regulation valid until December 31, 2009 provides that *“Subject to the review by the FINA Bureau, any dispute (including i.a. challenge of FINA Bureau decision or disputes in connection with payments or other disputes) in connection with an approval procedure shall be exclusively submitted to the Court of Arbitration for Sport in Lausanne”.*
6. According to the CAS jurisprudence, an appealable decision of a sport association or federation *“is normally a communication of the association directed to a party and based on an ‘animus decidendi’, i.e. an intention of a body of the association to decide on a matter [...]. A simple information, which does not contain any ‘ruling’, cannot be considered a decision.”* (CAS 2008/A/1548).
7. Based on the foregoing, the CAS considers that the email of 23 July 2009 from Ms DaSilva cannot be considered as a real decision, containing a ruling affecting the Appellants, but rather as a confirmation of a previous decision of the FINA Executive and is satisfied that, on a *prima facie* basis, it does not have jurisdiction to rule on the appeal.
8. Accordingly, the CAS has to refuse the application for provisional and conservatory measures filed by the Appellant.

Miscellaneous

9. This decision is a procedural order, not an award. As a result, it may not be challenged in court pursuant to Article 190 Swiss Private International Law Act.

The Court of Arbitration for Sport orders:

1. The application for provisional and conservatory measures filed by Mr Amaury Leveaux and Ms Aurore Mongel on 24 July 2009 in the matter CAS 2009/A/1917 Amaury Leveaux & Aurore Mongel v. FINA, is refused.