



Arbitration CAS 2007/A/1317 Matt Fogarty & Dean Schoppe v. Badminton World Federation (BWF), award of 25 June 2008

Panel: Mr Bernhard Welten (Switzerland), Sole Arbitrator

Badminton

Selection for the 2007 Pan American Games

Lack of CAS Jurisdiction regarding a claim for selection and a claim against the eligibility criteria

Based on art. 186 PILA it is up to a CAS panel itself to decide on its jurisdiction. Regarding the non-selection of the appellants for the competition, the CAS does not, based on the applicable regulations, have any jurisdiction. Furthermore, it is obvious that the CAS does not have any jurisdiction regarding a claim against the relevant technical manual and selection procedures addressing the eligibility criteria since the appellants did not only file their appeals too late (nearly one year after the regulations have been published) but also before the wrong body.

Matt Fogarty and Dean Schoppe (the “Appellants”) are badminton players and members of the United States Badminton Association (USBA), the latter being a national member of the Badminton World Federation (BWF). Matt Fogarty/Dean Schoppe are playing as a men’s-doubles pair.

The BWF (the “Respondent”) is the international governing body for the sport of badminton worldwide and it is an International Sports Federation as recognized under Chapter 4 of the Olympic Charter.

The Pan American Sports Organization (PASO) is the governing body of the Pan American Games and as such not an affiliated organization of the BWF. It is a regional international organization recognized by the International Olympic Committee (IOC) and by the Association of National Olympic Committees (ANOC).

In the period of 13 July to 29 July 2007 the Pan American Games were held in Rio de Janeiro, Brazil. The Badminton competition was held from 14 July to 19 July 2007.

On 11 June 2007 USA Badminton announced its nominees for the Pan American Games following the team trials in Orange, California. These nominees had to be confirmed by the United States Olympic Committee (USOC). The Appellants were not listed as nominees as they lost the final and decisive game against Howard Bach/Bob Malaythong.

On 28 June, 1 and 2 July 2007 the Appellant Matt Fogarty wrote letters to the Respondent and asked to appoint an Appeals Committee and to ensure to the Appellants to be able to compete in the 2007 Pan American Games.

On 3 July 2007, the Appellants filed an appeal with the Court of Arbitration for Sport (hereinafter referred to as "CAS"). The Appellants criticized the Respondent for not reacting to their appeals and therefore denying the Appellants' entry in the 2007 Pan American Games. They further applied for provisional and conservatory measures.

On 4 July 2007, the Respondent was invited by the CAS Court Office to communicate its position regarding the Appellants' request for an expedited procedure within 3 days and provisional measures within 5 days.

On 4 July 2007, the Appellants filed an amendment to their request for provisional measures and asked that the Respondent should file all documents showing that it authorized the changes to the BWF Competition Regulations providing for the limitation of entries to 4 women and 4 men per country for the 2007 Pan American Games.

On 5 July 2007 the Appellants filed another amendment to their request for provisional measures and confirmed the payment of the Court Office fee. Further they stated that their statement of appeal of 3 July 2007 be considered the appeal brief, if no addendum is sent by 8 July 2007.

On 6 July 2007, the CAS Court Office informed the parties that the appeal is submitted to a sole arbitrator in accordance with R50 of the Code.

On 7 July 2007, the Respondent submitted that it does not agree for the expedited procedure and the provisional measures requested by the Appellants. It requested that the case be submitted to a Panel formed with three arbitrators; however it did not appoint any arbitrator. Further the Respondent stated that the Appellants already lost before the competent authorities within USBA and USOC and they could have taken their case to the American Arbitration Association (AAA) under the USBA By-Laws and the USOC Constitution, however they failed to do so.

On 8 July 2007, the Appellants sent an amendment to their appeal, being announced and considered as an appeal brief; they filed more documents.

On 9 July 2007, the CAS Court Office notified the parties that the CAS Panel was duly appointed.

On 12 July 2007, the CAS issued the Order on Provisional Measures to the Parties. The Sole Arbitrator held that the application for provisional and conservatory measures filed by the appellants is rejected and the question of the costs is reserved.

With letter of 12 July 2007 the Appellants challenged the appointment of Bernhard Welten as Sole Arbitrator and asked the President to the CAS Appeals Division to render a decision and interim order within the same day.

On 13 July 2007 the CAS Court Office informed the parties that the challenge of Bernhard Welten as Sole Arbitrator is submitted to the ICAS for consideration. Further it stated, on behalf of the Deputy President of the Appeals Arbitration Division, that, the Sole Arbitrator having already been appointed, there is no basis under the applicable CAS procedural rules to submit the Appellant's request for provisional measures to the (Deputy) President of the Appeals Arbitration Division.

With letter of 19 July 2007 the Appellants have withdrawn their request to remove Bernhard Welten as Sole Arbitrator in this case.

On 20 July 2007 the CAS Court Office reminded the Appellants that, in accordance with article R51 of the Code, the Appellant shall file their appeal brief with the CAS within 10 days following the expiry of the time limit for the appeal.

On 27 July 2007 the Appellants filed their appeal brief in which they stated that *"the BWF, BWF Continental Confederation PABC, Member Associations USAB and BBC established "eligibility criteria" and "selection procedures" for Badminton Competition at the Pan American Games in violation of BWF Statutes" and "the BWF violated BWF appeal procedures by not complying with the appeal procedures regarding Appellant's June 28, 2007 appeal"*.

On 31 July 2007 the CAS Court Office set the Respondent in accordance to art. R55 of the Code of Sports-related Arbitration ("Code") the deadline of 20 days to file the Answer.

On 20 August 2007 the Respondent informed the CAS that it has appointed Mr. A.I Nathan & Isa Aziz Ibrahim, advocates & solicitors, Kuala Lumpur as legal representative to respond to the Appellant's appeal.

On 20 August 2007 the Respondent stated in its answer that it *"categorically denies all allegations as alleged in the Appellant's appeal brief"* and therefore *"respectfully requests that the Appellant's appeal be dismissed with costs of the proceedings and incidental costs, if any, be awarded to the Respondent"*.

On 29 November 2007 the CAS Court Office sent the Order of Procedure to the parties and asked them to sign and return this Order by 6 December 2007. In this Order of Procedure it is explicitly stated that following consultation with the parties, the Sole Arbitrator has decided not to convene an oral hearing and to decide the case based on the written submissions.

On 3 December 2007 the Respondent returned its signed Order of Procedure.

On 4 December 2007 the Appellants informed the CAS Court Office that they agree with the Order of Procedure and in view of their being out of the country such fax letter should be considered as signature of the Order of Procedure.

On 14 December 2007 the Appellants returned the signed Order of Procedure.

LAW

Jurisdiction of the CAS

1. In international arbitration procedures before an Arbitration Court in Switzerland the Swiss Private International Law Act (PILA) is applicable; art. 186 PILA states:

- “1. *The Arbitral Tribunal shall itself decide on its jurisdiction.*
2. *A plea of lack of jurisdiction must be raised prior to any defence on the merits.*
3. *The Arbitral Tribunal shall, as a rule, decide on its jurisdiction by preliminary award”.*

It is therefore up to the CAS to decide upon its own jurisdiction.

2. In its order on provisional measures of 12 July 2007 the Sole Arbitrator left the question of CAS’ jurisdiction open to be answered in this decision.
2. The Appellants are claiming in its appeal of 3 July 2007 to be admitted as participants of the 2007 Pan American Games in Rio as a part of the USA team. They raise the dispute that the Respondent, BWF Continental Confederation PABC, Member Associations USAB and the Brazilian Badminton Confederation (“BBC”) established “eligibility criteria” and “selection procedures” for Badminton Competition at the 2007 Pan American Games in violation of BWF Statutes and the Respondent violated BWF appeal procedures by not complying with the appealed procedures regarding Appellants 28 June, 2007 appeal.
3. In other words the Appellants’ claims concerned on one hand the selection procedure for the 2007 Pan American Games in Rio and on the other hand the Badminton Technical Manual for the 2007 Pan American Games in Rio respectively the USA Badminton Athlete Selection Procedures 2007 Pan American Games of 31 August 2006.
4. The Appellants, however, never claimed that the USAB Selection Procedures for the 2007 Pan American Games were violated in not selecting them for the 2007 USA Pan American Games team. They only claimed in June 2007 that these regulations violate the BWF Statutes.
5. Art. 10 a) PASO Regulations states that protests and complaints regarding the eligibility of a competitor shall be presented by the Chief of Delegation to the PASO Executive Committee, which shall decide on the matter. Further art. 10 d) PASO Regulations states that the decision of the PASO Executive Committee is final. There is no specific agreement between CAS and PASO and/or the Rio 2007 Pan American Games Organizing Committee to provide an ad hoc Arbitration Court for matters regarding the 2007 Pan American Games.
6. The Appellants appeal regarding their non-selection for the 2007 Pan American Games in Rio is in accordance to PASO Regulations a subject of the USOC and its Regulations. Section 8.18 USOC By-Laws states that regarding a decision of the Hearing Panel the aggrieved party may

file a demand for arbitration with the American Arbitration Association (AAA) within 30 days. CAS has therefore no jurisdiction.

7. Regarding the non-selection of the Appellants for the 2007 Pan American Games in Rio the CAS does not, based on the applicable regulations for the Pan American Games and USOC By-Laws, have any jurisdiction. Therefore the Appellants' appeal regarding their non-selection has to be rejected.
8. Regarding the claim that the eligibility criteria for the 2007 Pan American Games in Rio for Badminton Competition violates the BWF Statutes, the Appellants tried to initiate an appeal procedure in front of the corresponding BWF instances. However PASO Regulations for the Pan American Games do clearly state that the program of sports and their disciplines and events shall be the responsibility of the PASO Technical Commission (art. 6 g) PASO Regulations). Further art. 8 d) i) PASO Regulations states that each International and/or Continental Federation establishes its sport's own eligibility criteria in accordance with the PASO Statutes and such criteria must be submitted to the PASO Technical Commission for approval. The application of such eligibility criteria lies with each International and/or Continental Federation, their affiliated National Federation and the NOC in charge (art. 8 d) ii) PASO Regulations).
9. The PASO Regulations do not state any legal remedies to challenge the technical brochure published by the Pan American Games Organizing Committee. The PASO Regulations do, however, foresee procedures regarding protests and complaints regarding the eligibility.
10. In the case at hand the Appellants contest the Badminton Technical Manual for the 2007 Pan American Games in Rio which limits the participation to four (4) men (art. 4.4.1 Badminton Technical Manual) which is the basis of the USA Badminton Athlete Selection Procedures 2007 Pan American Games of 31 August 2006 and therefore had a major influence on their non-selection. In accordance with art. 6 h) PASO Regulations the Pan American Games Organizing Committee published this Badminton Technical Manual at least one year in advance of the Games and provided it to the Respondent and PABC. The Badminton Technical Manual for the XV Pan American Games in Rio 2007 has not been challenged by the Appellants.
11. As stated before, USAB published the Athlete Selection Procedures for the 2007 Pan American Games on 31 August 2006. In section I. D. 6. it is clearly stated that USAB has a quota of four (4) men and four (4) women for the 2007 Pan American Games. The Appellants had to sign the USA Badminton Code of Conduct in order to participate in the trials and with their signatures and participations they accepted the Athlete Selection Procedure as well as the Badminton Technical Manual for the 2007 Pan American Games.
12. Regarding the violation of BWF Statutes by the Badminton Technical Manual for the 2007 Pan American Games in Rio it is important to check the competences of the involved authorities. Art. 8 d) PASO Regulations clearly states that the International and/or Continental Federation, in the case at hand the Respondent or PABC, have to establish its own eligibility criteria for the Pan American Games. However such criteria must be submitted to the PASO Technical Commission for approval. It is therefore again on the level and in the competence of PASO to

finally decide. The appeal possibilities against such a decision are therefore stated in the PASO Regulations. The Badminton Technical Manual for the 2007 Pan American Games in Rio has been published at least one year before the games and based on this manual on 31 August 2006 USA Badminton published its Athlete Selection Procedures for the 2007 Pan American Games. An appeal filed in June 2007 against such Regulations is certainly too late. Further the Appellants signed the USA Badminton Code of Conduct and accepted therefore the applicable regulations for the selection procedures for the 2007 Pan American Games.

13. Summing up the legal situation it is obvious that the CAS does not have any jurisdiction regarding the claim against the Badminton Technical Manual for the 2007 Pan American Games and the USA Badminton Athlete Selection Procedures for the 2007 Pan American Games of 31 August 2006. The Appellants did not only file their appeals too late (nearly one year after the Regulations have been published) but also before the wrong body. It is further questionable, if the Appellants are legitimated to file any appeal against Regulations set by/accepted by PASO as they are in no direct contractual contact with PASO as non-participants of the 2007 Pan American Games.
14. Based on the above the Appellants' appeal regarding the violation of BWF Statutes by the Badminton Technical Manual for the 2007 Pan American Games in Rio is therefore fully rejected.
15. As mentioned before based on art. 186 PILA it is up to the Sole Arbitrator itself to decide on its jurisdiction. Based on the questions raised by the Appellants the Sole Arbitrator does therefore deny the CAS jurisdiction in the case at hand.

The Merits of the Appeal

16. Given the lack of jurisdiction of the CAS, the merits of the appeal are not examined.

The Court of Arbitration for Sport rules:

1. The jurisdiction of the Court of Arbitration for Sport is denied.
2. The appeal filed by Matt Fogarty and Dean Schoppe against the Badminton World Federation is not entertained.
3. (...).