Arbitration CAS ad hoc Division (O.G. Sydney) 00/014 Fédération Française de Gymnastique (FFG) / Sydney Organizing Committee for the Olympic Games (SOCOG), award of 30 September 2000

Panel: Mr. Michael Beloff QC (England), President; Mrs. Maidie Oliveau (USA); Mr. Dirk-Reiner Martens (Germany)

Gymnastics
Advertisement on clothing
Responsibility of an IF

The purpose of Rule 61 of the Olympic Charter is to regulate the amount and size of commercial identification which may appear on equipment used at the Olympic Games. A purposive construction of Bye-Law 1 to Rule 61 leads to the conclusion that the measurement must be carried out on the clothing as worn.

This is an application by the Fédération Française de Gymnastique ("FFG") filed on 28 September 2000 and naming SOCOG as the Respondent challenging a decision of the Respondent at medal ceremonies for the vault and the parallel bars on 24 and 25 September 2000 to conceal the logo representing the mark LI-NING which was on the costume of the French gymnasts ("the decision"). The decision had obvious potential impact on the Applicant's relationship with its commercial sponsors as well as for the balance of the rhythmic gymnastics competition at the Olympic Games.

LAW

1. The parties to this dispute are (1) a national federation (NF) and (2) SOCOG.

2. The Application suggests that our jurisdiction arises from the arbitration clause inserted in the entry form for the Olympic Games. The entry form states that the NOC signs the form on behalf of the NF ("*The NOC confirms that…… it has been authorised by the National Sports Federation concerned to sign this entry form on its behalf*"). Therefore, the Applicant is bound by that agreement.

3. In any event, we consider that national federations accept our jurisdiction by being members of an international federation which itself is subject to our jurisdiction as is explained in the ad hoc Panel's decisions in CAS Arbitration N° SYD 2 *Samoan NOC v/ IWF* and CAS Arbitration N° SYD 6 *Baumann v/IAAF*.

4. It was suggested that the proceedings are defective for absence of the French NOC and of the manufacturer of the LI-NING clothing. As far as the French NOC is concerned, we see no basis for concluding that there is any lack of identity between the interests of the French NOC and of the Applicants in this instance. In any event, the absence of the French NOC will not go to jurisdiction (we also draw attention to the Arbitration Rules for the Games of the XXVII Olympiad in Sydney ("ad hoc Rules") Article 10 last paragraph which confirms this interpretation). As far as the manufacturer is concerned, we cannot exercise jurisdiction over it: it is party to no relevant instrument which gives us such jurisdiction. We accordingly discount its absence as immaterial.

5. As to the Respondent, SOCOG receives its instructions for the organisation of the Olympic Games from the IOC (Olympic Charter Article 39). Such organisation includes, as in the present case, decisions as to advertising under Article 61 of the Charter and its ancillary Bye-Laws. SOCOG therefore is necessarily bound by the Charter including Article 74 (the arbitration clause).

6. It was submitted that the Applicant had failed to exhaust other legal remedies open to it as required by the provisions of the Entry Form (*"I agree that any dispute in connection with the Olympic Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, the Sydney Organising Committee for the Olympic Games and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games in Sydney, which form part of the Code of Sports-related Arbitration"*): but no legal remedies other than resort to the Court of Arbitration were drawn to our attention.

7. The subject matter of the dispute falls within our competence: the interpretation and application of a clause of the Charter [see Article 1 of the ad hoc Rules; see also *Schaatsefabriek V. v. German Speed Skating Association* (CAS Arbitration N° NAG 3, para. 17 and 18) ("the Skating Case")].

8. We therefore reject the challenge to our jurisdiction.

9. These proceedings are governed by the ad hoc Rules of CAS enacted by the International Council of Arbitration for Sport ("ICAS") on 29 November 1999. They are further subject to Chapter 12 of the Swiss Private International Law Act of 18 December 1987 as a result of the express choice of law contained in Article 17 ad hoc Rules and the choice of Lausanne, Switzerland, as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Article 7 of the ad hoc Rules.

10. Article 17 of the ad hoc Rules requires the Panel to decide the dispute "pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."

11. According to Article 16 of the ad hoc Rules, the Panel has "full power to establish the facts on which the application is based."

12. In this instance, as appears below, it is the Olympic Charter which is critical to our conclusion.

13. The decision was explained in a memo to the Applicant from SOCOG signed by Kym Dowdell, Competition Manager, Gymnastics, which said that the SOCOG Medal Ceremonies Manager had determined that the logo on the leotard of the French Gymnasts Poujade and Varonian *"exceeded the size allowed by IOC Rule 61"*.

14. It was clarified before us by SOCOG that Bye-Law 1.4 to Rule 61 of the Olympic Charter is relied on.

15. Bye-Law 1 to Rule 61 provides, so far as material, as follows:

No form of publicity or propaganda, commercial or otherwise, may appear on persons, on sportswear, accessories or, more generally, on any article of ***clothing*** *or equipment* ***whatsoever worn*** *or used* ***by the athletes*** *or other participants in the Olympic Games, except for the identification - as defined in paragraph 8 below - of the manufacturer of the article or equipment concerned, provided that such identification shall not be* ***marked conspicuously for advertising purposes****.*

1.1. The identification of the manufacturer shall not appear more than once per item of clothing and equipment.

*1.4. Clothing (****e.g. T-shirts, shorts, sweat tops and sweat pants): any manufacturer's identification which is greater than 12cm^2 shall be deemed to be marked conspicuously****.***

Bye-Law 8 to Rule 61 provides*:*

The word "identification" means the normal display of the name, designation, trademark, logo or any other distinctive sign of the manufacturer of the item, appearing not more than once per item.

(We shall use "logo" to describe all forms of identification).

16. The purpose of Rule 61 was authoritatively stated in the Skating Case to be to *"regulate the amount and size of commercial identification which may appear on equipment used at the Olympic Games"* (para. 17).

17. The Applicant's case, summarised in its Application, is that the logo on the French gymnasts' costume does not contravene Rule 61 because it occupies a surface of less than 12 cm^2 of the clothing only.

18. It was clarified by the Applicant that this refers to the clothing as manufactured, not to clothing as worn.

19. Bye-Law 1.4. to Rule 61 of the Charter provides for a fixed maximum. If the stipulated measurement is exceeded on clothing, the consequence is that the identification is deemed to be marked "conspicuously" and hence to violate Rule 61. There is no room for discretion or appreciation. However, certain questions of construction must be answered before the measurement is effected.

20. What is "clothing"? It is described in Bye-Law 1.4. by way of non-exhaustive examples. This poses a question. What if the costume is in two parts? Can each item contain a logo of no more than 12cm2 or must the total size of the logos on both items be $12cm^2$ or less? This is answered by 1.1. A logo of no more than $12cm^2$ can appear on *each* item.

21. What is "identification"? *Inter alia* name and logo are both included as appears from Bye-Law 8 to Rule 61.

22. Is the measurement to be on the clothing as manufactured or the clothing as worn? On the one hand, (i) Bye-Law 1.4. refers to clothing only (ii) had those who drafted the Bye-Law intended to apply it to clothing as worn, they could have said so (iii) to interpret it as referring to the clothing as worn would mean that different results would be obtained depending on whether the athlete wearing the clothing were male or female, large or small.

23. On the other hand (i) the overriding object of the rule is to prevent excessive advertising, i.e. as displayed in public, (ii) with modern fabrics a small logo could be hugely enhanced once the clothing is worn by the athlete, (iii) the introductory text to Bye-Law 1 (as distinct from Bye-Law 1.4 with reference to clothing) refers to *"clothing … whatsoever* ***worn by the athletes****"* (emphasis added), (iv) the measurement will ordinarily take place in the stadium, not in an office.

24. In our view a purposive construction of Bye-Law 1 to Rule 61 in its entirety leads to the conclusion that the measurement must be carried out on the clothing as worn.

25. Both parties sensibly accepted that (i) if the logo were measured on the clothing as manufactured, the Bye-Law would not be infringed, (ii) if the logo were measured on the clothing as worn, it would (save exceptionally) be infringed. It was not suggested by the Applicant that the measurement taken by the SOCOG official on the clothing as worn by the French gymnast on the podium was inaccurate.

26. It follows that the decision itself was correct.

27. The application also suggests inconsistent application of the Rule in two ways:

    a. no equivalent criticism was made to the Applicant or members of their team either during or after other gymnastic competitions although their gymnasts wore costumes with the same logo throughout.

b. Chinese gymnasts with the same logo on their costumes were on the medal ceremony podium at gymnastics competitions, but no effort was made by any official to cover up their logos.

It is accepted by the Respondent that such inconsistency did occur (although see para. 10 below).

28. The Applicant has a legitimate grievance if their athletes were subject to such inconsistent treatment. However, if (as we have concluded) the Bye-Law was correctly applied in the decision complained of it is no defence that it was incorrectly not applied to other competitors. We do, however, emphasize that as a general principle consistency of treatment in a matter such as this is of the greatest importance, and that those who enforce these rules (whether IOC, SOCOG or FIG) should strive to attain it. It was especially unfortunate that the athlete was subject to the enforcement of this Rule without prior warning and in circumstances where he had no reason to believe that a violation of the Rule (see 27(a) above) was involved.

29. Article 57 of the Charter provides:

"§ 3 Each IF is responsible for the technical control and direction of its sport; all competition and training sites and all equipment must comply with its rules.

§5 The necessary technical officials (referees, judges, timekeepers, inspectors) and a jury of appeal for each sport are appointed by the IF concerned, within the limit of the total number set by the IOC Executive Board upon the recommendation of the IF concerned. They perform their tasks in accordance with the directions of such IF and in coordination with the OCOG".

Bye-Law to article 57 provides:

"The IFs have the following rights and responsibilities:

1. Technical provisions relating to the IFs at the Olympic Games.

1.6 To ensure that all competitors comply with the provisions of Rules 59 and 61 of the Olympic Charter."

30. It would therefore seem that the IGF, not SOCOG was primarily responsible for the enforcement of Rule 61. We were told that the SOCOG official responsible for the decisions complained of acted in the first instance on the instructions of the IGF to take the measurements on the clothing of French gymnasts and then to cover up the logo. In the second instance because of the precedent set, the SOCOG official took the measurements and covered up the logo on his own initiative. However we are asked to rule on the merits of the decision, not as to the authority of the decision-maker, so say no more about this matter.

31. The Applicant requested that CAS order:

a. the withdrawal of the decision advised to FFG by memo dated 27 September 2000 by SOCOG, so that such decision will not be applied at future awards ceremonies;

b. that all costs incurred by FFG in the pursuit of these proceedings be reimbursed by SOCOG, in accordance with the provisions of Article 64.5 of the Code of Sports-related Arbitration.

32. As to this:

a. We do not consider for the foregoing reasons that the decision should be withdrawn: on the contrary it was correct.

b. We note that Article 22 of the ad hoc Rule does not provide for an award of costs.

The CAS ad hoc Division rules:

The application filed by the Fédération Française de Gymnastique is dismissed.