



Arbitration CAS 2006/A/1114 CMAS Underwater Hockey Commission v. Confédération Mondiale des Activités Subaquatiques (CMAS), award of 5 February 2007

Panel: Mr Martin Schimke (Germany), Sole Arbitrator

Underwater sports

Application for membership of a federation

Standing to file claims against decisions taken by the deliberative body of the CMAS

Lack of interest

- 1. An internal administrative unit and/or department of a sport federation like the CMAS Underwater Hockey Commission has no authoritative powers and is subordinated to the Sports Committee and to the Board of Directors of the CMAS. This means that the Underwater Hockey Commission is not granted any binding powers of its own. The CMAS Underwater Hockey Commission does not belong to the entitled “group” described in the applicable article 23 Italian Civil Code (ICC) (“member, public prosecutor or internal body”) and does therefore not have the ability to challenge the decisions of the CMAS rejecting the application of a club to become a member of the CMAS.**
- 2. It is a basic and customary rule under Italian Civil Procedure Code that in order to file a claim the party must have a qualified interest as to the possible outcome of the controversy. The CMAS Underwater Hockey Commission is not sufficiently affected by the disputed decision and has no tangible interest at stake in the procedure. The admission of prospective members is in the sole competence of the Board of Directors along with the Ordinary General Meeting.**

The Confédération Mondiale des Activités Subaquatiques Underwater Hockey Commission (hereinafter also referred to as the “Appellant”) is a section of the Sports Committee, which is the body of the Confédération Mondiale des Activités Subaquatiques responsible for the management of all competitive events.

The Confédération Mondiale des Activités Subaquatiques (hereinafter referred to as “CMAS” or the “Respondent”) is a non-profit international organisation, the aim of which is to use all appropriate means to develop and encourage the understanding and conservation of the underwater world as well as the practice of aquatic and underwater sports and activities. It consists of national and international federations, associations and organisations. Commercial organisations can also be admitted under certain conditions. Its head office is in Rome, Italy.

On 27 February 2006, the Jersey Underwater Hockey Club filed an application to become a member of the Hockey, Spear Fishing and Fin Swimming Commissions of the CMAS. All those commissions are part of the Sports Committee of the Respondent.

On 4 March 2006, the Board of Directors of the CMAS rejected the application with 8 votes against, 7 in favour and 4 abstentions.

On 10 March 2006, the Appellant informed the CMAS that it did not agree with the decision taken by its Board of Directors.

On 6 and 7 May 2006, an Annual General Meeting of the CMAS was held in Rome, Italy. During the meeting, the supporters as well as the opponents of the affiliation of the Jersey Underwater Hockey Club had a chance to present their respective point of view to all the voting members. The abstract of the minutes of the Annual General Meeting reads as follows where relevant:

<i>“Present votes</i>	<i>98</i>
<i>Votes by proxy</i>	<i>66</i>
<i>Total</i>	<i>164</i>
<i>Total of possible votes</i>	<i>188</i>
<i>Representation</i>	<i>87,23%</i>

The General Assembly is then legal

(...)

The President close debates and The decision taken by BD 152 to reject the request of affiliation of the Islands of the English Channel as no voting member of the Sports Committee (Hockey Commission) is confirmed by the assembly

85 YES

28 NO

18 Abstentions”.

On 27 May 2006, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as “CAS”).

On 13 August 2006, the Respondent filed an answer, with the following request for relief:

“We ask the Court not to accept the request in its action and to reject all its questions and pretensions and to order the Appellant to pay the costs engaged by the Respondent for his defence”.

On 31 October 2006 and upon the instructions of the Sole Arbitrator, the competent Counsel of the CAS Court Office wrote to the parties the following:

“(...) the Sole Arbitrator finds that article 10.3 of the CMAS Articles of Association may not be sufficient to establish a valid arbitration agreement in this case.

Furthermore, there is some doubt as to whether the Appellant's statement of appeal was filed in a timely fashion, as it is unclear whether the present appeal was filed against a decision of the CMAS Board of Directors on 4 March 2006 or against a decision of the CMAS Ordinary General Assembly on 6/7 May 2006.

Furthermore, the issue of the applicable law in this case, particularly the law to be applied for the resolution of these preliminary issues, has yet to be decided. It appears from article 10.3 of the CMAS Articles of Association that the applicable law will be the law of the country where CMAS has its 'Head Quarters'. It therefore appears that Italian law is the law to be applied by the Sole Arbitrator.

(...)

I have enclosed a copy of an Order of Procedure with this letter. The purpose of this Order of Procedure is, among other things, to clarify the extent of the CAS's jurisdiction to decide the present dispute by CAS arbitration, and to resolve some of the preliminary issues that arise at this stage. If the parties agree to the terms of the Order of Procedure, the Sole Arbitrator will deem a valid arbitration agreement to be in place, will deem the appeal to have been filed in a timely manner, and will deem the applicable law to be Italian law, thereby resolving these preliminary issues. However, the question of the standing of the Appellant to file this appeal will remain as a preliminary issue to be resolved by the Sole Arbitrator. The Sole Arbitrator will only proceed to examine the substantive issues regarding Jersey's rejected application in the event that the standing of the Appellant to file the appeal is established.

(...)"

The parties both agreed to the terms of the 'Order of Procedure'.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from article R47 of the Code of Sport-related arbitration (hereinafter "Code") and is further confirmed by the Order of Procedure duly signed by the parties.
2. It follows that the CAS has jurisdiction to decide on the present dispute.
3. Under article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

Applicable law

4. Article R58 of the Code provides the following:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties

or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

5. Article 10.3 of the Articles of Association of the CMAS reads as follows:

*“10.3.1 The law applied in the country where CMAS has its Head Quarters will prevail in all matters not covered by the present articles of association without prejudice of jurisdiction *ratione materiae* of the Sports Arbitrate Court.*

10.3.2 Competent Jurisdiction

Any litigation arising from the interpretation or implementation of the present articles of association or the Internal Regulations will be under the jurisdiction of the competent courts of the country in which the CMAS registered offices are located. Similarly, those registered offices constitute the CMAS domicile for legal purposes”.

6. According to article 1.2.1 of its Articles of Association, the CMAS has its head office in Rome, Italy.
7. Based on the foregoing and on the agreement of the parties, the regulations of the CMAS and Italian law are applicable to the present case.

Admissibility

8. In correspondence to the CAS, including the Respondent’s letter dated 7 November 2006, the parties expressly recognised the jurisdiction of the CAS to decide the present dispute. This was confirmed by the parties agreement to the terms of the Order of Procedure, in which they both accepted that there is a valid arbitration agreement and that the appeal had been filed in a timely fashion by the Appellant.

9. The remaining issue to be resolved by the Sole Arbitrator in deciding the question of admissibility is the following:

‘Does the Appellant have standing to file an appeal?’

In order to resolve this question, it is necessary to carry out an assessment as to the juridical qualification of the Appellant’s petition in order to properly identify its scope and intended purposes as well as the actual relief that the Appellant is entitled to pursue.

10. On the basis of all of the documents provided to the Sole Arbitrator, it is fair to say that the petition filed by the Appellant is actually to be construed and qualifies as a challenge against the resolution passed on 6 and 7 May 2006 by the Annual General Meeting of the CMAS (hereinafter referred to as the “Resolution”), filed on the grounds that it is inconsistent and, in any case, in contrast with the applicable provisions of the Articles of Association and Internal Regulations of the CMAS (see appeal brief dated 14 July 2006, page 3). In other words, the ultimate relief pursued by the Appellant is to have the above-mentioned Resolution set aside.

A further specific request of the Appellant is to have the application for membership of the Jersey Underwater Hockey Club accepted through a CAS decision (see appeal brief dated 14 July 2006, page 4).

- A. *Does the Appellant have standing to file petitions or claims against decisions taken by the relevant deliberative body of the CMAS?*
11. Since the CMAS Regulations as well as the CAS Code do not specifically regulate the issue “standing to file an appeal” Italian Law is applicable to this (procedural) question.
 12. As exposed here above, the disputed decision is the one rejecting the application of the Jersey Underwater Hockey Club to become a member of the CMAS. The Appellant submits that it is a legal entity which has a legal personality separate from the Respondent. As such, the Appellant deems that it is entitled to bring an appeal against the latter’s decisions before the CAS.
 13. In this regard, article 23 of the Italian Civil Code (hereinafter referred to as “ICC”) is applicable. It provides a set of rules to be applied to associations, including both “incorporated” (or recognised) by way of public deed as well as “unincorporated” associations. The first paragraph of the said provision states:
“Any and all resolutions passed by the association general meeting [that is to say the deliberative body each member is entitled to attend] are capable of being set aside at the request of (i) any member thereof, (ii) the public prosecutor as well as (iii) the internal bodies of the association itself, in so far the petitioner shows and gives evidence that the given resolution under scrutiny is in contrast with the memorandum of incorporation, the articles of association or mandatory provisions of laws”.
 14. This means that third parties – *id est* individuals or legal entities extraneous to the association – are not entitled to file petitions or claims against resolutions passed by the deliberative body of the concerned association. As a result, there is no need to ascertain whether the Appellant qualifies as an independent legal entity, different from the CMAS. The question which has to be examined is whether the Appellant has one of the qualifications provided under article 23 ICC in order to challenge the Resolution.
 15. It goes without saying that the Appellant is not “*the public prosecutor*”. Furthermore, the Appellant cannot be considered as a “*member*” of the CMAS, which consists exclusively of national and international federations, associations and organisations and, under certain conditions, of commercial organisations (see article 2.1 of the Articles of Association of the CMAS). Pursuant to the Articles of Association (see article 5.1.1) and to the internal Regulations of the CMAS (see chapters 9 and 13), it is possible – at least in theory - for members of a Sport Commission to also function as delegates of an affiliated federation, association or organisation with a voting right in the CMAS General meeting. In the present case, the Appellant did not submit that its own members acted as delegates of an affiliated federation, association or organisation with voting rights in the CMAS General meeting. The Appellant also did not contend that the appeal was filed in the name of an affiliated federation, association and organisation. Under those circumstances, it appears that the Appellant is not a voting member of the Respondent. The

remaining issue to be addressed is whether the Appellant qualifies as an “*internal body*” of the CMAS under the meaning of article 23 ICC.

16. In this respect, it has been held that for an internal department of an association to qualify as an “*internal body*”, it is to be established that it has been granted with exclusive competence and binding prerogatives (see DE GIORGI M. V., *Le persone giuridiche in generale. Le associazioni riconosciute e le fondazioni*, in *Trattato di Diritto Privato – Diretto da Pietro Rescigno*, Vol. 2, Tomo I, Utet 2005, page 332 with further references). In other words, such an internal department must have authoritative powers to issue and perform juridical acts capable of being binding upon the association itself as well as relevant members.
17. It appears that the Appellant does not meet such requirements since it is a mere administrative division of the CMAS with a very limited competence. The Appellant has no power within the CMAS to act independently. Although it may have been delegated certain administrative and technical competence in relation to the underwater hockey discipline, all of its actions are subject to the approval of the Board of Directors together with the Committee’s Bureau. As a matter of fact:
 - the Underwater Hockey Commission is nothing more than a division of the Sports Committee (article 13.1 Internal Regulations of the CMAS, Edition April 2005, hereinafter also referred to as “IR”);
 - any sports commission – including the Underwater Hockey Commission – is under the authority of the Committee’s Bureau (article 13.3.1 IR);
 - the role of any sports commission is exclusively technical and its decisions can only concern technical aspects of its discipline (article 13.3.3 IR);
 - “*All commissions initiatives [...] require the approval of CMAS Board of Directors, **condition sine qua non to make them executory***” (article 13.3.4 IR).

It can be plainly inferred from the overall content of the Articles of Association and Internal Regulations of the CMAS that the Appellant is just an internal administrative unit and/or department with no authoritative powers, subordinated to the Sports Committee and to the Board of Directors of the CMAS. This means that the Underwater Hockey Commission is not granted any binding powers of its own.

18. In the view of the above, the Sole Arbitrator comes to the conclusion that the Appellant cannot be considered as an “*internal body*” as defined under article 23 ICC and does therefore not have the ability to challenge the decisions of the Respondent rejecting the application of the Jersey Underwater Hockey Club to become a member of the CMAS.
19. Since the Appellant does not belong to the entitled “group” described in article 23 ICC (“member, public prosecutor or internal body”) the further elements of this legal basis (“violation of own rules and/or mandatory law”) need not to be proved. Consequently, in relation to the Appellant in particular the following questions are not of relevance:
 - Did the Respondent respect its internal decision-making regulations regarding the

admission of new possible members?

- Can the Jersey Underwater Hockey Club be deemed as an “organisation” in terms of article 2.1.1.1 of the Articles of Association of the CMAS?
- Is the refusal of admission at hand an illegal abuse of a dominant position?

B. *Can the Appellant be regarded as representing the interests of the Jersey Underwater Hockey Club by filing a claim to have its membership accepted?*

20. The Appellant claims that it “has the right to take this matter to arbitration as we are acting on behalf of any potential member to give them the right of access to CMAS membership and in turn membership of our commission”. With such an assertion the Appellant is suggesting that it has representative standing to assert the right of any prospective member. This statement is groundless and must be dismissed for the following reasons:

21. It is a basic and customary rule under Italian Civil Procedure Code (see section 100) that for the plaintiff (as well as for the defendant) to stand a trial he has to give evidence that he enjoys the so-called *legitimatio ad causam* in relation to the very subject matter of the dispute, that is to say that in order to file a claim the party must have a qualified interest as to the possible outcome of the controversy.

22. Furthermore, it is a well-established principle under Italian law that - in case of breach of antitrust provisions - the only person entitled to start a legal proceedings would be the one (entrepreneur or consumer alike) claiming to have suffered a direct damage as a result of the alleged unfair practice or abuse of dominant position on the part of the defendant (see Court of Cassation July 13, 2005 no. 14716, in *Foro it. Rep.*, 2005, under “Concorrenza (disciplina)” n. 194).

C. *Lack of interest of the Appellant*

23. The Sole Arbitrator finds that the Appellant is not sufficiently affected by the disputed decision and has no tangible interest at stake in this appeal procedure. No damage is suffered by the Underwater Hockey Commission, in financial terms or in any other way, if the Jersey Underwater Hockey Club is or not admitted as a member of the CMAS. The admission of prospective members is in the sole competence of the Board of Directors along with the Ordinary General Meeting. It is therefore unquestionable that the Appellant did not suffer any detrimental consequence as to its own technical competence and powers – as laid down in the Internal Regulations – from the rejection of the application for membership filed by the Jersey Underwater Hockey Club.

24. Accordingly, the Sole Arbitrator finds that the Appellant has no legitimate interest, and thus no standing, to claim that the CMAS membership of the Jersey Underwater Hockey Club has to be accepted.

25. In the view of the above, the appeal lodged by the Appellant is not admissible.

Merits

26. The parties agreed that the Sole Arbitrator would only proceed to examine the substantive issues regarding Jersey's rejected application in the event that the standing of the Appellant to file the appeal was established.
27. Based on the foregoing, the respective arguments of the parties with regard to the substantive issues of the dispute do not have to be decided by the Sole Arbitrator.

The Court of Arbitration for Sport rules:

1. The appeal filed on 27 May 2006 by the Confédération Mondiale des Activités Subaquatiques Underwater Hockey Commission is dismissed.
2. (...).