Arbitration CAS 2010/A/2219 Malaysian Tenpin Bowling Congress (MTBC) v. World Tenpin Bowling Association (WTBA), award of 22 February 2011

Panel: The Hon. Michael Beloff QC (United Kingdom), Sole Arbitrator

Bowling
Withdrawal of the award of an event to a national federation
Right of FIQ Members to appeal to the FIQ praesidium in case of controversies
Freedom of an International Federation to select any dispute mechanism resolution for an event

1. **A national federation member of the Fédération Internationale des Quilleurs (FIQ) is, in accordance with FIQ Statutes, entitled to have controversies or disputes between it and the body overseeing one of the membership discipline - in this instance WTBA - determined by the FIQ presidium and thereafter by CAS. However, this does not mean that such member is entitled to have that same mechanism embodied in a contract to host an event passed between it and the membership discipline.**

2. **WTBA is entitled to promulgate and enforce playing rules and equipment specifications for tournaments it conducts or approves, provided that they are not in conflict with the FIQ Statutes. Otherwise it appears to enjoy organisational freedom. There is no limitation on the power of WTBA to select any dispute mechanism resolution it chooses for an agreement it concludes with a national federation for the hosting of an event, as long as it is compatible with the relevant municipal law. If the host federation refuses to accept such dispute mechanism resolution, WTBA are entitled to move the location of the event elsewhere.**

This is an appeal by the Malaysian Tenpin Bowling Congress (MTBC), against the decision of the Fédération Internationale des Quilleurs (FIQ) Presidium dated 9th August 2010 declining to reverse the decision of the World Tenpin Bowling Association (WTBA) presidium made on 24th April 2010 to withdraw the award of the 2011 Women's World Championships (WSWC 2011) ("the Event") to MTBC.

The FIQ was formed in 1952 to foster interest worldwide in amateur tenpin and ninepin bowling and has been recognised by the International Olympic Committee (IOC) as the International Federation for the sport of bowling. It is a non-profit corporation organised under the laws of the State of Colorado, USA. FIQ is governed by its Statutes and Bylaws (the "FIQ Statutes").

WTBA is the governing body overseeing one of two separate membership disciplines maintained by the FIQ, tenpin bowling (FIQ Statutes Article 3(1)ff). WTBA is a non-profit corporation organised

under the laws of the State of Texas, USA. WTBA is governed by its Statutes and Playing Rules ("the WTBA Statutes"). WTBA may make its own rules and regulations as long as they are not in conflict with the FIQ's Statutes [Article III(f)(v)]..

MTBC is a member of both the FIQ and WTBA and is recognised as the governing body for the sport of tenpin bowling in Malaysia.

HKTBC is the Hong Kong equivalent of MTBC *mutatis mutandis*.

On or about 15 September 2008, MTBC submitted an application to the WTBA to serve as the host of the Event.

As its meeting held on 6-7 October 2008, the WTBA Presidium voted to appoint MTBC as host of the Event. No other applications to host the Event had been received by WTBA.

MTBC by WTBA Secretary General Christer Jonsson in an email dated 17th October 2008. In response, MTBC's Executive Director, Sidney Tung, indicated that *"we look forward to sign the agreement"*.

Under Section 1.12.10 of the WTBA Statutes

> *"the host federation, within nine months of its selection, shall invite the WTBA President, or his designated representative, to verify and approve the information in the federation's application to host the Championships [the Event]. At this time, the parties will initiate the agreement to be executed between the host federation and the WTBA"* (Emphasis added).

MTBC did not in point of fact invite the WTBA President or his designated representative to verify or approve the information in MTBC's application to host the Event.

Between 3 March 2009 and 5 June 2009 MTBC and the WTBA communicated on several occasions about the status of the first draft of the agreement between the WTBA and MTBC to host the Event ("the Agreement").

On 16 July 2009, the WTBA forwarded the initial draft of the Agreement to MTBC. MTBC responded by indicating that *"we will bring the agreement to hand it to [WTBA president Kevin Dornberger] at Vegas"* during a WTBA and FIQ Congress.

In the initial draft of the agreement, the WTBA proposed that disputes between MTBC and the WTBA be resolved by negotiations, and if negotiations were not successful, then the *"final body"* to solve the disagreements should be the WTBA Presidium.

On 25th August 2009, because MTBC and WBTA had not agreed on a contract within the nine month period, MTBC requested an extension of time through the end of September to review the Agreement with its legal representatives.

On 14 September 2009, MTBC emailed to the WTBA a signed Agreement with an appendix setting forth proposed changes to the Agreement. This appendix proposed 7 changes to the Agreement. With

respect to the dispute resolution process, MTBC proposed that, if negotiations were unable to resolve a dispute, *"the final body to solve the disagreements is the FIQ Presidium"*.

On 30 September 2009, WTBA President Dornberger responded to MTBC's suggested changes. He approved three of the proposed changes and indicated that another three changes would need further clarification or approval by the WTBA Presidium. Mr Dornberger did not approve the proposed change to the dispute resolution process, indicating that the Event is not an FIQ event but is *"the sole and exclusive property of the WTBA"*.

On 2 October 2009, Mr Tung responded to Mr Dornberger, indicating that all outstanding issues on the Agreement were resolved except for the dispute resolution provision. Accepting the ownership of the event he insisted that another body than the WTBA Presidium must resolve disputes between WTBA and MTC *"it first has to go to FIQ"*.

On 13 October 2009, Mr Dornberger responded to MTBC, indicating that all changes had been made to the Agreement, except that no changes had been made to the dispute resolution provision, because of the ownership of the event was *"not negotiable"*.

On 21 October 2009, Mr Dornberger MTBC responded indicating that the dispute resolution process was the only issue outstanding, and disagreeing with Mr Dornberger's position on that issue (*"the unanimous view is that if 2 parties sign an agreement, one party cannot be the final court of appeal in the event of any dispute"*), and requesting an extension until 1 December 2009 to complete the Agreement.

On 22 October 2009, Mr Dornberger approved the requested extension, and indicated that, if the parties were unable to resolve this final issue, the WTBA Presidium would be forced to reconsider its award of the Event to MTBC. Mr Dornberger also outlined his rationale for the proposed dispute resolution including that *"it would be the ordinary business custom to agree to binding arbitration in the venue of the business location of the property owner"*.

On 27 October 2009, MTBC responded to Mr Dornberger's letter, indicating opposition to his proposed dispute resolution and describing the proposed provision as *"an illegal contract"* and saying "we should strictly follow the WTBA and FIQ constitutions".

On 1 December 2009 MTBC requested an additional 48 hours to respond on the basis that it had only heard from its Attorney General's Chambers the day before.

On 3 December 2009, MTBC sent an email to Mr Dornberger again confirming its opposition to WTBA's proposal on the dispute resolution provision as being *"illegal"* and *"ultra vires the FIQ statutes"* and *"against the provisions in the WTBA and FI Q statutes"*.

On 6 December 2009, Mr Dornberger responded, noting that he had offered other alternatives for dispute resolution i.e. arbitration in Texas.

On 19 January 2010, Mr Dornberger offered specific language for an alternative dispute resolution process involving arbitration in the States of Texas, USA [the domicile of WTBA] and invited MTBC to *"advise as to the exact alternative language that MTBC would propose"*.

On 12 February 2010, WTBA Secretary Christer Jonsson sent an email to MTBC indicating that the WTBA must know if a final agreement has been reached by the time the WTBA Presidium met on 26-27 February 2010 or be compelled to consider alternative venues. It also invited an MTBC representative to attend the Presidium meeting to state its case, in accordance with Section 1.12.9 of the WTBA Statutes.

On 16 February 2010, MTBC President Dr P.S. Nathan responded indicating that (i) no agreement had been reached, (ii) MTBC *"rest[s] its case"* with respect to the dispute resolution provision reiterating its case as to its illegality and incompatibility with the FIQ's constitution (and that of the WBTA).

On 26-27 February 2010 President Dornberger proposed, before taking away the Event, that WTBA ask for independent legal advice on alternatives that might be offered. The WTBA approved this idea, and also determined that *"in case we cannot reach an agreement with MTBC we soonest have to invite a new host of WWC 2011"*.

On 19 March 2010, legal counsel for WTBA(i) indicated that the WTBA's proposal was not illegal, as asserted by MTBC *"but that the WTBA Presidium might be seen as having a conflict of interest"* so it was understandable for MTBC not to want to use the WTBA Presidium as the final arbiter, and (ii) offered two alternatives, including arbitration through CAS to be held in New York City USA with the proviso for an award of attorneys fees and costs to the party winning the arbitration (*"the CAS alternative"*).

Between 23 March and 28 March 2010, the WTBA Presidium approved a resolution to propose arbitration on the basis of the CAS alternative.

On 29 March 2010 Mr Dornberger of the WTBA sent a letter to MTBC, forwarding the legal opinion and indicating that the WTBA Presidium was proposing a process *"as approved by the resolution as a last good faith effort to reach satisfactory resolution with MTBC"*. Mr Jonsson also warned MTBC that *"should you not agree with the proposed language, then WTBA shall choose another site of the Championships pursuant to WTBA statutes 1.12.9"*.

On 5 April 2010 MTBC responded indicating that the WTBA Presidium's proposal was not acceptable, demanding that WTBA agree to a two-step dispute resolution process involving appeal to the FIQ and then to CAS. MTBC also rejected the possibility of awarding attorneys fees and costs to the winning party and New York as the venue for a CAS arbitration, noting *"we prefer the Lausanne CAS"*. MTBC indicated that the terms set forth in this letter was *"our final position"*.

On 5 April 2010 Mr Dornberger emailed the WTBA Presidium expressing disappointment that the matter could not resolved, and indicating that the matter would be referred to the WTBA Presidium for final action.

On 9 April 2010 Dr Nathan first in a withdrawn draft (whose language was somewhat intemperate) and second in a following *"final official response"* rejected the WTBC proposal.

Over the period of 5-19 April 2010 in an email vote, the WTBA Presidium voted to confirm the revocation of the award of the Event of MTBC by a vote of 6 in favour, 1 against and 2 abstentions.

The WTBA Presidium also authorised the WTBA Secretary General to advertise for bids to host the Event.

On 24 April 2010 the Presidium's decision was communicated to MTBC.

On 27 April 2010 MTBC sent a *"preliminary objection"* to the decision.

On 3 May 2010, MTBC asked WTBA *"on what specific basis did the WTBA decide to withdraw the said championships?"*.

On 5 May 2010, Mr Dornberger responded on behalf of the WTBA indicating that the Event was revoked under WTBA statutes, which required MTBC and WTBA to enter into a written agreement.

On 10 May 2010, MTBC appealed the WTBA Presidium's decision to the FIQ Presidium pursuant to clause 1.2 9(c) of the WBTA Statutes.

On 11 May 2010, WTBA sent a letter to its member federations inviting those members to apply to host the Event.

On 15 May 2010, the President of FIQ instructed the WTBA to refrain from taking further action on the matter pending a decision by the FIQ Presidium.

On 22 May 2010, Mr Dornberger disputed the FIQ President's authority to order WTBA to refrain from further action and stated that because of the need to *"develop an alternative site for the 2011"* and the WTBA would *"continue to carry out its business in this matter as directed by the Presidium"*.

On 11 June 2010, the WTBA sent out another letter encouraging its members to apply to host the Event.

On 10 July 2010, the WTBA received an application to host the Event from the Hong Kong Tenpin Bowling Congress (HKTBC).

On 9 August 2010, the FIQ Presidium met to consider MTBC's appeal. Of the 11 members of the FIQ Presidium, four WTBA representatives were excluded from voting on the matter, and the four WNBA (World Ninepin Bowling Association) representatives chose not to participate as the matter did not concern them, leaving only three members of the FIQ's Presidium vote. As this did not achieve a quorum under Colorado law, no hearing or vote was taken on the appeal.

On 11 August 2010, the WTBA Presidium voted to award the Event to the HKTBC.

The Statement of Appeal by MTBC (including an application for a stay) was submitted on 1st September 2010.

The Appeal brief of MTBC was submitted on 9th September 2010.

The Answer of WTBA was submitted on 9th October 2010.

The opposition to a stay by WTBA was submitted on 20th October 2010.

On 22nd October 2010, HKTBC asked to be heard as an interested party in the procedure.

The reply of MTBC was submitted on 28th October 2010.

On 1 November 2010, the parties and HKTBC were requested to inform the CAS what, if any, steps were taken and were planned to be taken in relation to HKTBC's selection to host the Event.

On 4 November 2010, HKTBC sent a letter to the CAS outlining its preparation and enclosing *"HKTBC Action Plan for WCC 2011"*.

The rejoinder of WTBA was submitted on the 11th November 2010.

On 28th January 2011 the parties were advised that the Appellant's request for an interim stay had been refused and that the Sole Arbitrator's reasons in this regard would be contained in the final award.

The parties were also advised that in relation to the role of HKTBC, the Sole Arbitrator considered that it should be heard as an interested party, pursuant to Article R54, applying Article R41.4 of the Code of Sports-related Arbitration (the "Code") and that the Sole Arbitrator would treat HKTBC's letter of 4 November 2010 as its submission/evidence.

LAW

CAS Jurisdiction

1. Article R47 of the Code provides as follows:

   "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.

   An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance".

2. MTBC relied on Article 5.1(b) of the FIQ statutes as granting a right of appeal to the CAS. At paragraph I of its Answer, WTBA expressly stated that it did not challenge CAS's jurisdiction in this matter. The jurisdiction of the CAS was further confirmed by the signature of the Order of Procedure by the parties.

Applicable law

3. Article R58 of the Code provides as follows:

"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".

4. In their submissions, both parties rely on the provisions of the FIQ and WTBA statutes. Accordingly, these are applicable for the purposes of regulations to this dispute. WTBA is domiciled in the USA: accordingly US law applied supplementarily.

Admissibility

5. The Statement of Appeal was filed on 1 September 2010 within 21 days of the decision. It follows that the appeal was filed in due time and is admissible.

Analysis

6. Although the interchanges between the parties has been prolonged and at times intense, the dispute between them had a narrow focus i.e. what was the appropriate mechanism for dispute resolution ("the issue") in an Agreement ("the Agreement") between the host federation (here MTBC) for a world championship (here the women's world championship for 2011) and the WBTA itself.

7. At the outset of the interchanges on the issue there was some space between the rival proposals, but by the time of their conclusion i.e. preceding the decision that space itself had narrowed considerably. It was by then common ground that CAS would be the ultimate arbiter to resolve disputes relating to the agreement. The residual debate was whether an appeal to the FIQ presidium should precede any appeal to CAS; where a CAS panel should sit (New York or Lausanne); and whether there should be provisions for an award of costs to the party successful in any CAS appeal.

8. The 'decision' under appeal was the refusal of the FIQ praesidium to overturn a decision of the WBTA praesidium to move the event from Malaysia to Hong Kong. The reason for the WBTA decision was the failure of MTBC to sign the written agreement envisaged under Section.1.12.9 of the WBTA statutes, states:

"Following the selection of a host federation, the WTBA President or First Vice President will initiate a written agreement signed by legally authorised officer(s) of the host federation and any other necessary parties. Failure of such officials (and other parties) to sign said documents within nine months of selection will be constituted as a cause for the WTBA Presidium to consider moving the championships to another location. Such action may only be taken at a WTBA Presidium meeting where the host federation has been invited to appear to state its case".

9. In point of law the failure of the host federation to sign such an agreement was *"a cause for the WTBA Presidium to consider moving the championships to another location"*; subject only to an opportunity accorded to the putative host federation to state its case to the WTBA praesidium as to why such move should not be made (WTBA statutes Section 1.12.9).

10. I can ignore the fact that the provision required signature within a particular time since that requirement was clearly waived by WTBA and no reliance is placed upon it. I am also relieved of the need to resolve who bore the responsibility for the 9 month limit being exceeded, about which MTBC and WTBA disagree. At what stage MTBC introduced an appeal to CAS into the equation is another matter at which the parties were at odds, but is in the event immaterial. I shall also proceed on the premise, notwithstanding sporadic submissions on both sides to contrary effect that both parties acted throughout in good faith. It is inappropriate to make findings of *mala fides*, save in exceptional circumstances on documents alone.

11. In point of fact there was indubitably a failure to sign such an agreement, at the time the WTBA decision was taken - and indeed at the time of the FIQ "decision" - because of the division of view between MTBC and WTBA on the issue. Hence WTBA were entitled, albeit not obliged, to consider moving the championship to another location, subject only to (i) the decision being taken at a WTBA Praesidium meeting (ii) MTBC being invited to state its case at such a meeting- both of which procedural conditions were satisfied.

12. In legal terms the question becomes whether WTBA in exercising that express power to consider moving the event away from Malaysia (and the ancillary power, implicit in the express power, so to move it) acted in some way unlawfully. For MTBC to establish that WTBA did act unlawfully it must show that WTBA were obliged to accept MTBC s proposal for the dispute resolution clause.

13. No reliance is placed by MTBC on any provision of any national law; but only on the statutes of WTBA and FIQ. The Sole Arbitrator cannot for his part identify any provision of either instrument which compels the result MTBC contended for i.e. that the dispute resolution mechanism set out in Section 5.1(b) of Article V of the FIQ statutes had to form part of the Agreement.

14. Under the WTBA statutes members (who include all national federations such as have been admitted by FIQ are members of WTBA [WTBA statutes 1.4.1]) have the right to appeal to the Presidium (contextually the WTBA Presidium see WTBA statutes 1.1.2) *"in cases of controversies"* [WBTA statutes 1.4.2(d)]. Disputes *"not arising from tournament decisions"* will go to the *"FIQ Presidium for final decision"* [ditto 1.4.9(c)].

15. The WTBA's purposes include *"to further and perpetuate interest in ten pin bowling in conformity with the statutes of FIQ"* (WTBA statutes 1.2.1) and not to adopt amendments to their statutes *"which would be in conflict with the statutes of the FIQ"* (ditto 1.18.2) i.e. WTBA has to respect rights conferred, or duties imposed by the FIQ statutes. Members of FIQ such as have rights *"to appeal to the FIQ praesidium in case of controversies"* (FIQ Statutes Article 111 Section 3.2.c). The FIQ praesidium itself *"has authority to hear and determine disputes between FIQ members and the membership*

disciplines... Provided however that the Court of Arbitration for Sport shall be used as the final forum to resolve all disputes between FIQ and/or the membership disciplines and/national federations and/or individuals and/or third parties" [FIQ Statutes Article V Section 5.1.(b)].

16. MTBC's argument seems to the Sole Arbitrator, to conflate two separate matters; firstly the (accepted) entitlement of a member of FIQ to have controversies or disputes between it and a membership discipline – in this instance WTBA – determined by the FIQ presidium and thereafter by CAS [FIQ Statutes Section 3.2. (e) of Article 111 and Section 5(I.b) of Article V], an entitlement which MTBC not only enjoys but is exercising in the present proceedings; and a separate (and disputed) entitlement to have that same mechanism embodied in any contract between WTBA and MTBC. The second is not – contrary to MTBC's contention – the necessary consequence of the first. To put it another way MTBC was entitled to have the controversy or dispute about what should be in the Agreement determined by FIQ and CAS: *non sequitur* that FIQ or CAS is obliged to find that disputes arising under the Agreement have to be determined in the same way.

17. Not only is there no positive support for MTBC's argument in the FIQ statutes, but, if anything, there are provisions which contradict it. Section 3(1)(f) of Article 111 establishes the membership disciplines, one of which is WTBA. The default position is that *"they shall determine their own rules and regulations"*. The gloss or proviso includes at (v) *"WTBA and WNBA are entitled to promulgate and enforce playing rules and equipment specifications for tournaments they conduct or approve, thereby providing an example of uniformity for the sport"*, provided that *"their rules may not conflict with these Statutes"*.

18. This provision then envisages that WTBA may conduct or approve tournaments (which would include world championships) and that the only qualification to their powers in this context is the need to ensure that their playing (sic) rules have – for reasons too obvious to elaborate – to conform with the FIQ statutes. Otherwise it appears to enjoy organisational freedom.

19. In exercise of this freedom WTBA statutes have made particular provision for world championships in 1.12 specifying that they are *"the exclusive property of the WTBA"* [ditto 1.12.1] – a concept not limited to intellectual property rights which, *inter alia*, are specifically dealt with in other sub paragraphs of the same section. I can see against such legal backcloth, no limitation on the power of WTBA to select any dispute mechanism resolution it chooses for the world championship agreement as long as it is compatible with the relevant municipal law. MTBC do not contend that there is any such incompatibility.

20. It follows in my view that WTBA were entitled to insist on the final version of their dispute resolution clause (which had been modified, I repeat, in response to representations from MTBC) and that there was nothing unlawful or irrational in their so doing. Equally given MTBC's refusal to accept such version, WTBA were entitled to move the location of the Event elsewhere, and there was nothing unlawful or irrational in their so doing. In their Reply to WTBA's Answer MTBC complain that they are being unfairly penalized for taking *"a legitimate and principled stand"*. But the fact that their stand might be both legitimate and principled is insufficient. MTBC have to show not that they were reasonable, but that they were right; and that WTBA had no option but to accept the MTBC version of the dispute resolution clause in

the Agreement. This they cannot do, and have not done. In the end they became victims of their own adamant adherence to a false legal argument.

21. Given my conclusion on the substantive point the issue of remedy becomes moot.

22. However the prayer for a mandatory order reversing the WTBA decision to award the Event to HKTBC and to re-award it to MTBC was always destined to fail given that HKTBC had since 12th August 2010 necessarily been working against a tight time schedule to host the Event; as it said in its letter seeking intervention *"a much tighter time schedule"* than in previous years and there was evidence in that same letter of steps taken of preparation for the Event even before MTBC's appeal to CAS was launched.

23. The Sole Arbitrator refused a stay [the grounds for which were not in any event adequately laid by MTBC to reflect well established CAS jurisprudence, see eg *CAS 2008/A/1453*] because he accepted that to prevent HKTBC to proceed with logistical preparations could in WTBA's phrase cause delay *"jeopardiz(ing) the event's success"*.

24. The Sole Arbitrator noted too that the stay actually sought in the Statement of Appeal i.e. to prevent any or any further steps by WTBA to appoint another WTBA federation to host the event would seem a classic instance of trying to close the stable door after the horse had bolted: the appointment had already been made.

25. The alternative remedy to consider, had matters proceeded that far, would have been, damages; the Sole Arbitrator expresses no view as to what the result of such consideration would have been, noting only that any loss sustained by MTBC by reason of the relocation of the event was not quantified or evidenced.

26. MTBC can at least have the satisfaction of having persuaded WTBA that justice might not be seen to be done if world championship agreements made the WTBA Presidium the judge of whether WTBA had itself breached the agreement.

27. Accordingly, the appeal filed by MTBC is dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed by Malaysian Tenpin Bowling Congress on 1st September 2010 against the decision of Fédération Internationale des Quilleurs dated 9th August 2010 is dismissed.

2. (…).

3. (…).

4. All other or further claims are dismissed.