



Arbitration CAS 2011/A/2475 Israel Basketball Association (IBA) v. FIBA Europe e.V., award of 2 August 2011

Panel: Mr Romano Subiotto QC (United Kingdom), Sole Arbitrator

Basketball

Organisation of competition

Standing to be sued

Jurisdiction of an International Federation's appeal body and of a Continental Federation's appeal body respectively

CAS competence regarding rules concerning uniforms

- 1. Since neither the CAS rules nor the federation's applicable regulations specify against whom an appeal must be directed, the answer must be derived from Swiss law. In accordance with the jurisprudence of the Swiss Federal Tribunal, the question of whether there is standing to be sued is treated as an issue on the merits and not a question of admissibility of an appeal. Pursuant to Swiss law, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it.**
- 2. The competence of an International Federation's appeal body and of a Continental Federation's appeal body are clearly divided. A decision issued by an IF's may be appealed before the IF's appeals body while a decision of the Secretary General of a Continental Federation must be appealed before the Continental Federation's appeal body.**
- 3. A large freedom is given to a federation's governing bodies to determine the rules concerning uniforms. The CAS will intervene only in cases of blatant arbitrariness and/or discrimination.**

The Appellant, the Israel Basketball Association, (IBA), is the governing body of basketball in Israel. It has its registered office in Tel-Aviv, Israel.

The Respondent, FIBA Europe e.V. ("FIBA Europe"), is a registered association under German law, seated in Munich, Germany. FIBA Europe is a "Zone" created under the General Statutes of the Fédération Internationale de Basketball (FIBA). FIBA Europe is designated as the "*sole competent authority authorized and delegated by FIBA for promoting, supervising, and directing all men's and women's basketball activities within the Zone and to promote, supervise and direct basketball in Europe*". IBA and FIBA Europe are collectively referred to as the "Parties".

FIBA is the world governing body for basketball, seated in Geneva, Switzerland. FIBA's goal is to "promote the sport of basketball throughout the world and to lead the basketball movement as recognized by the International Olympic Committee". FIBA is participating as *amicus curiae* in this arbitral procedure and is represented by Andreas Zagklis, Attorney-at-law, Munich, Germany.

N. (the "Player") is a member of the Israeli women national basketball team that will compete in the Eurobasket Women 2011 tournament (the "Tournament") in June 2011, organized by FIBA Europe. In furtherance of her religious beliefs, entailing that a woman should not reveal her shoulders, the Player wishes to play at the Tournament with undergarments under her uniform that cover her shoulders. FIBA and FIBA Europe, however, apply strict rules with respect to the uniforms of a team.

In the past three years, the Player competed in a college basketball competition (National Collegiate Athletic Association) in the United States of America, where she was allowed to wear undergarments under her uniform. This competition is not organized by FIBA and, therefore, not governed by FIBA's regulations.

Two years ago, the Player competed in the U-20 European championship. In that competition, the Player also wished to play with covered shoulders, which led to an intervention by officials of FIBA Europe who claimed that her outfit did not match the team uniform and was not allowed under the applicable rules. According to IBA, this event caused considerable commotion, following which the Player was allowed to play with an undergarment under her uniform that covered her shoulders.

To prevent similar difficulties at the Tournament, the president of IBA approached FIBA Europe's Secretary General (the "Secretary General") by letter of March 13, 2011, asking him to instruct all personnel involved that wearing an undergarment under the shirt of the uniform is allowed and in accordance with FIBA's regulations. The rejection by the Secretary General of this request led to the current proceedings.

By letter of March 28, 2011, the Secretary General answered: "*The FIBA Internal Regulations state: Basketball allows no discrimination ... on the basis of ... religion...*". *As a consequence to the above regulation, regretfully we cannot approve your request*".

On April 11, 2011, IBA appealed the decision of the Secretary General (i.e., of FIBA Europe) to the FIBA Appeals Panel (the "Appeals Panel"). IBA requested the Appeals Panel to overturn the Secretary General's decision, "*if he was authorized to make such a decision*", and to declare that the Player is allowed to wear an undergarment in the same colour as the team's uniform under the shirt of her uniform during FIBA's tournaments. The IBA involved FIBA Europe in the dispute as a respondent.

By a statement dated May 24, 2011, Rabbi Dr. Cham Burganski, of the Hoshaya community in Israel, testified as to the principles of the Player's religion, her religious status, and the framework established with the Player outlining the "*areas where [the Player] can perform her athletic responsibilities fully as well as defining the absolute limitations that are imposed upon her by her faith as an observant woman*". On May 27, 2011, a hearing was held in Munich, Germany, at which the Player gave an oral statement regarding the practical consequences of her religious beliefs.

By decision of June 8, 2011, the Appeals Panel declined jurisdiction, stating that FIBA Europe's Appeals Commission was the competent body for an appeal of the Secretary General's decision. The Appeals Panel concluded that it had no competence to hear the appeal.

On June 15, 2011, IBA filed a Statement of Appeal, to be considered as the Appeal Brief, to the Court of Arbitration for Sport (CAS), in which it challenged the Appeals Panel's decision. Given that the Tournament was about to start, IBA requested the CAS to follow an expedited procedure and to render a decision within a reasonable time before the first match of the Israeli women national basketball team in the Tournament (i.e., June 18, 2011 20:30 CEST).

By letter of June 16, 2011, Counsel for CAS informed FIBA of IBA's appeal against the Appeals Panel decision of June 8, 2011, and provided the FIBA with copies of the Appeal Brief. Further, Counsel for CAS informed FIBA that, if it intended to participate as a party in the arbitration, it should file an application with the CAS by the end of the day.

By letter of June 16, 2011, FIBA Europe acknowledged receipt of the appeal filed by IBA and agreed with an expedited procedure. FIBA Europe further agreed that the matter be handled by a sole arbitrator "*provided that such arbitrator will be appointed by the President of the CAS Appeals Arbitration Division and is not the person suggested by IBA*". FIBA Europe provided a partial response and requested that the time limit for it to file the complete answer be extended. Furthermore, FIBA Europe requested that FIBA be joined to the arbitration.

By letter of June 16, 2011, Counsel for CAS confirmed that the procedure would be conducted in an expedited manner and that Mr. Romano Subiotto QC had been appointed as the Sole Arbitrator in this arbitral procedure.

By letter of June 17, 2011, FIBA submitted its position on an "*important question of interpretation of the FIBA Official Basketball Rules*" and requested the Sole Arbitrator to treat its submission as an amicus curiae brief in accordance with Article 41.4 of the CAS Code.

On the basis of careful consideration of the Parties' submissions and the evidence, and given the urgent nature of the procedure, the Sole Arbitrator considered he was sufficiently well informed to be able to determine the arbitration without the need to hold a hearing, pursuant to Rule R44.2 of the CAS Code.

In response to the Sole Arbitrator's decision not to hold a hearing, IBA filed a short reply to FIBA Europe's partial answer and requested the CAS to consider this statement in the absence of a hearing. FIBA Europe subsequently submitted its final Response. Both submissions were taken into consideration by the Sole Arbitrator.

The summary below refers to the substance of the Parties' allegations and arguments without listing them exhaustively in detail.

In its discussion of the case and its findings under section VI of this award, the Sole Arbitrator has nevertheless examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to.

The Appeals Panel concluded that it did not have jurisdiction to hear the appeal from the Secretary General's decision and that FIBA Europe's Appeals Commission is the only competent body to hear such appeal.

IBA argues that the Appeals Panel erred when it came to this conclusion, since the Secretary General (*i.e.*, of FIBA Europe) is an organ of FIBA according to the General Statutes. IBA refers to Article 13.1 thereof, which states the divisions in accordance with which FIBA is organized, among which are the Zones and the Secretary General (*i.e.*, of FIBA). IBA concludes: "*as we can see the Secretary General is a FIBA organ; and the Zones are FIBA organs. Therefore, IBA could appeal on the decision of the Secretary General of FIBA Europe, to the FIBA's Appeals' Panel*".

Furthermore, the Appellant refers to Article 37.4(a) of the FIBA General Statutes, which states that the Appeals Panel has the duty to hear and decide on appeals filed against decisions of FIBA "*including its organs and disciplinary bodies, unless such an appeal is expressly excluded in these General Statutes or the Internal Regulations of FIBA*". On the basis hereof, the Appellant submits that therefore there can be no dispute that FIBA Europe is an organ of FIBA and that a decision made by the Secretary General (*i.e.*, of FIBA Europe) is a decision of an organ of FIBA Europe, and hence a decision made by FIBA's organ. IBA concludes that since such appeal was not expressly excluded in the statutes "*an appeal against such a decision can be filed to the FIBA's Appeals' Panel*".

IBA maintains that the Player should be allowed to wear undergarments under her uniform that cover her shoulders. IBA refers to the FIBA Official Basketball Rules 2010 (the "OBR"), which state that "*the uniform of the team members shall consist of: shirts of the same dominant colour front and back... shorts of the same dominant colour front and back... socks of the same dominant colour for all players of the team*" and that "*all equipment used by the players must be appropriate for the game*". IBA also observes that the OBR permits compression sleeves of the same dominant colour as the shirts.

Furthermore, IBA refers to Article 2-127 of the FIBA Internal Regulations, which provides that "*all undergarments must be the same colour as the respective part of the uniform*". On this basis, IBA submits that a player can wear undergarments as long as they are in the same colour as the uniform and that, therefore, the Secretary General's decision goes against the FIBA rules and regulations.

The Appellant additionally submits that not allowing the Player to play with undergarments for religious considerations is contrary to Articles 1-16 to 1-18 of the FIBA Internal Regulations.

FIBA Europe submits that the "*decision appealed from (the decision of the FIBA Appeals Panel) was issued by a body of FIBA (and not a body of FIBA Europe)*". Therefore, FIBA Europe argues, the FIBA Appeals Panel was "*not competent to entertain the initial appeal. This is obvious from the wording of Article 1-152 FIBA Internal Regulations: 'The Appeals' Panel shall hear appeals filed by an affected party against decisions of FIBA ..., unless such appeal is the competence of an Appeals Panel of a FIBA Zone'*".

Further, FIBA Europe submits that it established the FIBA Europe Appeals Commission pursuant to Article 21 of the FIBA Europe Bye-Laws, Article 144 of the FIBA Europe Regulations and Article 5 of the FIBA Europe Bye-Laws, which provide that the Appeals Commission has the duty to hear and decide on appeals filed by an affected party against decisions of FIBA Europe's Divisions, among which is the Secretary General.

According to FIBA Europe, these provisions establish the competence of the FIBA Europe Appeals Commission to hear appeals against the decision of the Secretary General. FIBA Europe therefore submits that the competence of the Appeals Panel is excluded for the present dispute, since the Appeals Commission of FIBA Europe is an 'Appeals Panel of a FIBA Zone' within the meaning of Article 1-152 FIBA Internal Regulations.

FIBA Europe submits that the requirement that all players of a team be dressed in the same way "*stems from the definition of 'uniform'. A playing 'uniform' requires a uniform way of dressing. If a member of a team would dress differently from the other members of the team, he/she would not be wearing a 'uniform'. Wearing a T-shirt or other visible undergarment cannot be considered a uniform within the meaning of the Official Basketball Rules*".

Furthermore, FIBA Europe notes that Article 2-127 of the FIBA Internal Regulations, on which IBA relies in arguing that the Player can wear any undergarment in the same colour as the shirt of the uniform, falls under the chapter "Advertising on Team Uniforms". The rule does not specify which undergarments are allowed, but only attaches certain restrictions regarding colour and advertisement to any undergarments that are allowed.

LAW

CAS Jurisdiction, Jurisdiction, Applicable Law and Admissibility

1. Rule 47 of the Arbitration Code provides, in part, as follows:

Rule 47 Appeal

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 IBA 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.

2. The Appeals Panel is an organ of FIBA, which is governed by *inter alia* the FIBA Internal Regulations. Article 1-178 of the FIBA Internal Regulations provides as follows:

Article 1-178 of the FIBA Internal Regulations

A further appeal against the decision by the Appeals' Panel can only be lodged with the Court of Arbitration for Sport in Lausanne, Switzerland, within thirty (30) days following receipt of the reasons for the decision. The Court of Arbitration for Sport shall act as an arbitration tribunal and there shall be no right to appeal to any other jurisdictional body.

3. The CAS therefore has jurisdiction to consider IBA's Appeal, as confirmed by the Parties' signed order of procedure. Moreover, it follows from this article that the Appeal was timely and is therefore admissible.

4. Rule 58 of the CAS Code provides, as follows:

Rule 58 Law Applicable to the merits

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. On the basis of the above rule, the Sole Arbitrator shall decide the dispute in accordance with all relevant FIBA regulations. Moreover, Swiss law applies since the decision against which the appeal was brought was delivered by an organ of FIBA, which is subject to the laws of Switzerland pursuant to Article 2 of the FIBA General Statutes, which provides as follows:

Article 2 Headquarters and Place of Jurisdiction

2.1 The headquarters of FIBA shall be established in Switzerland.

2.2 FIBA is subject to the laws of Switzerland and shall be organised in such a manner as to acquire legal status, listed in the Registre du Commerce.

Merits

A. Standing of FIBA Europe to be sued before the CAS

6. FIBA Europe has consistently drawn the CAS' attention to the fact that the decision under appeal was issued by the Appeals Panel, which is not part of FIBA Europe, and that the Appeal should have been directed against FIBA, or that FIBA should at least join the procedure as a Respondent. However, FIBA considered that it was not in a position to join the present proceedings, and, since IBA's Appeal was only addressed to FIBA Europe, FIBA joined the proceedings only in the role of *amicus curiae*.
7. The question arises whether FIBA Europe has *locus standi* before the CAS in the current procedure. Since neither the CAS rules nor the FIBA regulations specify against whom an appeal must be directed, the answer must be derived from Swiss law. In accordance with the jurisprudence of the Swiss Federal Tribunal, the question of whether there is standing to be

sued is treated as an issue on the merits and not a question of admissibility of an appeal. See in this respect also cases CAS 2008/A/1639 and CAS 2008/A/1517.

8. Pursuant to Swiss law, *“the defending party has standing to be sued (légitimation passive) if it is personally obliged by the “disputed right” at stake. In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it”* (see also cases CAS/2007/A/1329 & CAS 2007/A/1330). It should therefore be determined whether FIBA Europe is a legitimate respondent in the current procedure.
9. This question is particularly delicate in the current proceedings, since IBA requested an initial decision from FIBA Europe while it should have requested a decision from FIBA’s Technical Committee, and then filed an appeal with the Appeals Panel of FIBA, while it should have appealed to FIBA Europe Appeals Commission (see below), and finally addressed the CAS appeal only to FIBA Europe and not to FIBA.
10. In any case, it follows from the considerations in the following section that the CAS’s role in the current proceedings is limited to confirming the Appeals Panel decision to reject jurisdiction over the decision by the Secretary General. There is therefore no need for the Sole Arbitrator to consider the issue of standing.

B. *Jurisdiction of the Appeals Panel*

11. The Appeals Panel decided it did not have jurisdiction over the decision of the Secretary General. It noted that an athlete who would like to wear any equipment that does not conform to the OBR may ask the FIBA Technical Commission for approval in accordance with Article 4.4.4 of the OBR. The Appeals Panel has jurisdiction over decisions of the FIBA Technical Commission on the basis of Article 37.4(a) of the FIBA General Statutes.
12. However, IBA requested a decision of the Secretary General. The Appeals Panel considers that if it were to assume jurisdiction it would circumvent *“the rules applying to FIBA Technical Commission’s hearing of cases on “any other equipment””*. Therefore, *“FIBA Europe’s Appeals Commission is the only body competent to consider this specific decision”* by the Secretary General.
13. The Sole Arbitrator must determine whether the Appeals Panel was correct. In order to understand the role of the Appeals Panel, it is important to understand the structure and relationship of FIBA and FIBA Europe.
14. Pursuant to Article 13.1 of the FIBA General Statutes, FIBA is organized in the following divisions: *“the Congress, the Central Board, the Secretariat of FIBA, acting through the Secretary General, the Zones, and the Commissions”*.
15. FIBA Europe is a “Zone” created under the FIBA General Statutes, which is reflected in Chapter 1 of the FIBA Europe Bye-Laws:

Article 1 of the FIBA Europe Bye-Laws

FIBA Europe is a Zone created under Article 17 of the General Statutes of the International Basketball Federation (FIBA).

FIBA Europe has acquired legal status and is organised in accordance with the laws governing the country in which its Headquarters are located.

16. Article 5 of the FIBA Europe Bye-Laws provides that FIBA Europe is organised in, among others, the following divisions: the “Secretary General”, the “Permanent Commissions”, which includes, among others, the “Appeals’ Commission”.

17. Article 19 of the FIBA Europe Bye-Laws explains the duties of the Secretary General:

Article 19

The Secretary General shall manage the administration of FIBA Europe and assume all responsibility for it. [...]

The Secretary General is the sole legal representative of FIBA Europe.

The Secretary General shall be appointed by the Board of FIBA Europe [...].

The Secretary General [...] shall be responsible for the study and implementation of measures concerning the promotion, supervision and direction of basketball in the European Zone.

With the exception of the Appeals Commission when it is considering an appeal, he shall be an ex-officio member of all the Permanent Commissions and enjoy voting rights.

In particular, the Secretary General shall have the following duties:

b. To ensure the implementation of all decisions taken by the General Assembly, the Board and the Executive Committee of FIBA Europe.

c. To be responsible for all European international competitions and for the implementation of the aims set out in Article 3 of these Bye-Laws.

n. To ensure the enforcement of these Bye-Laws, all Regulations of FIBA Europe and FIBA Statutes and regulations.

18. Article 21 of the FIBA Europe Bye-Laws details the duties of the FIBA Europe Appeals Commission:

Article 21

The Appeals’ Commission shall have the following duties:

a) To hear and decide on appeals filed by an affected party against decisions of FIBA Europe, including its divisions and disciplinary bodies, unless such appeal is expressly excluded in these Bye-Laws or other regulations of FIBA Europe.

19. On the basis of the above provisions, a decision of the Secretary General must be appealed before the FIBA Europe Appeals Commission. In such a case, jurisdiction of the Appeals Panel is excluded pursuant to Article 1-152 of the FIBA Internal Regulations:

Article 1-152

The Appeals' Panel shall hear appeals filed by an affected party against decisions of FIBA including its organs and disciplinary bodies, unless such appeal is the competence of an Appeals' Panel of a FIBA Zone or expressly excluded in the FIBA General Statutes or Internal Regulations.

20. The competences of the Appeals Panel and FIBA Europe's Appeals Commission are clearly divided. On this basis, and in line with the reasoning of the Appeals Panel, the Sole Arbitrator agrees with the Appeals Panel's decision that it had no jurisdiction over the decision of the Secretary General. The appeal must therefore be rejected.

C. Undergarments under Uniform

21. By way of *obiter dictum*, the Sole Arbitrator would like to remind the Parties of the importance of uniforms in sport, and the large freedom that is given to governing bodies to determine the rules concerning uniforms. The CAS will intervene only in cases of blatant arbitrariness and/or discrimination.
22. The OBR clearly describes the requirements for a basketball uniform. These rules provide directions on how a uniform should generally appear, list equipment that is permitted (*e.g.*, knee braces and undergarments that extend below the shorts) and contain a list of equipment that is not permitted (*e.g.*, jewellery). In case there is any doubt (*i.e.*, any equipment that is not specifically mentioned in the rules) the rules provide for a procedure to obtain approval from a specifically appointed committee.
23. On the basis of the above articles, the FIBA Technical Commission is the competent body to approve the use of the undergarment requested by IBA. As becomes clear from the facts provided by IBA, such approval was not requested by IBA.
24. Also, as correctly pointed out by FIBA Europe, the current rules would have not prevented IBA from providing the entire team with a uniform that matches the specific demands of the Player.
25. It therefore appears that, in the current case, the CAS would not have intervened in the rules of the governing bodies. However, since the appeal is rejected for reasons mentioned above, the Sole Arbitrator will not consider the issue in any more detail.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Israel Basketball Association on 15 June 2011, is rejected.

(...)

4. All other or further requests for relief are rejected.