



Arbitration CAS ad hoc Division (OG Nagano) 98/003 Viking Schaatsenfabriek B.V. v. German Speed Skating Association, award of 16 February 1998

Panel: Prof. Richard McLaren (Canada), President; Mr Jan Paulsson (France); Mr Jacques Baumgartner (Switzerland)

Skating (speed skating)

Commercial dispute over the display of a manufacturer's logo

Purpose of Art. 61 of the Olympic Charter

Unfair competition

- 1. Article 61 of the Olympic Charter is not intended to regulate commercial competition. It is intended to regulate the amount and size of commercial identification which may appear on equipment used at the Olympic Games. Hence, to the extent a manufacturer seeks relief for a loss of promotional effort and for potential passing off, it cannot rely on Article 61.**
- 2. It is impossible within the time constraints of proceedings before the ad hoc Division to conduct a trial of the type of factual issues which would have to be resolved before a considered decision could be handed down in relation to accusation of unfair competition. It is therefore for the claimant to act in another forum on legal grounds other than the violation of the Olympic Charter.**

At the Nagano Winter Olympic Games, in the sport of speed skating, a new technology has been used, nicknamed the “Klap System” because of the sound made by the skate. The essence of this technology involves a folding mechanism for speed skating blades. This enables the heel of the skate to be raised while the blade of the skate remains on the ice.

Viking Schaatsenfabriek B.V., a corporation duly organized, constituted and existing in accordance with the laws of the Kingdom of the Netherlands, is the manufacturer of ice skates, especially designed for speed skating, which incorporate the “Klap System” technology. This is thought to have made a substantial contribution to improving the times for Olympic and world records in speed skating at Nagano. It was suggested that perhaps 85 to 90% of the athletes at the Games use speed skates manufactured by the Claimant. The manufacturer’s name “Viking” is visible on the outside of the boot at the ankle.

The device that affixes the Claimant’s blade to its boot is made by another manufacturer. In this case that manufacturer is K2, an American corporation based in the state of Washington, USA. The Panel is advised by the Respondent that this corporation does not manufacture ice skates for speed skating.

K2 is also the manufacturer of skate boot covers. Its covers have the logo of K2 stamped into them. The Respondent told the Panel that Viking does not make a skate boot cover; the Claimant's counsel could not confirm or deny this assertion.

The Claimant alleges that the skate boot cover is used by some athletes under the supervision of the Respondent intentionally to cover up the Viking logo of the Claimant, and that this creates the impression that K2 is the manufacturer of the ice skate boot. The Claimant further alleges that the Respondent has received royalties for use of the K2 covers. The Claimant complains that it is deprived of the promotional effect of the display of its logo. Finally, the Claimant asserts that the Respondent is in violation of the Olympic Charter as well as of the law for The Prevention of Unfair Competition of Japan (Law no. 47 of 1993, as amended, the "Unfair Competition Law").

At 21:00 hours on 15th February 1998, the following persons appeared before the Panel in the course of a one and one-half hour hearing:

- Ryu Umezu, attorney at law in Tokyo of the law firm of Anderson Mori representing Schaatsfabriek Viking B.V.
- Gerhard Zimmermann, President, German Speed Skating Association
- Gunther Schumacher, Sportsdirector, German Speed Skating Association
- Walter Troeger, President, National Olympic Committee for Germany
- Heinrich K. Henze, Secretary General, National Olympic Committee for Germany
- Howard Stupp, Director Legal Affairs of the International Olympic Committee

The Claimant seeks both preliminary and permanent injunctive relief in the form of an order directing the Respondent to "*stop competitors of the German Speed Skating Team at Nagano Olympic Game from wearing shoe coverings which have logos of K2 competitors ...*". In making this request the Claimant specifically reserved its right to bring an action in any other forum, including the CAS in its ordinary proceedings, to claim any damages arising out of the alleged facts. Therefore, this matter is purely one of injunctive relief for the duration of the Games.

LAW

Applicable Rules and Jurisdiction

1. These proceedings are governed by the Rules for the Resolution of Disputes Arising During the XVIII Olympic Winter Games in Nagano (the "ad hoc Rules") of CAS enacted by the International Council of Arbitration for Sport (ICAS) on 9 April 1997. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act applies to this arbitration because the seat of the ad hoc Division and of its

panels of Arbitrators is established at Lausanne, Switzerland, pursuant to Art. 7 of the ad hoc Rules.

2. Under Article 17 of the ad hoc Rules, the Panel must decide this 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”*.
3. At the hearing, after the Claimant had stated its claim, the representatives of the parties confirmed that the arbitration panel was duly and properly appointed and that they had no objection to its composition. They also stated that they had no objection to the jurisdiction of the panel to deal with the claim as submitted.
4. According to Article 16 of the ad hoc Rules, the Panel has *“full power to review the facts on which the application is based”*.

The Merits

5. Article 14 of the ad hoc Division of CAS Rules for the Resolutions of Disputes Arising During the XVIII Olympic Winter Games in Nagano provides for preliminary relief. Such relief was requested but not granted. The panel was informed that none of the athletes of the Respondent intended to use the covers in the speed skating races scheduled for February 16th. The Panel’s decision would be available before any further races are held, making it unnecessary to consider any provisional relief.

Permanent injunctive relief can be granted only for the period of time defined in the application, i.e. the duration of the Nagano Games.

6. The Claimant alleges a violation of Article 61 of the Olympic Charter which reads in relevant part:

61 “Propaganda and Advertising”

[1 ...

2 ...]

Bye-Law to Rule 61

1. *No form of publicity or propaganda, commercial or otherwise, may appear on [.....] any article of clothing or equipment whatsoever worn or used by the athletes or other participants in the Olympic Games, except for 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.*

Outline criteria are given below:

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

...

1.5. *Shoes: it is acceptable that there appear the normal distinctive design pattern of the manufacturer. The manufacturer's name and/or logo may also appear, up to a maximum of 6cm², either as part of the normal distinctive design pattern or independent of the normal distinctive design pattern.*

...

8. *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.*

7. The Respondent advised the Panel that speed skaters under its supervision may make their own choice concerning equipment. We were advised that the German medalist skaters up to the date of the hearing had not used the K2 covers. Other German skaters had done so; certain of those competitors were identified in the application to CAS.
8. The Respondent states that the cover is placed over the skate boot to reduce wind resistance from the laces. In photograph #4 a different method of accomplishing the same purpose may be seen. There, tape is applied across the top of the boot over the place where the skate laces are tied.
9. The Claimant has not proved to the Panel's satisfaction that the K2 cover has no *bona fide* independent function and that it is worn only for the purpose of promoting K2. To the contrary, the Panel heard a plausible explanation to the effect that skaters are concerned to eliminate the wind resistance of their laces. Some do it by taping the laces to the boot, others use a cover. If the Respondent were engaged in an effort to further the advertising purposes of K2, it is odd that the most successful skaters on its team (in the competitions to date) have not worn the K2 cover. In sum, the Panel cannot, on the basis of the evidence before it, conclude that the K2 cover is not a genuine item of equipment which may be identified without violating Article 61 of the Charter.
10. Article 61 of the Charter is not intended to regulate commercial competition. It is intended to regulate the amount and size of commercial identification which may appear on equipment used at the Olympic Games. Hence, to the extent the Claimant seeks relief for a loss of promotional effort and for potential passing off, it cannot rely on Article 61.
11. The law which this panel is to apply is set out in Article 17 of the ad hoc Rules quoted above (para. 2). Accordingly, to grant injunctive relief, this Panel must find a violation of the Olympic Charter, the applicable sports regulations; or a violation of the general principles of law and rules of law which it deems appropriate to apply.
12. The Panel finds no violation of the Olympic Charter for the reasons just set out. The Claimant alleges no violation of any sports regulations or general principles of law. However, it pleads a violation of the Japanese Unfair Competition Law. Assuming Japanese law is applicable at all, which is an open issue, the Panel is inadequately informed of its contents in this respect. Moreover, the Respondent is hardly in a position with a few hours notice to take advice and define a position with respect to matters likely to present considerable complexity. Most of all, it is impossible within the time constraints of these proceedings to conduct a trial of the type

of factual issues which would have to be resolved before a considered decision could be handed down in relation to accusation of unfair competition.

13. In the absence of a violation of the Charter, there is, thus, no pleaded basis upon which this Panel can issue the requested injunctive relief.
14. To avoid any ambiguity, the Panel stresses that its decision is limited to the application of the Olympic Charter. It makes no finding as to the violation of the applicable unfair competition laws and has taken due notice that the Claimant has reserved its right to act in another forum on legal grounds other than the violation of the Olympic Charter.

On the basis of the foregoing factual and legal analysis, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The application for injunctive relief is rejected;
2. In accordance with Article 22 of the ad hoc Rules, there is no order as to costs.