



Arbitration CAS ad hoc Division (OG Vancouver) 10/001 Australian Olympic Committee (AOC) v. Fédération Internationale de Bobsleigh et de Tobogganing (FIBT), award of 9 February 2010

Panel: Prof. Michael Geistlinger (Austrian), President; Mr Henri Alvarez (Canada); Prof. Ulrich Haas (Germany)

Bobsleigh

Interpretation of the FIBT Qualification System for the Olympic Games

Interpretation of the Continental Representation rule

The contents of the term “Continental Representation” which is not commonly defined has to be derived by interpretation of the FIBT Qualification System. The clear wording of the qualification system implemented by the FIBT reflected the intention of representation by one men’s bob team and one women’s bob team from non-represented continents and could not be interpreted otherwise than formulated. The guarantee of continental representation is a fundamental principle of the Qualification System and according to the structure of the document is to be applied at all stages of the allocation of places, not only at the stage of the re-allocation.

The Applicant is the National Olympic Committee of Australia (the Australian Olympic Committee – AOC). The Respondent is the Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) which opposes the AOC’s appeal.

The AOC appeals against the FIBT’s decision dated 26 January 2010 (“the challenged decision”), subsequently confirmed on 2 February 2010, to not allocate a continental representation quota place to the AOC in the Women’s 2-man Bobsleigh event (“Women’s Bob Event”) for the athletes Ms. Astrid Loch-Wilkinson (pilot) and Ms. Cecilia McIntosh to participate in the 2010 Winter Olympic Games in Vancouver, Canada commencing on 12 February 2010.

The challenged decision allocates to the German and US NOC three teams in the Women’s Bob Event, to the Canadian, Suisse, British and Russian NOCs two teams each and to each of the Dutch, Italian, Belgium, Roumanian, Irish and Japanese NOC one team, respectively.

The General Secretary of the FIBT announced to the AOC already on 25 January 2010 by email that it would not admit an Australian women’s bob team at the Olympic Games. This email reads, in relevant part as follows:

“... since two of your teams have already qualified to participate in the Olympic 2-man bob event, the continent of Oceania is classified as being represented at the Games.

The Qualification Regulations require that a continent be represented either in the 2-man bob or the 4-man bob event (emphasis in the original).

As for the admission of a women’s bob team from your continent, we regret to inform you that this will not be possible, because the quota of participating women’s bob teams has already been met. ...”.

The FIBT’s Qualification System for XXI Winter Olympic Games, Vancouver 2010, is set out in a document (the “Qualification System”) established in collaboration by the FIBT and the International Olympic Committee (IOC); issued in November 2008, pursuant to chapter 4.1 FIBT International Rules Bobsleigh 2008, which states in relevant part as follows:

“Olympic Winter Games

The criteria for the right to participate in the Olympic Winter Games are determined by the I.O.C. The qualification rules are determined by the I.O.C. in collaboration with the F.I.B.T. The qualification rules are communicated directly by the I.O.C. to all National Olympic Committees”.

The Qualification System provides for the allocation of 170 athletes for participation in the discipline of bobsleigh at the 2010 Winter Olympic Games, including 130 men and 40 women. Qualification is achieved by the “pilot’s” results, which are the basis for obtaining a qualification place for the pilots’ respective National Olympic Committee (NOC). The general principles of the Qualification System provide guarantees of participation in the Winter Olympic Games for the best bob teams, the host nation and non-represented continents, provided that in each case the athletes are ranked among the top 50 men or top 40 women in the FIBT Ranking 2009/10 by the deadline of 17 January 2010.

The Qualification System reads in the relevant parts as follows:

“EVENTS

<i>Men’s Bobsleigh</i>	<i>2-man Bobsleigh Competition</i>
	<i>4-man Bobsleigh Competition</i>
<i>Women’s Bobsleigh</i>	<i>2-man Bobsleigh Competition</i>

ATHLETE / NOC QUOTA

Athletes Quota	<i>170 athletes</i>
	<i>130 Men</i>
	<i>40 Women</i>

QUALIFICATION SYSTEM

General Principles

The qualification process takes place via participation in the Federation’s competition activity. Qualification is achieved by the ‘pilots’ results. Pilots gain a qualification slot for their NOC. Participation in the Olympic Winter Games is guaranteed for the best Bob teams. Representation of the host country and non-represented

continents is also guaranteed, provided that athletes are ranked among the top 50 men or top 40 women in the FIBT Ranking.

The FIBT recognises five continents: Africa, America, Asia, Europe and Oceania.

...

System in Detail for Women's Bobsleigh

During the 2009/10 season, the best results of each Pilot are summed up by name for the FIBT Ranking, regardless of the race series in which results were scored:

- World Cup*
- Europe Cup*
- America Cup*

The number of races taken into account is the same as the number of World Cup races that are carried out during the qualification period.

The NOC quotas for the Olympic Winter Games are based on the updated ranking. In cases of equal points, the following decision criteria apply for the FIBT ranking:

- a) First, the highest single points result obtained;*
- b) Next, the highest single points obtained during the previous race.*

The quotas are assigned to the NOC. They may choose the pilots who may make use of this quota, provided that the pilots concerned have taken part and were ranked in at least five international FIBT races on three different tracks during the 2008/2009 and/or 2009/2010 competition seasons. They must have been ranked among the top 40 pilots of the FIBT ranking 2009/10 by the deadline of 17 January 2010.

The participation in the Olympic Winter Games is limited to:

- Women's Bobsleigh: 20 crews including host country*

Teams per NOC:

- 2 NOCs with 3 crews*
- 4 NOCs with 2 crews*
- 6 NOCs with 1 crew*

The athletes' quota per NOC is established according to the number of bob crews qualified, according to the following table

<i>Number of crews qualified:</i>	<i>Women's Bob</i>	<i>Athletes quota</i>
<i>1 crew</i>		<i>2</i>
<i>2 crews</i>		<i>4</i>
<i>3 crews</i>		<i>6</i>

...

CONTINENTAL REPRESENTATION

Male and female pilots belonging to NOCs of non-represented continents may also take part in the Olympic Winter Games. Maximum of one 2-man bob team or one 4-man bob team and one women's bob team per continent, provided that the pilots of these teams have taken part and were ranked in at least five international FIBT competitions on three different tracks during the 2008/09 and/or 2009/10 competition seasons, and ranked among the top 50 men or top 40 women in the FIBT Ranking.

The selection of the pilots will be based on FIBT Ranking of the 2009/10 season set up during the qualification period. If no pilot can achieve this condition, that continent will have no representative.

REALLOCATION OF UNUSED QUOTA POSITIONS

Places earned and not taken up are reallocated until all 30 crews (Men) or 20 crews (Women) are filled, in the following order of priority:

- *The highest ranked NOC(s) of non represented continents.*
- *If the number of non represented continents surpasses the number of places available for reallocation, only the highest ranked pilot in the FIBT ranking will enable his/her NOC to send a team to fill a reallocation position”.*

On 2 February 2010 the AOC filed its application with the Court of Arbitration ad hoc Division (CAS).

By email of 5 February 2010, the President of the Brazilian Ice Sport Confederation (“CBDG”) approached the CAS in the context of the present case and pointed to the fact that the Brazilian Women’s Bobsled team is ahead of Australia in the FIBT Rankings of 17 January 2010. Furthermore, the CBDG submitted that the way “*Ireland Women Bobsleigh Team got to qualify for the Olympics was irregular*”.

By letter dated 6 February 2010 the Respondent submitted its response.

Upon request by the CAS Secretary General, the President of the CBDG specified by email on 6 February 2010 that the CBDG requested consolidation of its case with the one filed by the AOC.

By e-mail dated 6 February 2010 the Panel invited the CBDG to participate as an Interested Party at the hearing. The Respondent objected to this. The President of the Panel informed the Respondent that the Panel would decide upon this objection in the context of all other procedural issues at the outset of the hearing.

During the morning of 8 February 2010, the CBDG formally filed an application before CAS, the FIBT being designated as the Respondent and Ireland and Australia as Interested Parties.

On the same day, the President of the Ad hoc Division of CAS decided that the Panel in charge of this new case (registered under the reference OG 10/002 CBDG v.FIBT) would be constituted of Michael Geistlinger as the chairman and Henri Alvarez and Ulrich Haas as co-arbitrators.

Pursuant to art. 15 lit. c para. 1 of the CAS Arbitration Rules for the Olympic Games (the CAS ad hoc Rules) and in view of the connection of this case with the procedure OG 10/001 AOC v. FIBT, the parties to this new procedure were also summoned to appear at the hearing fixed on Monday, 8 February 2010, 2 pm.

On 8 February 2010 the Respondent submitted its *“response regarding the Brazilian matter”* before the CAS.

At the beginning of the hearing, the CBDG, the Olympic Council of Ireland and FIBT objected to the hearing of both cases together. The Olympic Council of Ireland also objected to the admission of the CBDG as Interested Party in the first case: CAS arbitration OG 10/001 AOC v. FIBT. Subsequently, the FIBT withdrew its objections as to the status of the CBDG as Interested Party in the first case. The Panel decided to separate the hearing in the case CAS arbitration OG 10/002 CBDG v. FIBT and to postpone it to a later date. On the other hand, the Panel confirmed its decision to allow the CBDG to participate in the case initiated by the AOC as Interested Party because the decision on the interpretation and the relevance of the provisions on the continental representation in the Qualification System (“Continental Representation rule”) may affect the legal interests of the CBDG, since both the AOC and the CBDG are seeking the place of the Olympic Council of Ireland in the Women’s Bob Event.

LAW

Applicable law and jurisdiction

1. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. 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 as a result of the location of the seat of the CAS ad hoc Division in Lausanne, Switzerland, pursuant to art. 7 of the CAS ad hoc Rules.
2. The jurisdiction of the CAS ad hoc Division arises out of Rule 59 of the Olympic Charter. Furthermore, in the case at hand none of the Parties or the Interested Parties disputed the CAS jurisdiction in their submissions at the hearing.
3. Under art. 17 of the CAS ad hoc Rules, the Panel must 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”*.
4. According to art. 16 of the CAS ad hoc Rules, the Panel has *“full power to establish the facts on which the application is based”*.

Merits

5. Having listened to all arguments of the Parties and seen the documents submitted by them, the Panel finds that the Qualification System first of all must be seen as a legal document. It contains the provisions concerning the requirements that must be fulfilled in order to allow athletes to compete at the Winter Olympic Games. As a legal document the Qualification System is to be understood according to general rules of interpretation. The interpretation has to start from the ordinary meaning of the words used in this context and the reasonable understanding of the addressees of such rules.
6. The parties disagree on the interpretation of the Continental Representation rule in the Qualification System and whether it is applicable to the allocation and/or re-allocation of places in the Women's Bob Event. The document refers to this rule in three different places:
 - a) In the chapter "Qualification System" – "General Principles";
 - b) In the Chapter "Continental Representation";
 - c) In the chapter "Reallocation of Unused Quota Positions".

A. *Interpretation of the Continental Representation Rule*

7. The concept of "Continental Representation" is not commonly defined, nor is it defined in the Qualification System. The question is whether the concept applies to the sport of Bobsleigh as such, to the Men and Women Events or to individual events in this sport. The contents of the term "Continental Representation" has to be derived by interpretation of the Qualification System. In the Panel's view the document provides for qualification on three bases, participation of the best bob teams, representation of the host nation, and participation of athletes from non-represented continents. Each of these is referred to as being "*guaranteed*". This is clear language that must be respected and given meaning.
8. The chapter on Continental Representation commences by giving a right to male and female pilots belonging to NOCs from non-represented continents to take part in the Winter Olympic Games, provided they are ranked among the top 50 men or top 40 women in the FIBT Ranking. This right is limited to a "*maximum of one 2-man bob team or one 4-man bob team **and** one woman's bob team per continent*" (emphasis added).
9. The use of the word "*and*" attracted much of the parties' attention in their written submissions and at the hearing. The Olympic Council of Ireland argued that the word should be used conjunctively and that, as a result, the maximum that the NOC of a non-represented continent could receive would be one 2-man bob team, one 4-man bob team or one women's bob team. However, this would require a change in the actual language of the sentence and is contrary to its plain meaning. In the Panel's view the maximum entitlement is a representation of one man's bob team (a 2-man bob team or a 4-man bob team) **and** one women's bob team. In the context of this sentence, the use of the word "*and*" clearly reflects the intention of representation by one

men's bob team and one women's bob team. In other words, "*and*" is used in the sense of "*in addition*" or "*also*". In order for the Olympic Council of Ireland's and the FIBT's interpretation the word "*and*" would have to be substituted by "*or*" (emphasis added).

10. The Panel's interpretation is consistent with the distinction between men's bobsleigh teams and women's bobsleigh teams in a number of places in the document. A review of the Qualification System reveals that from the outset men's and women's bobsleigh teams are treated separately and differently. The men's category has two events, more teams and more athletes than the women's category which has only one event, fewer teams and fewer athletes. Each of the men's and women's categories has a separate detailed system ("System in Detail for Men's Bobsleigh" and "System in Detail for Women's Bobsleigh").
11. The Olympic Council of Ireland also argued that the use of the word "*may*" in the first sentence of the chapter on Continental Representation gave the FIBT a discretion to decide whether to permit representation by a men's bob team or a women's bob team. In the Panel's view this is inconsistent with the guarantee of continental representation by a men's team and a women's team. Rather the use of the word "*may*" simply grants the entitlement to qualified teams belonging to NOCs of non-represented continents to take part in the Winter Olympic Games. This is consistent with the use of the word "*maximum*" in the next sentence.
12. The FIBT argued that its intention and that of the IOC was to give athletes of NOCs whose continents were not represented in any FIBT events an opportunity to be represented. Further, according to the FIBT, it was not contemplated that the Continental Representation rule could be used in order to guarantee NOCs from non-represented continents representation in all events. However, this intention is not reflected in the clear language of the text. Rather the language in the document reflects the intention to provide representation of one men's 2-man bob or one men's 4-man bob and one women's bob team per continent. With respect to men's teams this clearly sets a maximum of representation in one event. With respect to women's teams it means representation in the only women's event.
13. The Olympic Council of Ireland also sought to support its interpretation on a comparison of the language used in the Host Nation Qualification rule and the Continental Representation rule. It noted that the former provided for participation of the Host Nation NOCs "... *with one 2-man bob team, one 4-man bob team and one women's bob team, respectively*". On the other hand, the Continental Representation rule does not use the word "*respectively*", but simply provides for a "*maximum*" of one 2-man bob team or one 4-man bob team and one women's bob team per continent. In the Panel's view this difference in language in the two rules is of no significance. The rights of representation granted to the Host Nation are different from those granted to NOCs from non-represented continents. The NOC of the Host Nation is given the right to take part in the Winter Olympic Games in each of the events for 2-man bob teams, 4-man bob teams and women's bob teams. On the other hand, NOCs of non-represented continents have the right to take part in the Winter Olympic Games with only one team in the men's events and one team in the women's event. Thus, the use of the word "*respectively*" makes sense in the context of the Host Nation Qualification rule, but is not required in the context of the Continental Representation rule.

14. The Panel was given one example demonstrating an inconsistent handling of the Continental Representation rule by the FIBT in respect of women's events. In the case of allocation of a quota place in the women's event to Japan, the FIBT communicated to the IOC having applied continental representation for Asia, whereas Japan and Korea were already represented in the men's events.
15. At the hearing the Olympic Council of Ireland submitted a new document in support of the position that the Continental Representation rule applied only at the re-allocation stage. The new document submitted was a previous draft of the Qualification System discussed between the IOC and the FIBT. The Olympic Council of Ireland pointed to differences between this earlier draft and the final version of the document: in each of the separate systems in detail for men and women, the participation limits are stated to include "Host nation and non-represented continents", whereas, in the final version of the Qualification System the reference is simply to "Host nation". The Olympic Council of Ireland submitted that this reflected the intention of the IOC and the FIBT to limit the application of the Continental Representation rule to the re-allocation stage. In response, the AOC stated that it was unaware of the previous draft document and had not been provided with a copy of it. Further, in its submission the previous draft was irrelevant, since the Panel was required to decide the dispute on the basis of the final, published version of the Qualification System and the actions and decision of the FIBT based on that document.
16. In the Panel's view the draft document submitted by the Olympic Council of Ireland is of no assistance. It is clearly a draft which was the subject of internal discussions between the IOC and the FIBT. There was no indication that the draft, or the discussion between the IOC and the FIBT, were provided or made known to the FIBT's members or the various NOCs or athletes. Further, a review of the draft reveals that there are a number of other differences between it and the final version of the Qualification System. These were not addressed or explained by the FIBT, the IOC or the Olympic Council of Ireland and there was no explanation of the nature and content of the discussion relating to the draft and the preparation of the final document. In these circumstances, the Panel is not prepared to draw any inferences, or draw any conclusions on the basis of the different versions of the Qualification System. It must base its decision on the final, published document.

B. Stage at which the Continental Representation is to be applied

17. It is disputed between the Parties whether the Continental Representation rule is applicable to the re-allocation of places only, or also to the initial allocation stage. The Qualification System is not self-evident as to this point and requires interpretation. The FIBT supported its interpretation of the Continental Representation rule on the basis of the language of the re-allocation of unused quota positions. The FIBT says that the reference to the highest ranked NOC(s) of non-represented continents in the order of priority for re-allocation of unused quota positions would be redundant if the AOC's interpretation of the Continental Representation rule were correct. In other words, if continental representation were required to be taken into

account in the initial allocation of quota, then there would be no need to reallocate positions not taken up to NOCs of non-represented continents.

18. The AOC says that this argument is misplaced. In the AOC's view, the FIBT's argument based on a possible inconsistency or error in the re-allocation rule does not overcome the express language set out in the "General Principles" chapter of the document which guarantees representation of non-represented continents. In the Panel's view this is correct. The guarantee of continental representation is a fundamental principle of the Qualification System and according to the structure of the document is independent of the re-allocation rule. Further, at the hearing in response to questions from the Panel, both the FIBT and the AOC recognized that, although unusual, it was possible for a non-represented NOC that had received its place through re-allocation to withdraw and have its place re-allocated. This would provide an example of the need to re-allocate a place to the NOC of a non-represented continent under the re-allocation rule. The Panel accepts that this would be an unusual case and that there may be difficulties in the application of the Re-allocation rule as drafted. However, this does not outweigh the other previously mentioned elements that clearly favor the Applicant's interpretation. In conclusion, the Panel finds that the better arguments speak in favor of not limiting the Continental Representation rule to the stage of re-allocation.
19. Given that the non-allocation of a place in the Women's Bob Event to the AOC is incompatible with the Qualification System and given that the overall number of places is limited to 20, the Panel has no other possibility than to set aside the FIBT's decision dated 26 January 2010 in as much as it allocates a place in the Women's Bob Event to the Olympic Council of Ireland.

C. Recommendation

20. Taking into consideration that in the case at hand several NOCs are competing for the same place in the Women's Bob Event and that allocating the spot to one team will always be to the detriment of the others and that the dispute in question has its origin in regulations that are not entirely clear, the Panel suggests to add a further 21st place to the Women's Bob Event.
21. The Panel is of the view that adding an extra place to an event is not impossible from the outset and has been recommended by previous CAS Panels in the past (CAS OG 04/001). Furthermore, the Panel notes that the FIBT Secretary General has requested additional places in events to the IOC Sport Director in the past. In an email dated 25 January 2010 he writes as follows: "*Oceania is not represented in the women's bob. A place opened up and was assigned to Japan, first among the excluded NOCs. Second and third after Japan are BRA and AUS. Since Oceania is not represented in the women's bob, should we admit the Australian team in addition to the 20 qualified teams? Thanking you in advance for your kind reply, I send my best regards Ermanno Gardella FIBT. P.S.: For your information in the Men's Skeleton Competition we will only have 29 participants (instead of 30)*".
22. The mission of the CAS Panel was to decide which interpretation of the FIBT Rules was correct and to determine whether the AOC's application should be upheld or dismissed. It has ruled that the AOC should prevail in this arbitration. Furthermore, the CAS cannot issue any order

as to the inclusion of a 21st team in the 2-man women's bobsleigh event which might require a change in the competition format of the Olympic Games and would require the agreement of the IOC and VANOC. However, the Panel wishes to express the view that, in case the IOC and VANOC are in the position to allocate the non-used 30th place in Men's Skeleton as the additional (21th) place for the 2-man Women's Bob Event, it would find such action just and equitable.

The ad hoc Division of the Court of Arbitration for Sport rules:

1. The application filed by the Australian Olympic Committee on 2 February 2010 is upheld.
2. The decision of the FIBT of 26 January 2010 is set aside in part. As a result, the FIBT is ordered to allocate a continental representation quota place to the Applicant for participation of the pilot Astrid Loch-Wilkinson in the 2-man Women's Bob Event in the 2010 Winter Olympic Games on the basis of a continental quota place in the Women's Bob Event to be allocated to Oceania.
3. The FIBT is ordered to request that the IOC and VANOC allocate an additional quota place (21 teams to compete) to the FIBT for the 2-man Women's Bob Event in the 2010 Winter Olympic Games.
4. By way of recommendation only: The IOC and VANOC are requested to allocate an additional quota place (21 teams to compete) to the FIBT for the 2-man Women's Bob Event in the 2010 Winter Olympic Games.
5. All other Prayers of Relief are denied.