CAS 2024/A/10760 Nayoka Clunis v. World Athletics & International Olympic Committee

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr. Ulrich Haas, Professor in Zurich, Switzerland, and Attorney-at-law in Hamburg, Germany

in the arbitration between

Nayoka Clunis, Jamaica

Represented by Mr. Saverio P. Spera and Mr. Jacques Blondin, Attorneys-at-Law with SP.IN Law, Zurich, Switzerland

- Appellant -

and

World Athletics, Principality of Monaco

Represented by Mr. Nicholas Zbinden, Attorney-at-Law with Kellerhals Carrard, Lausanne, Switzerland

- First Respondent -

International Olympic Committee, Switzerland

Represented by Mr. Antonio Rigozzi and Mr. Eolos Rigopoulos, Attorneys-at-Law with Lévy Kaufmann-Kohler, Geneva, Switzerland

- Second Respondent -

I. THE PARTIES

1. Ms. Nayoka Clunis (the "**Appellant**" or the "**Athlete**") is an elite Jamaican athlete, specialising in the hammer throw event.

2. World Athletics (the "**First Respondent**" or "**WA**") is the world governing body for the sport of athletics, recognised as such by the International Olympic Committee (the "**IOC**"). WA has its seat and headquarters in Monaco, Principality of Monaco.

3. The IOC (or the "**Second Respondent**") is the governing body of the Olympic Games and the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, including the Summer Olympic Games in Paris in 2024 ("**Olympic Games Paris 2024**") fulfilling the mission, role and responsibilities assigned by the Olympic Charter ("**OC**"), which includes promoting peace through sport.

4. WA and the IOC are collectively referred to as the "Respondents".

5. The Appellant and Respondents are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Introduction

6. The present dispute is primarily based on a decision by the Director of Competitions and Events Department of WA dated 8 July 2024 not to allow the Appellant to participate in the Olympic Games Paris 2024, because the Jamaica Athletic Administrative Association ("**JAAA**") had failed to include the Appellant's name in the list of confirmed athletes within the prescribed deadline (the "Appealed Decision"). The Appealed Decision reads as follows:

> *"Dear Mr. President, Dear Garth,*
>
> *Thank you for your letter below and I do hope that Hurricane Beryl passed without major destruction and damage to your facilities and most importantly the Jamaican athletics family.*
>
> *About the situation concerning Ms. Nayoka Clunis, I am sorry to have to confirm to you that as the target numbers for each event at the Paris Olympics have been reached by reallocation over the past few days, we can no longer guarantee her participation in the upcoming games. I personally discussed the unfortunate situation at length internally even with President Coe to seek a solution, but the best I can do at this point in time is to give you my word, that should there be any cancellation or withdrawal in the women's hammer throw before the games begin, Ms. Clunis will be first in line to be offered the position.*
>
> *While I do understand this is not the solution you were hoping for, please do accept that we have to follow the rules and regulations, furthermore in another situation you would expect World Athletics to do just that.*
>
> *Thank you for your understanding and hope to be in touch about possible withdrawals over the coming weeks."*

7. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, the CAS file and the content of the remote hearing that took place on 29 July 2024. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he shall refer in this Award only to those submissions and evidence he deems necessary to explain his reasoning.

B. Background Facts

8. On 20 December 2022, WA published its qualifying system for the sport of athletics for the Olympic Games Paris 2024 (the "**WA QS**"), according to which field events like hammer throw has 32 entries each for men's and women's categories who can qualify for the 32 spots by Entry Standard or World Ranking.

9. On 19 June 2024, WA held an information session for its Member Federations regarding the WA QS, relevant deadlines, and reallocation procedure. Following the information session the Member Federations were advised by WA via email – *inter alia* – as follows:

> *"As mentioned, your proposed entries must include qualified athletes (whether by standard or world rankings) as well as any next best athlete available to take a reallocated quota place. Athletes that are not included in your EES entries, will NOT be considered for Paris 2024*
>
> *By submitting these entries, you will allow World Athletics to know which qualified athletes are going to participate in each event and, therefore, reallocate any unused quota places to the next best available athletes by world rankings.*
>
> *Deadline to populate the EES is 4 July midnight Monaco time."*

10. On 1 July 2024, JAAA made eighty-nine pre-entries in the Event Entry System ("**EEA**").

11. On 2 July 2024, WA confirmed the list of athletes who qualified by Entry Standard and World Ranking for the Olympic Games Paris 2024, wherein the Appellant was identified to JAAA and Jamaica Olympic Association ("**JOA**") as eligible for nomination through her World Ranking position then (23rd in the world) (the "**Communication**"). The Communication contained the following:

> *"This is to inform you that, following the end of the qualification period on 30 June, we have processed all the results from the registered competitions and many National Championships. We have done that to the best of our ability and accuracy and have updated the Road to Paris accordingly, which is now published on our website […] Any omissions or corrections must be immediately reported to us for eventual review.*
>
> ***Please remember to submit your pre-entries through the Event Entry System (EES)** […]*
>
> *As mentioned, these must include qualified athletes (whether by standard or world rankings) as well as any next best athlete available to take a reallocated quota place. Athletes who are not included in your EES entries, will **NOT** be considered for Paris 2024.*
>
> *By submitting these entries, you will allow World Athletics to know which qualified athletes are going to participate in each event and, therefore, reallocate any unused quota places to the next*

best available athletes by world rankings.

Deadline to populate the EES is 4 July midnight Monaco time.

Any problem using EES, please email the list of athletes to enter to […] by the deadline of 4 July."

12. On 3 July 2024, JAAA informed the Appellant that, based on her World Ranking, she had been selected to compete at the Olympic Games Paris 2024.

13. On the same date, Hurricane Beryl, a category-five Atlantic hurricane, hit Jamaica.

14. On 4 July 2024, JAAA submitted the pre-entries on the EES before the midnight deadline stipulated by WA, which did not include the name of the Appellant.

15. On 5 July 2024, WA reallocated places to the next best ranked athletes by their Member Federations for those quota places which were not used. The next best ranked athlete for hammer throw was Ms. Iryna Klymets from Ukraine, and the unused quota place was offered to and accepted by her.

16. On the same date, WA informed Member Federations and the IOC of the athletes qualified and eligible for entry to the Olympic Games Paris 2024, which did not include the name of the Appellant.

17. On 6 July 2024, the president of JAAA (the "JAAA President") wrote an email to WA that reads as follows:

"Dear Marton

I am seeking your assistance in adding hammer thrower Nayoka Clunis as a Quota Athlete who is ranked 23rd. Due to the inputs being done on the day of the approaching hurricane which adversely affected our ability to act we were unable to correct and complete the entries on the final day due to the passage of the hurricane which affected our electricity and internet islandwide. We still have limited capabilities and I am requesting that she be added to the list of quota athletes in the hammer …"

18. On 7 July 2024, JAAA released a press release containing the names of track and field athletes selected to represent Jamaica at the Olympic Games Paris 2024.

19. On the same date, WA published the final list of athletes who will compete at the Olympic Games Paris 2024.

20. Still on the same date, the Appellant's coach informed the Appellant that her name was not included in the list of athletes who will compete at the Olympic Games Paris 2024. The Appellant proceeded to contact the Secretary General of JAAA, who informed the Appellant of the situation.

21. On 8 July 2024, WA submitted the list of participating athletes to the IOC, which did not include the Appellant. JOA also submitted a list of Jamaican athletes to compete at the Olympic Games Paris 2024, which also did not include the Appellant.

22. On the same date, WA informed JAAA of the Appealed Decision.

23. In response to the Appealed Decision, the JAAA wrote to the WA as follows:

> *"Dear Marton*
>
> *Thank you for all the assistance offered and we do remain hopeful that eventually she will be able to be added if there is a withdrawal."*

24. On 12 July 2024, the Appellant was informed by the President of JAAA that he had been speaking with the IOC and WA, and they should be meeting soon for her matter.

25. On 15 July 2024, the JAAA President wrote to WA as follows:

> *"Dear Mr. Gyulai:*
>
> *Further to your letter of July 8, 2024 with regard to Miss Nayoka Clunis' not being declared as an entrant in the Women's Hammer Throw event at the 2024 Paris Olympics, we write to inform you that this situation has been creating severe emotional stress on the athlete.*
>
> *We also write to remind you that this unfortunate situation was due to the devastation caused by hurricane Beryl in which Jamaica suffered severe damage in telecommunications and other infrastructure throughout our country.*
>
> *Based on the foregoing, we are respectfully asking that even if there is no withdrawal or cancellation (suggested in your letter), Miss Clunis be included in the list of athletes to compete in the event."*

26. On 16 July 2024, the President of JAAA informed the Appellant that there were no updates, and JAAA made another request to WA.

III. The Proceedings before the Ad Hoc Panel of the Court of Arbitration for Sport

27. On 18 July 2024, the Appellant filed an application with the Court of Arbitration for Sport ("CAS") Ad Hoc Division Games of the XXXIII Olympiad in Paris ("CAS Ad Hoc Division") against JAAA as respondent. The case was docketed under CAS OG 24/01. In these proceedings the Appellant filed the following requests for relief:

> *"- direct that her name be included on the appropriate list (and anything incidental thereto);*
> - *direct the JAAA to implement remedial measures to ensure this does not happen again, for the athlete's sake and the wide sporting community; and/or*
> - *any other relief or remedy the Panel may deem just in the circumstances"*

28. In the proceedings CAS OG 24/01, the IOC, as one of the interested parties, contested the jurisdiction of the CAS Ad Hoc Division on – *inter alia* – the following grounds:

- The Appellant based the jurisdiction of the CAS Ad Hoc Division on the "*arbitration clause inserted in the official entry form of the O.G.*", but does not produce a duly-executed entry form, and the IOC understood that the Appellant was not provided with such a form.

- The Appellant's own Application Form confirms that the dispute on her non-selection arose before 16 July 2024, as it indicates that "*this is a dispute arising on the occasion of, or in connection with the Olympic Games (and one which has continued into the 10 days preceding the Opening Ceremony […])*". By stating that the dispute "*has continued into the 10 days preceding the Opening*

Ceremony", the Appellant acknowledged that the dispute came into existence earlier than that.

29. In the same proceedings, WA, as one of the interested parties, objected to the Appellant's application on the following grounds:

- WA had, in accordance with the WA QS, communicated eligible and qualified athletes for entry to the Member Federations and to the IOC on 5 July 2024.

- In accordance with the WA QS, WA had reallocated the place to the next qualified athlete and opposed to another athlete and Member Federation being penalised as a result of the omission of the JAAA.

30. On 22 July 2024, the CAS Ad Hoc Panel decided that the "*CAS ad Hoc Division does not have jurisdiction to hear the application filed by Nayoka Clunis on 18 July 2024*".

31. In the merits of the award, the CAS Ad Hoc Panel held, its pertinent parts, as follows:

> *"28. This Panel has been formed under the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games ('the Rules'). Article 1 of the Rules provides that the relevant dispute must* ***arise*** *during the Olympic Games or* ***during a period of ten days preceding the Opening Ceremony of the Olympic Games*** *(emphasis added).*
>
> *29. The Opening Ceremony for the Paris Olympic Games is 26 July 2024.*
>
> *30. The IOC has specifically raised the question of jurisdiction, submitting that the dispute is not covered by Article 61 of the Olympic Charter and that the dispute did not arise during the relevant 10-day period.*
>
> *31. To determine whether the Panel has jurisdiction, it is necessary to consider the chronology of relevant events concerning the Athlete, as ascertained from the evidence provided by the Athlete in her Application, together with some additional evidence provided during the hearing. […]*
>
> *49. In the Application, the Athlete has not nominated a decision from which she appeals; the section of the Application asking for the details of the decision challenged, if any, is left blank. It is to be recalled that the Respondent is the JAAA and that the relief sought, while seeking 'any other relief or remedy that the Panel may deem just in the circumstances' can only be sought against the respondent to the application.*
>
> *50. From the chronology set out above, it is apparent that the dispute as between the Athlete and the JAAA could be said to have arisen on 4 July 2024 - when the Athlete's name was omitted from the list sent to WA, on 7 July 2024 – when the Athlete was informed by the JAAA that her name was not on the list sent to WA by the JAAA, or on 8 July 2024 – when WA informed the JAAA that the Athlete's name could not be added to the list of competitors.*
>
> *51. It is clear that all of these dates are beyond the time limit required for the Panel of the ad hoc Division for the Paris Olympic Games to have jurisdiction. […]*
>
> *The relevant date is when the dispute between the Athlete and the JAAA arose, not when it could be said to have 'crystallised' by the receipt of submissions from WA as an interested party. A dispute does not arise when all steps to resolve the dispute have failed. The dispute either arose when the Athlete became aware that her name had not been included on the list submitted by the JAAA to WA, or when she first became aware that the mistake would not, or could not, be rectified by WA. The Panel does not need to decide which of these dates apply as both are beyond the 10 days prior to the Opening Ceremony of the Paris Olympic Games. […]*

> *56. The Panel concludes that it has no jurisdiction in this case as the dispute arose prior to a period of ten days preceding the Opening Ceremony of the Paris Olympic Games. Having determined that the Panel does not have jurisdiction for this reason, it is unnecessary to consider whether there is jurisdiction under Rule 61 of the Olympic Charter."*

IV. THE APPEAL PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. On 25 July 2024, the Appellant filed a Statement of Appeal (serving also as Appeal Brief) with the CAS against the Respondents with respect to the Appealed Decision, in accordance with Articles R48 and R51 of the CAS Code of Sports-related Arbitration (2023 edition) (the "CAS Code"). In her Statement of Appeal, the Appellant brought the appeal against the Respondents, as well as against Ms. Iryna Klymets and the Ukrainian Athletic Association ("UAA") as third and fourth respondents, and JAAA and JOA as interested parties. The Appellant, *inter alia*, requested for the matter to be expedited in accordance with Article R52 (4) of the CAS Code. The procedure was docketed as *CAS 2024/A/10760 Nayoka Clunis v. World Athletics & International Olympic Committee & Iryna Klymets & Ukrainian Athletic Association*.

33. On 26 July 2024, the CAS Court Office acknowledged receipt of the Statement of Appeal, and proposed an expedited procedural calendar for the Parties' agreement.

34. On the same date, the JAAA filed a separate Request for Arbitration and Statement of Claim against WA, the IOC, JOA, Ms Iryna Klymets and the UAA. This procedure was docketed as *CAS 2024/O/10764 Jamaica Athletics Administrative Association v. World Athletics & International Olympic Committee & Jamaica Olympic Association & Irina Klymets & Ukrainian Athletics Association*.

35. Still on 26 July 2024, WA informed the CAS Court Office as follows:

> *"Further to the JAAA's filing of a request for arbitration … today, rising from the same facts. And the need for World Athletics to consider the matter, World Athletics would respectfully request an extension of until tomorrow morning … to provide the information requested by the CAS … namely our position on the request for an expedited procedure, proposed timetable and request for a sole arbitrator."*

36. On 27 July 2024, the Appellant, First Respondent, and Second Respondent submitted that they agree to an expedited procedure and the proposed calendar, while Ms. Klymets and UAA objected to an expedited procedure. In the same communications, the Appellant requested for the Hon. Dr Annabelle Bennett to be appointed as sole arbitrator while the First and Second Respondents proposed for the dispute to be submitted to the same three-member panel as CAS OG 24/01.

37. On the same date, the CAS Court Office informed the Parties that in the absence of an agreement among all Parties, no expedited procedure shall be implemented.

38. On the same date, the Appellant informed the CAS Court Office that "*should the procedure follow the regular time limits … the appeal would become entirely moot. … Should the Third and Fourth Respondent … refuse the expedited procedure, the Appellant sees no other option but to withdraw the appeal against the hirs and Fourth Respondent …* ".

39. Still on 27 July 2024, the CAS Court Office invited Ms. Klymets and UAA whether they maintained their objection against an expedited procedure.

40. As no response was received by the Third and the Fourth Respondents, the CAS Court Office determined that the Appellant's appeal against Ms. Klymets and UAA was withdrawn and proposed the following amended expedited procedural calendar to the remaining Parties:

- *Filing of the Respondents' Answers by 28 July 2024 (with direct copy to the Appellant);*
- *Hearing on 29 July 2024 at 15:00 CEST;*
- *Issuance of the operative part of the Arbitral Award by 30 July 2024, if possible.*

41. The letter of the CAS Court Office invited the Parties to comment on the procedural calendar by 28 July 2024. In addition, the CAS Court Office informed the Parties that, due to the Appellant's withdrawal of her appeals against Ms. Klymets and UAA, the new reference of the present procedure was *CAS 2024/A/10760 Nayoka Clunis v. World Athletics & International Olympic Committee*.

42. On 28 July 2024, the Appellant and the JAAA requested the following:

- For the JAAA's Request for Arbitration dated 26 July 2024 to be admitted as *amicus curiae* brief; and
- For the JAAA to be permitted to attend the hearing in the present matter on 29 July 2024 and to make *amicus curiae* submissions in support of the Appellant's position.

43. On the same date, the First and Second Respondent objected to the Appellant's and the JAAA's requests of even date, and maintained their request to submit the present matter to the same three-member panel as CAS OG 24/01.

44. On the same date, the CAS Court Office informed the Parties that the Parties' positions on JAAA's requests will be referred to the Panel once constituted. In a separate letter of the same day, the CAS Court Office also informed the Parties that the issue of the constitution of the Panel will now be referred to the President of the CAS Appeals Arbitration Division, or her Deputy.

45. On the same date, the Respondents submitted their respective Answers in accordance with Article R55 of the CAS Code.

46. Still on the same date, the Parties provided the names of the persons that will be attending the hearing on their respective behalf.

47. On 29 July 2024, the CAS Court Office acknowledged receipt of the Respondents' respective Answers.

48. On the same date, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel to decide the present dispute was constituted as follows:

Sole Arbitrator: Prof. Dr Ulrich Haas, Professor of Law in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany

49. On the same date, the CAS Court Office informed the Parties that the hearing was postponed to 29 July 2024 at 16:30 CEST.

50. On the same date, the CAS Court Office provided the Parties with an Order of Procedure ("OoP") for the Parties' signature. The Appellant, the First Respondent, and Second Respondent submitted their signed OoP on 29 July 2024, 30 July 2024, and 29 July 2024, respectively.

51. Still on the same date, the First Respondent produced the document M/35/23 dated 14 August 2023 upon request of the Sole Arbitrator and following the document production request contained in the Appellant's Statement of Appeal /Appeal Brief.

52. Still on 29 July 2024, a hearing took place by videoconference before the Sole Arbitrator. Besides Dr Björn Hessert (Counsel to the CAS), the following persons attended the hearing:

For the Appellant
- Ms. Nayoka Clunis (the Appellant);
- Mr. Saverio Spera (Counsel for the Appellant);
- Mr. Jacques Blondin (Counsel for the Appellant);

For WA
- Ms. Catherine Pitre (Representative for WA);
- Mr. Nicholas Zbinden (Counsel for WA);

For the IOC
- Dr Antonio Rigozzi (Counsel for the IOC); and
- Mr. Eolos Rigopoulos (Counsel for the IOC).

53. At the outset of the hearing, the Parties confirmed that they had no objection as to the constitution of the Panel. However, the Parties reiterated their divergent positions as to the jurisdiction of the CAS.

54. Furthermore, the Sole Arbitrator at the hearing rejected the Appellant's and JAAA request to admit the latter's submission dated 26 July 2024 as *amicus curiae* brief and JAAA's attendance at the hearing. The Sole Arbitrator advised the Parties that the reasons for such decision would be provided in the final Award.

55. At the end of the hearing the Parties acknowledged that their right to be heard had been fully respected.

V. SUBMISSIONS OF THE PARTIES

56. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In

considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

57. In her Appeal Brief, the Appellant requested as follows:

> *"(a) Upholding the present Appeal.*
> *(b) Setting aside the Appealed Decision.*
> *(c) Replacing the Appealed Decision with an award ordering that the Appellant will participate in the Olympic Games by:*
>
> *i. Either allocating an additional slot to the Athletics competition;*
> *ii. Or replacing Ms Klymets' participation with the Athletes'."*

i) Jurisdiction and Admissibility

58. The Appellant submits that the CAS has jurisdiction to hear the present dispute on the following grounds:

- The Appellant has an interest to participate at the Olympic Games Paris 2024 and has been adversely affected by the Appealed Decision. As a consequence of the Appealed Decision, the Appellant was denied the opportunity to enter into a legal relationship with the IOC (with the Games Participation Agreement, and *ergo*, the clause for arbitration before the CAS). Failing which, the Appellant would have consented to arbitration pursuant to Rule 61(2) of the OC, and grounded the jurisdiction of the CAS upon that provision.

- The Appellant was unable to rely on the jurisdiction of the CAS Ad Hoc Division, as the Appealed Decision was rendered on 8 July 2024, more than ten days prior to the opening ceremony of the Olympic Games Paris 2024.

- The CAS has jurisdiction under Rule 3.1 of the World Athletics Disputes and Disciplinary Proceedings Rules (2019 Edition) (the "**2019 Disputes Rules**"), which provides for a catch-all provision conferring exclusive jurisdiction of the CAS to entertain appeals filed by a range of affected parties, which would include the Appellant (cf. CAS 2021/A/8167, para. 44).

- However, while the 2019 Disputes Rules were revised in 2023 and now constitute two distinct documents, *viz*, the Dispute and Disciplinary Proceedings Rules (the "**2023 Disputes Rules**") and the Disciplinary and Appeal Tribunal Rules (the "**2023 Tribunal Rules**"), the latter still confers the CAS exclusive jurisdiction in Rule 16 contained herein. The 2023 Disputes Rules are not applicable to the present case.

- The World Athletics Constitution (the "**WA Constitution**") provides for Member Federations and Area Associations the possibility to refer to the CAS

any matter against WA "*within 5 days of the date in which the dispute arose*", but JAAA failed to submit a claim to the CAS regarding the dispute arising out of the email dated 8 July 2024 within the applicable time limit. However, the Decision has adversely affected the Appellant's position in a way that is akin to a disciplinary measure, and it would be a denial of justice to confer jurisdiction of the CAS only to JAAA, since the party directly affected in this case is the Appellant (with JAAA's rights only indirectly affected).

- Pursuant to Rule 16 of the 2023 Tribunal Rules, the CAS has exclusive jurisdiction to hear the present matter. Determining otherwise would deprive the Appellant of a means of appeal which is guaranteed to athletes in such situations, and put the Appellant in a position of juridical limbo (in violation of the legal principle of legal certainty) as she has no effective means of access to justice. The CAS is the only forum to which such disputes can be effectively brought and determined (cf. CAS 2020/A/6912, para. 119).

ii) Admissibility of the appeal

59. The Appellant further contends that the requirements under Article R49 of the CAS Code are fulfilled, wherein the present appeal is filed within the time limit, and there is no effective internal remedy which the Appellant could have used for the present appeal (cf. CAS 2021/A/8034, para. 90).

60. The Appellant maintains that the Appealed Decision is an appealable decision under the unambiguous CAS jurisprudence on the same matter.

iii) Standing

61. The Appellant also submits that she has standing to appeal as she is greatly affected by the Appealed Decision (cf. CAS OG 22/007, paras. 90 to 92), and she has self-evident and enormous sporting interest in the present matter.

62. The Appellant further submits that the Respondents in the present matter (including the initial claim against Ms. Klymets and UAA) have standing to be sued, as follows:

- They have some stake in the dispute by being personally obliged by the disputed right at stake or something is sought against the said party(s) (cf. CAS 2022/A/8886, para. 52; CAS 2018/A/5888, paras. 4 to 5). In particular, WA as the party who made the Appealed Decision, which is under appeal, the IOC as the Appellant is requesting admission to the Olympic Games Paris 2024, Ms. Klymets and UAA as parties who are affected by the present appeal.

- Neither the WA Constitution nor the regulations of WA limit which parties may be named as respondents in an appeal.

iv) Applicable Law

63. The Appellant submits that under Article R58 of the CAS Code, the applicable regulation is Article 84(5) of the WA Constitution which refers to the application of the

rules of WA and the subsidiary application of Monegasque law. The Appellant further submits that since the IOC is involved and based in Switzerland, Swiss law can also apply.

v) Merits

64. The Appellant submits that the Appealed Decision is the outcome of excessive formalism on the part of WA:

- Under Swiss jurisprudence, excessive formalism is a particular aspect of the denial of justice prohibited by Article 29(1) of the Swiss Constitution (SFT 142 I 10). Formalism is considered to be excessive when the strict application of the rules is not justified by an interest worthy of protection and unsustainably complicates the realisation of substantive law or restricts access to courts (SFT 130 V 177, consid. 5.4.1; SFT 128 II 139, consid. 2 a; SFT127 I 31).

- Under CAS case law, the strict application of rules should be avoided when it becomes an end in itself (cf. CAS 2019/A/6636, para. 87).

- The circumstances around the Appellant's eligibility to participate at the Olympic Games Paris 2024 is uncontested, including the liberty on the part of WA to rectify the error made by JAAA between 6 July 2024 and 8 July 2024, before JOA could submit the final list to the IOC.

- The decision of WA to allocate the Appellant's slot to Ms. Klymets constituted an application of the rules resolving in an end in itself.

65. The Appellant contends that the administrative oversight by JAAA was not her fault and arose out of a *force majeure* situation:

- Upon realisation that the Appellant had not been included in the list unintentionally, JAAA had immediately informed WA that it was their clerical mistake due to the approaching of Hurricane Beryl.

- JAAA had clarified that the approaching of Hurricane Beryl prevented it from correcting the pre-entries since the said Hurricane caused a general power shortage that affected the whole country.

- The concept of *force majeure* is defined by CAS case law, with elements present in this case (cf. CAS 2021/A/8277):

    - Neither JAAA nor the Appellant could foresee that Hurricane Beryl would have affected Jamaica on the last available day to submit the pre-entries.
    - Hurricane Beryl is an event that occurred beyond the activities of JAAA or the Appellant.
    - Hurricane Beryl caused an objective impediment to JAAA, which was not able to correct the pre-entries due to power shortages.

- Neither JAAA nor the Appellant could do anything to avoid Hurricane Beryl or prevent the damage it caused to the whole island, including power shortages.
- Both JAAA and the Appellant were diligent throughout the entire process, and JAAA was still within its rights when it tried to correct the pre-entries, but it was prevented from doing so by Hurricane Beryl.
- By not submitting the pre-entries at the last second before the expiry of the deadline for pre-entries, JAAA took all reasonable steps to prevent or limit the effects of the external interference, considering that JAAA could not foresee the power shortages caused by Hurricane Beryl.

- The above circumstances justify departing from a strict and unreasonable application of the rules around the pre-entries.

- The *force majeure* situation also excludes the possibility of creating a dangerous precedent for future circumstances, wherein there is no chance for the same chain of events to occur again, on the last day available for the submission of pre-entry for the Olympic Games.

- There is nothing preventing WA or the IOC from accepting the Appellant's participation at the Olympic Games Paris 2024.

66. The Appellant also seeks the production of "*any documents, preparatory and/or explicatory notes, circulars concerning the amendment of the World Athletics Disputes and Disciplinary Proceedings Rules of August 2023*", pursuant to Article R44.3(1) of the CAS Code.

B. WA'S POSITION

67. In its Answer, WA requested the Panel to rule as follows:

> *"I. The CAS does not have jurisdiction over the present appeal, or alternatively the appeal filed by Nayoka Clunis is inadmissible or dismissed;*
>
> *II. The arbitration costs (if any) shall be borne by the CAS legal aid fund."*

i) Jurisdiction and Admissibility

68. WA maintains that the Appellant's reliance on Rule 16(4) of the 2023 Tribunal Rules to claim CAS jurisdiction is wrongly placed:

- Rule 16(4) of the 2023 Tribunal Rules is not an arbitration clause, but rather a provision setting out the relevant deadline and other formalities for an appeal to the CAS.

- Rule 16 of the 2023 Tribunal Rules has nothing to do with the present subject matter, wherein it refers only to "*a decision of the Disciplinary Panel under the Rules*", and the said Rules only pertain to "*any alleged Non-Doping Violations*

over which jurisdiction is conferred on [the Disciplinary and Appeals Tribunal] *by the Integrity Code of Conduct and the Integrity Unit Rules and any Preliminary Proceeding under the Reporting, Investigation and Prosecution Rules – Non-Doping*".

- The Appellant has not identified any basis for her appeal to the CAS, and the CAS has no jurisdiction to hear the present matter.

- The Athlete's allegations of denial of justice are denied, which cannot, in any event, be a basis to create CAS jurisdiction.

69. WA contends that the Appealed Decision is not a "decision" within the meaning of Article R47 of the CAS Code:

- A decision requires an *animus decidendi*, or any intention of a body of the association to decide on a matter. Said Appealed Decision (or email communication) was only meant to provide information and not to decide on any matters (cf. CAS 2008/A/1633, para. 11). Further, there was no request from JAAA in the first place on which WA had to decide. Instead, JAAA only contacted WA to place a call for help.

- The Appealed Decision (or email) had no impact on the Appellant's legal situation, as by the time of JAAA's email dated 6 July 2024, the quota place of the Appellant was already reallocated, and the Appellant could no longer be entered at the Olympic Games Paris 2024.

- As such, the present appeal is also not admissible.

70. Finally, WA also submits that the Appellant did not fulfil her responsibility of including the correct respondents, since she withdrew her appeal against Ms. Klymets and UAA. As such, the Appellant's present request to "replace" Ms. Klymets at the Olympic Games Paris 2024 cannot be granted by the Panel, as it would be impacting the rights of a third party that is no longer party to these proceedings (cf. CAS 2011/A/2654, paras. 16 to 17).

ii) Merits

71. WA – on a subsidiary basis – admits that the matter is unfortunate but maintains that the rules for entry are clear and must be strictly enforced:

- It is unchallenged that the Appellant was not included in the EES, the quota earned by the Appellant was rightly considered unused, and therefore properly reallocated. As a result, JOA did not include the Appellant on its list of entries on 8 July 2024.

- The communications on 19 June 2024 and on 2 July 2024 made it absolutely clear that only the list of athletes submitted by 4 July 2024 would be considered for participation at the Olympic Games Paris 2024.

- It was solely due to the mistake of JAAA (and not the WA) that the Appellant's name was not on that list.

- Unfortunate events pertaining to pre-entry name inclusion are not unprecedented, wherein the CAS has determined previously that a late admission of an athlete could detrimentally affect other athletes who have been properly admitted following the required procedures (cf. CAS OG 20/05, para. 7.14).

- The allegations by JAAA about Hurricane Beryl is wholly unsubstantiated and is contradicted by the evidence on file. The logs of JAAA's activities on the EES show that all entries were made on 1 July 2024 (prior to Hurricane Beryl hitting Jamaica on 3 July 2024), and JAAA was able to log into the system on 3 July and 4 July 2024 (as well as 5, 6, and 7 July 2024). JAAA did, in fact, log into the system and accessed both the "Entries Summary" and "Check Final Entries" on 3 July 2024, and accessed the "Entries Summary" on 4 July 2024. Notwithstanding JAAA's access to the system on 3 and 4 July 2024, it failed to include the Appellant's name. The allegation that Hurricane Beryl prevented JAAA from rectifying the list and including the Appellant is a red herring.

- WA cannot be accused of excessive formalism when the same strict framework is expected and imposed on all its Member Federations. The deadlines are applied strictly in order for equal treatment, in order that the limited quotas are used and reallocated. The qualification systems cannot be disregarded just because a Member Federation made a mistake.

- The non-inclusion of the Appellant in the present case is a matter which the Appellant should take with JAAA, rather than with WA, as JAAA made the mistake which resulted in the reallocation of her quota to the next deserving athlete.

72. WA also maintains that the document production request of the Appellant pertaining to the 2023 Tribunal Rules should not be granted, as the Appellant has not explained the relevance of the said documents, or established that such documents exist.

C. THE IOC'S POSITION

73. In its Answer, the IOC requested the Panel to rule as follows:

> *"i. Declare that it does not have jurisdiction over the Appellant's appeal;*
> *ii. In the alternative to prayer for relief i, dismiss the appeal filed by the Appellant;*
> *iii. Order that the arbitration costs incurred with the present proceedings be borne by the CAS legal aid fund."*

74. The IOC notes that given the withdrawal of the Appellant's appeal against Ms. Klymets and UAA on 27 July 2024, the scope of the present proceedings are limited to point (c).i of the Appellant's prayers for relief, *viz*, that she be allowed to participate in the Olympic Games Paris 2024 by "[…] *allocating an additional slot to the Athletics competition*". The other request filed by the Appellant, i.e. "*replacing Ms Klymets' participation with the Athlete's*" can no longer be granted after the partial withdrawal

of the Appellant's appeal.

i) Jurisdiction and Admissibility

75. The IOC challenges the jurisdiction of the CAS on the following grounds:

- The Appellant has not identified a proper legal basis to establish the jurisdiction of the CAS in the present matter. She has conceded in any event that the CAS does not have jurisdiction on the basis of Rule 61(2) OC.
- The 2019 Disputes Rules do not apply as they were replaced by the 2023 version of the Disputes Rules, as well as the 2023 Tribunal Rules.
- The Appellant's request for the documents related to the amendment of the 2023 version of the 2023 Disputes Rules proves that her arguments on jurisdiction are weak.
- In any event, Rule 1.2.4 of the 2019 Disputes Rules expressly excludes from its scope "*any protests made prior to a competition concerning the status of an athlete to participate in the competition*". Such disputes must be submitted to a different body within WA, which the Appellant failed to consult.
- The 2023 Tribunal Rules are also not applicable in the present case as they apply only to "Appeals from Decisions of the Disciplinary Panel" and the Appellant does not allege that there was any decision by such organ, or that the present dispute pertains to a disciplinary matter.
- The Appellant already conceded that the jurisdiction of the CAS cannot be established under Article 84 of the WA Constitution, which only allows JAAA or JOA to file a claim with the CAS Ordinary Division within five days of the dispute arising.

ii) Applicable Law

76. The IOC – on a subsidiary basis – agrees that the rules of law applicable to the merits of the present proceedings are governed by Article R58 of the CAS Code. Consequently, the IOC submits that the present dispute must be decided primarily according to the WA Constitution, rules and regulations of WA, and on a subsidiary basis, Monegasque law – pursuant to Rule 84(5) of the WA Constitution.

77. The IOC objects to the Appellant's position that Swiss law can apply subsidiarily on the basis of the involvement of the IOC, as the involvement of a Swiss respondent cannot affect the applicable rules of law, given the clear choice of law in the WA Constitution in favour of Monegasque law.

iii) Merits

78. The IOC – on a subsidiary basis – contends that the Appealed Decision does not "constitute excessive formalism" as argued by the Appellant:

- The Appellant based her arguments on excessive formalism under Swiss law, which is inapplicable, when the applicable law in the present case is Monegasque law.

- The fact that WA decided to allocate the quota spot to Ms. Klymets before the issue involved the IOC cannot reasonably "*constitute an application of the rules resolving in an end in itself*".

- Further, the fact that WA applied the WA QS within the applicable deadlines faster than the Appellant would have preferred has nothing to do with excessive formalism, especially since the Appellant does not allege that WA would have misapplied any of the applicable rules. The Appellant merely contends that WA acted before JAAA realised its mistake. The Appellant has failed to address the fact that once her spot had been reallocated, there was nothing that WA could have done to change the situation.

- There is ample CAS case law confirming the unfortunate reality that athletes sometimes have to suffer the consequences of the mistakes made by their national federations, and there is nothing wrong for international federations (in this context) to rely on national federations and their submissions. WA cannot be held responsible for the mistakes of the national federations (cf. CAS OG 20/05, para. 7.14; CAS 2015/A/4319, para. 73).

79. The IOC submits that JAAA's mistake was due to its negligence and not to a case of *force majeure*:

- CAS case law has consistently held that a mistake of a national federation in the context of the registration of its athletes for the Olympic Games does not justify making exceptions to the qualification rules, irrespective of how genuine or how significantly the mistake has impacted on the athlete's situation.

- It is clear from the circumstances that JAAA's mistake was a result of its negligence. JAAA had the ability to correct or recheck the pre-entry list for the EES and was not precluded from doing so by Hurricane Beryl. JAAA – for whatever reason – had not included the Appellant's name in list in the first place (which the Appellant does not allege was caused by *force majeure*). Further, JAAA confirmed that it only forgot to include one name in the list of pre-entries on the EES. This can hardly be a consequence of Hurricane Beryl. Instead, the hurricane had nothing to do with the submission of the pre-entries.

- There is, in any event, no evidence on the record to show the effect of Hurricane Beryl on the communication lines that allegedly prevented JAAA from "rechecking" the list for pre-entries on EES prior to the expiry of the deadline on 4 July 2024.

VI. PRELIMINARY ISSUES

80. There are two preliminary issues raised, namely:

i. A request from JAAA to be included as Interested Party, and for JAAA's request for arbitration filed in procedure *CAS 2024/O/10764* to be included as *amicus curiae* brief in the present procedure; and

ii. A request for document production by the Appellant for "*any documents, preparatory and/or explicatory notes, circulars concerning the amendment of the World Athletics Disputes and Disciplinary Proceedings Rules of August 2023*", pursuant to Article R44.3(1) of the CAS Code.

A. Requests Pertaining to JAAA

81. On 26 July 2024, a Request for Arbitration was filed by JAAA in *CAS 2024/O/10764*. Since the CAS Code does not provide for the status as "interested party", JAAA and the Appellant requested that JAAA's submissions filed on 26 July 2024 be included as an *amicus curiae*. Both WA and the IOC object to such request. The Respondents contend that an *amicus curiae* is typically envisaged for organisations which are not directly affected by the prayers for relief but should be allowed to assist the arbitrators by offering expertise or insight that has a bearing on the issues at stake. As JAAA is the party who made the mistake of not including the Appellant in the pre-entry list, which forms the core of the present dispute, the Respondents do not see the relevance of JAAA's inclusion in these proceedings as an *amicus curiae*. The Respondents further submit that the purpose of an *amicus curiae* is not to allow a third party to circumvent the fact that they have failed to meet the deadline for appeal and/or lack standing to appeal or to intervene in the proceedings. Finally, the Respondents are of the view that under no circumstances the JAAA should be allowed to participate in the hearing.

82. According to Article R41.4(6) of the CAS Code, the Panel "*may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix.*" It is, thus, within the Sole Arbitrator's discretion to grant the status of an *amicus curiae* to a third person. Literally translated "*amicus curiae*" means "*friend of the court*". The term *amicus curiae* or *amicus* brief describes an instrument allowing someone who is not a party to a case to voluntarily offer special perspectives, arguments or expertise on a dispute, usually in the form of a written (*amicus curiae*) brief or submission, in order to assist the court in the matter before it. The Sole Arbitrator finds that in order to assist a Panel by providing an additional perspective or expertise it is not necessary for this third person to be covered by the same arbitration agreement. However, admitting a third person as an *amicus* only makes sense where it serves the purpose of the arbitration proceedings in question. This is, however, not the case here.

83. In JAAA's submissions there is nothing to assist the Panel beyond of what has already been submitted by the Parties. The latter have presented all relevant facts. Any further relevant evidence that JAAA wishes to submit can be included in these proceedings via the Appellant. The Sole Arbitrator also sees no reason to include JAAA in these proceedings for any alleged specific expertise. Finally, the Sole Arbitrator notes that

the possibility of filing an *amicus curiae* brief shall not be to allow a third party to circumvent the deadlines for either filing an appeal or requesting its intervention in these proceedings. Thus, the Sole Arbitrator dismisses JAAA's request to participate in these proceedings as a "friend of the court".

B. Request for Document Production

84. The Appellant seeks the production of "*any documents, preparatory and/or explicatory notes, circulars concerning the amendment of the World Athletics Disputes and Disciplinary Proceedings Rules of August 2023*", as there were no such explanatory notes or circulars found online in order to explain the amendments from the 2019 Disputes Rules to the 2023 Disputes Rules. In particular, there is a specific circular titled, "M35/2" (the "**Circular**"), concerning the above-stipulated amendments which is not publicly available. The Appellant alleges that the Circular is relevant to the present proceedings as it concerns the revision of the 2019 Disputes Rules to the 2023 Disputes Rules, upon which the Appellant seeks to ground CAS jurisdiction on the present matter, *viz*, the removal of Rule 3.1 in the 2019 Disputes Rules.

85. WA, on the other hand, maintains that the document production request of the Appellant pertaining to the 2023 Tribunal Rules should not be granted, as the Appellant has not explained the relevance of the said documents, or established that such documents exist, and is just mounting on a "fishing expedition". At the hearing, WA confirmed that the requested Circular is only available to Member Federations and would otherwise remain confidential and maintains that – with the revocation of the 2019 Disputes Rules – the request for the Circular on the amendment remains irrelevant.

86. The Sole Arbitrator, at the hearing, found that the request for the Circular remains relevant and sought the Parties cooperation to produce the same during the hearing.

87. During the hearing, WA produced the Circular and all Parties were granted the opportunity to consider and make submissions on its content.

VII. JURISDICTION

88. According to Article R47(1) of the CAS Code, the Panel has jurisdiction to hear:

> "[a]*n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body*".

89. Based on this provision, the Sole Arbitrator has jurisdiction only "*if the statutes or regulations of the said body so provide*" or "*if the parties have concluded a specific arbitration agreement*".

90. Accordingly, the Sole Arbitrator will first have to assess whether CAS has jurisdiction to hear the present dispute by the Appellant against both WA and the IOC. As the seat of the present arbitration is – indisputably – Switzerland pursuant to Article R28 of the

CAS Code, the applicable *lex arbitri* or law of the arbitration is Swiss law. More specifically, the Swiss Private International Law Act ("PILA"), since at the time that the alleged arbitration agreement was concluded, at least one of the Parties thereto did not have its domicile, its habitual residence or its seat in Switzerland (Art. 176(1) of the PILA).

91. Based on Article 186(1) PILA and Article R55(4) of the CAS Code, the Sole Arbitrator has the competence to decide on his own jurisdiction (so-called *Kompetenz-Kompetenz*).

A. Arbitration Agreement between the Appellant and WA

i) Parties' submissions on the arbitration agreement *in casu*

92. In relation to WA, the Appellant bases the CAS jurisdiction on the 2019 Disputes Rules (which are amended to 2023 Disputes Rules), the 2023 Tribunal Rules, and the WA Constitution. WA, in turn, has objected to the jurisdiction of the CAS. According to WA the 2019 Disputes Rules, the 2023 Disputes Rules, the 2023 Tribunal Rules, and Article 84 of the WA Constitution are not applicable to the present proceedings. More particularly, WA submits that the 2019 Disputes Rules are no longer in force (while its 2023 Tribunal Rules have no arbitration clause in favour of CAS), and the 2023 Tribunal Rules and the WA Constitution do not provide an arbitration clause in favour of CAS applicable to the dispute at stake or the Appellant.

ii) Decision of the Sole Arbitrator

93. Article 84 of the WA Constitution reads – in its pertinent parts – as follows:

> *"84.2 In the event there is a dispute or difference between:*
> *a. a Member Federation or Member Federations and World Athletics; or*
> *b. an Area Association or Area Associations and World Athletics;*
>
> *that cannot be resolved as set out in Article 84.1, the matter will be submitted to arbitration before the CAS (Ordinary Arbitration Division), to the exclusion of any other court or forum, in accordance with Article 84.3, below. The CAS will resolve the dispute definitively in accordance with the CAS Code of Sports–related Arbitration.*
>
> *84.3 Any dispute submitted to the CAS under Article 84.2 must be filed either within five (5) days of the date of the dispute first arising or within five (5) days of any failure to resolve the dispute in accordance with Article 84.1(whichever the case may be)."*

94. It follows from the above provision that there is an arbitration clause in favor of the CAS enshrined in Article 84.2 of the WA Constitution. Article 84.3 of the WA Constitution – on the contrary – is not a self-standing arbitration clause. Instead, the provision only deals with the time limits within which an appeal according to Article 84.2 of the WA Constitution must be filed. The scope *ratione personae* of the arbitration clause in Article 84.2 of the WA Constitution is limited to disputes between Member Federations or Area Associations, on the one hand, and WA, on the other hand. At the hearing, the Appellant somewhat conceded to the inapplicability of Article 84 of the WA Constitution in the present case. While the Appellant claims that she is a member of WA, the WA Constitution does not mandate arbitration before the CAS for

its indirect members, such as athletes. As such, Article 84 of the WA Constitution does not confer jurisdiction upon the CAS to hear the present dispute between the Appellant and WA. Thus, the present dispute involving the Appellant is not covered by that clause.

95. Article 3.1 of the 2019 Disputes Rules read as follows:

> *"This Rule 3 relates to any legal dispute of any kind whatsoever arising between World Athletics on the one hand and any Member, Area Association, athlete, athlete support personnel or other person who is subject to the Constitution and/or any of the Rules or Regulations on the other hand, in relation to the Constitution and/or any Rule or Regulation and/or any World Athletics decision or act or omission, howsoever arising, that is not covered by the dispute resolution provisions of the Constitution or any Rules or Regulations (each, a "Dispute"). Subject to, and in accordance with Article 84 of the Constitution, a Dispute shall be submitted to arbitration before the CAS (Ordinary Arbitration Division or Appeal Arbitration Division, depending on the circumstances of the case), to the exclusion of any other court or forum. The CAS will hear and determine the Dispute definitively in accordance with relevant provisions of the CAS Code of Sports-Related Arbitration. The law governing the Dispute will be the Constitution and Rules and Regulations, with the laws of Monaco applying subsidiarily. Unless the parties agree otherwise, the arbitration proceedings before the CAS will be conducted in the English language before a Panel consisting of three arbitrators. Pending determination of the Dispute by the CAS, any provision of the Constitution or Rule or Regulation or decision or act or omission under challenge will remain in full force and effect unless the CAS orders otherwise. The ultimate decision of the CAS on the merits of the Dispute will be final and binding on all parties, and all parties waive irrevocably any rights they might otherwise have to any form of appeal, review or other challenge in respect of that decision, except as set out in Chapter 12 of Switzerland's Federal Code on Private International Law."*

96. The above arbitration clause in favor of the CAS covers "[d]*isputes between World Athletics and any Member, Area Association, athlete, athlete support personnel or other person(s)*" – save for disputes which are excluded therein under Rule 1.2 of the said Rules. However, the 2019 Disputes Rules have been revised to the 2023 Disputes Rules effective as of 14 August 2023, and thus are no longer in force. Since the present dispute arose subsequent of the change of the rules, the 2019 Dispute Rules can no longer be applied to the present matter *ratione temporis*. The 2023 Dispute Rules, however, no longer contain any arbitration clause in favour of the CAS.

97. The 2023 Tribunal Rules contain an arbitration clause in favour of the CAS, but only for appeals against a decision of the WA Disciplinary Panel (cf. Article 16.2). According to the 2023 Tribunal Rules, the WA Disciplinary Panel is competent to hear the following types of disputes:

> *"The … Disciplinary Panel shall have jurisdiction to hear and decide any alleged Non-Doping Violations over which jurisdiction is conferred on it by the Integrity Code of Conduct and the Integrity Unit Rules and any Preliminary Proceeding under the Reporting, Investigation and Prosecution Rules – Non-Doping."*

98. It follows from the above that the arbitration cause contained in the 2023 Dispute Rules does not cover the case at hand. The clause is limited – *ratione materiae* – to appeals from decisions of the Disciplinary Panel pertaining to disciplinary matters of a non-doping nature. This is clearly not the case here. Neither has the Disciplinary Panel decided in the present case as a first instance nor is the present eligibility matter of a disciplinary nature. Without going into details on whether and why the Appellant was

required to refer the dispute to the Disciplinary Panel, the Sole Arbitrator notes that Rule 16 of the 2023 Tribunal Rules does not permit the Appellant to bring her present dispute – which did not arise from the Disciplinary Panel – to the CAS. The Appealed Decision is a decision by the Director of Competitions and Event Departments of WA, and does not pertain to any disciplinary matter arising out of the 2023 Tribunal Rules. As such, the Sole Arbitrator finds that there is no basis for the Appellant to raise the 2023 Tribunal Rules as grounds for CAS jurisdiction. The above result is not contradicted by the documents produced by WA in these proceedings following the Appellant's request and the Sole Arbitrator's order of document production. The Circular is in line with the above interpretation of the new rules coming into force in 2023.

99. The Sole Arbitrator acknowledges, on a side note, that Rule 61(2) OC does stipulate that all disputes "*on the occasion of, or in connection with, the Olympic Games*" are to be referred exclusively to the CAS, providing – arguably – for jurisdiction *ratione materiae* for all "Olympic Games"-related dispute to be referred to the CAS. However, Rule 61(2) of the Olympic Charter is found in the governing document of the IOC, providing no agreement – still – between the Appellant and WA and, thereby, not conferring jurisdiction to the CAS to hear a dispute between the Appellant and WA.

B. Arbitration Agreement between the Appellant and the IOC

i) Parties' submissions on the arbitration agreement *in casu*

100. With regards to whether the Appellant and the IOC have an arbitration agreement in favour of the CAS, the Appellant raises the preliminary point that the IOC was brought in as Respondent in the proceedings only because the IOC has a stake in the outcome of the said dispute, *viz*, the inclusion of the Appellant at the Olympic Games Paris 2024.

101. In her submissions, the Appellant raised that – due to JAAA's fault – she has not reached the stage of selection where she would have been invited to sign the Games Participation Agreement for the Olympic Games Paris 2024, which would have included an arbitration clause in favour of CAS as follows:

> *"**7. ARBITRATION***
>
> ***The Court of Arbitration for Sport is exclusively competent to finally settle all disputes arising in connection with my participation in the Games***
>
> *Unless otherwise agreed in writing by the IOC, any dispute or claim arising in connection with my participation at the Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, Paris 2024 and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport ("CAS") for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, and the Code of Sports-related Arbitration.*
>
> *The seat of arbitration shall be in Lausanne, Switzerland and the language of the proceedings English. The decisions of the CAS shall be final, binding and non-appealable, subject to the action to set aside to the Swiss Federal Tribunal.*

I hereby waive my right to bring any claim, arbitration or litigation, or seek any other form of relief, including request for provisional measures, in any other court or tribunal, unless otherwise agreed in writing by the IOC."

102. The Appellant, nevertheless, submitted that save for the inadvertent non-inclusion of her name in the pre-entries and admission into the Olympic Games Paris 2024, she would have signed the Games Participation Agreement which would have established the jurisdiction of the CAS, on the basis of Rule 61(2) of the OC. As such, the Appellant had been denied the opportunity to submit to CAS jurisdiction by the Games Participation Agreement.

103. The IOC, in turn, maintains that there is no CAS jurisdiction, and the denial of access to justice is, in itself, insufficient as a basis to "create" CAS jurisdiction. Further, the IOC submits that under Swiss law the standard to assert jurisdiction is high, and is only established once there is an arbitration agreement that fulfils both the substantive and formal validity requirements.

ii) Decision of the Sole Arbitrator

104. The Sole Arbitrator agrees with the IOC that under Swiss law an arbitration agreement shall not be accepted lightly. The Sole Arbitrator is minded by the jurisprudence of the Swiss Federal Tribunal ("SFT") according to which a rather strict standard applies when it comes to the consent to arbitrate. According thereto, the parties' intention to resort to arbitration must be clear and unequivocal as such consent is a waiver of the right to involve otherwise competent state courts. The SFT has expressed this principle as follows:[1]

"Unter einer Schiedsvereinbarung ist eine Übereinkunft zu verstehen, mit der sich zwei oder mehrere bestimmte oder bestimmbare Parteien einigen, eine oder mehrere, bestehende oder künftige Streitigkeiten verbindlich unter Ausschluss der ursprünglichen staatlichen Gerichtsbarkeit einem Schiedsgericht nach Massgabe einer unmittelbar oder mittelbar bestimmten rechtlichen Ordnung zu unterstellen […] Entscheidend ist, dass der Wille der Parteien zum Ausdruck kommt, über bestimmte Streitigkeiten ein Schiedsgericht, d.h. ein nichtstaatliches Gericht, entscheiden zu lassen […]

Die Auslegung einer Schiedsvereinbarung folgt den für die Auslegung privater Willenserklärungen allgemein geltenden Grundsätzen. Massgebend ist danach in erster Linie der übereinstimmende tatsächliche Wille der Parteien … Diese subjektive Auslegung beruht auf Beweiswürdigung, die der bundesgerichtlichen Überprüfung grundsätzlich entzogen ist … Steht bezüglich der Schiedsvereinbarung kein tatsächlich übereinstimmender Wille der Parteien fest, so ist diese nach dem Vertrauensprinzip auszulegen, d.h. der mutmassliche Wille ist so zu ermitteln, wie er vom jeweiligen Erklärungsempfänger nach Treu und Glauben verstanden werden durfte und musste .. Bei der Auslegung einer Schiedsvereinbarung ist deren Rechtsnatur zu berücksichtigen; insbesondere ist zu beachten, dass mit dem Verzicht auf ein staatliches Gericht die Rechtsmittelwege stark eingeschränkt werden. Ein solcher Verzichtswille kann nach bundesgerichtlicher Rechtsprechung nicht leichthin angenommen werden, weshalb im Zweifelsfall eine restriktive Auslegung geboten ist …"

Free translation: An arbitration agreement is to be understood as an agreement by which two or more specific or specifiable parties agree to submit one or more existing or future disputes to an

[1] SFT 4A_124/2020, consid. 3.1.2.

> arbitration tribunal in accordance with a directly or indirectly specified legal system, to the exclusion of the original state jurisdiction. What is crucial is that the will of the parties is expressed to have a court of arbitration, i.e. a non-state court, decide on certain disputes.
>
> The interpretation of an arbitration agreement follows the principles generally applicable to the interpretation of private declarations of intent. Accordingly, the decisive factor is primarily the parties' actual concordant will [...] This subjective interpretation is based on the consideration of evidence, which is generally not subject to review by the Federal Supreme Court [...] If the parties' actual concordant will regarding the arbitration agreement is not established, then it must be interpreted according to the principle of good faith, i.e. the presumed will must be determined as it could and should have been understood in good faith by the respective recipient of the declaration [...] When interpreting an arbitration agreement, its legal nature must be taken into account; in particular, it must be noted that the avenues for appeal are severely restricted by the waiver of a state court. According to the case law of the Federal Supreme Court, such a waiver cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt [...]

105. Thus, a substantively valid arbitration agreement in favour of CAS requires a mutual intent between the Parties to refer their dispute to the CAS to the exclusion of state courts. Such mutual intent may be expressed in an agreement or by submitting to the rules and regulations of a sports organisation that contain an arbitration clause. Furthermore, Article 178(4) PILA provides that the arbitration clause can also be contained in a unilateral transaction or in articles of association.

106. Rule 61(2) of the OC sets out an arbitration clause for "*any dispute[s] arising on the occasion of, or in connection with, the Olympic Games*" to be submitted exclusively to the CAS. The provision covers – *ratione personae* – all stakeholders that are bound to the OC either by membership or by submitting contractually to the rules of the IOC. In the present case, the Appellant is neither a member of the IOC nor has she submitted contractually to the rules of the IOC. It is true that the Appellant was deprived from doing so (with no fault of her own), because JAAA failed to enter her in the EAA. However, this cannot substitute for a valid arbitration agreement.

107. The Sole Arbitrator also finds that Rule 61(2) of the OC cannot be construed as a contract "offer" by the OC to any third party that wishes to litigate with the IOC in relation to the Olympic Games. First of all – absent any clear indications to the contrary – statutes of a Swiss association cannot be construed as awarding rights to non-members akin to Article 112(1) of the Swiss Code of Obligations ("SCO"). In principle, the rights and duties arising from the internal relationship between the association and its members do not extend to third parties (BK-ZGB/RIEMER, 2n ed. 2023, Art. 70 no. 134). Nothing in the OC points to the IOC's willingness to be bound with respect to its dispute resolution mechanism in Rule 61(2) of the OC to any third party. Furthermore, the Sole Arbitrator notes that the rules and regulations of an association are to be interpreted – according to the jurisprudence of the SFT – applying the same methodology as for laws. In a decision dated 14 February 2022, the SFT stated as follows (4A_406/2021, consid. 4.3.1 seq.):

> *"Le Tribunal fédéral a interprété à l'égal d'une loi les statuts d'associations sportives majeures, comme l'UEFA, la FIFA, en particulier leurs clauses relatives à des questions de compétence … Il en a fait de même pour découvrir le sens de règles d'un niveau inférieur aux statuts édictées par une association sportive de cette importance […]*

> *Toute interprétation débute par la lettre de la loi (interprétation littérale), mais celle-ci n'est pas déterminante: encore faut-il qu'elle restitue la véritable portée de la norme, qui découle également de sa relation avec d'autres dispositions légales et de son contexte (interprétation systématique), du but poursuivi, singulièrement de l'intérêt protégé (interprétation téléologique), ainsi que de la volonté du législateur telle qu'elle résulte notamment des travaux préparatoires (interprétation historique).”*
>
> **Free translation** : The Swiss Federal Supreme Court has interpreted the statutes of major sports associations such as UEFA and FIFA in the same way as it would a statute, in particular their clauses relating to questions of jurisdiction [...] It has done the same to discover the meaning of rules enacted by a major sports association at a lower level than the statutes [...]
>
> All interpretations begin with the letter of the law (literal interpretation), but this is not the decisive factor: it is still necessary to restore the true scope of the rule, which also derives from its relationship with other legal provisions and its context (systematic interpretation), the aim pursued, in particular the interest protected (teleological interpretation), as well as the will of the legislator as it results in particular from the preparatory work (historical interpretation).

108. Nothing has been submitted by the Parties in the case at hand concerning the will of the legislator. Similar to the literal interpretation also a systematic interpretation points against interpreting Rule 61(2) of the OC as awarding third parties the right to litigate against the IOC before the CAS. If one were to follow this approach, all persons, including sports bodies and individuals at the national level, would have access to bring a claim against the IOC before the CAS. It is not, however, in the objective interest of the IOC to extend the scope of application of its statutes to an unknown multitude of third parties around the world and in this way to enter into innumerable legal relationships with an unmanageable number of persons. Thus, the better arguments speak in favour of applying Rule 61(2) of the OC only to those instances, where the parties mutually and unequivocally have expressed their willingness to be bound *vis-à-vis* each other either by entering into a membership relationship or by contractually subordinating their legal relationship in full or in part to the OC. Only this reading fosters legal certainty by ensuring that an agreement exists between the parties (jurisdiction *ratione personae*) covering the dispute at stake (jurisdiction *ratione materiae*).

C. Conclusion

109. This is a very unfortunate case. A great injustice has been committed *vis-à-vis* the Appellant, a world-class, Olympic-level athlete who had qualified for the Olympic Games Paris 2024. Due to JAAA’s mistake the Appellant was deprived of a life-time experience, i.e. to participate in the pinnacle of competitions in her sport to which she was eligible, i.e. the Olympic Games Paris 2024. This wrongdoing was difficult to remedy, because she was caught in an unfortunate legal position wherein she has no legal proximity to both WA and the IOC for her to appeal the case to the CAS and where she was not yet invited to sign the Games Participation Agreement (containing the CAS arbitration clause). The entity having caused these problems, the JAAA, only took belated and inefficient steps to remedy the damage caused to the Appellant. Be it as it may, there is no provision comparable to Article 3 of the PILA providing for default jurisdiction to the CAS. Article 3 of the PILA reads as follows:

> *"Where this Act does not provide for jurisdiction in Switzerland and proceedings abroad are impossible or cannot reasonably be required, the Swiss judicial or administrative authorities at the place with which the case has a sufficient connection have jurisdiction."*

110. Thus, the hands of the Sole Arbitrator are bound and he cannot do otherwise than to not entertain the appeal of the Appellant, because CAS has no jurisdiction to hear the present dispute between the Appellant and WA, or between the Appellant and the IOC. As such, the Sole Arbitrator is precluded from making any further determinations on the admissibility or the merits of the case.

VIII. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has no jurisdiction to entertain the appeal filed on 25 July 2024 by Nayoka Clunis against the decision rendered on 8 July 2024 by World Athletics.

2. (…).

3. (…).

4. All other motions or prayers for relief are dismissed.

Seat of the arbitration: Lausanne, Switzerland
Date of the operative part: 31 July 2024
Date: 26 February 2025

THE COURT OF ARBITRATION FOR SPORT

Ulrich Haas
Sole Arbitrator