

**AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal**

Case No. 01-19-0002-2206

In the Matter of the Arbitration between

YIANNI DIAKOMIHALIS, Claimant

and

UNITED STATES OF AMERICA WRESTLING ASSOCIATION d/b/a USA
WRESTLING ASSOCIATION, INC. Respondent

and

ZAIN RETHERFORD, Affected Athlete.

AWARD

**RESPONDENT AND AFFECTED ATHLETE JOINT MOTION TO DISMISS
ARBITRATION DEMAND FOR LACK OF JURISDICTION**

I, THE UNDERSIGNED ARBITRATOR, having been designated by the American Arbitration Association ("AAA"), and in accordance with the Ted Stevens Olympic and Amateur Sports Act ("ASA"), 36 U.S.C. §220505 et seq., and Section 9 of the United States Olympic and Paralympic Committee ("USOPC") Bylaws, having been duly sworn, and having fully considered the allegations in Claimant's Demand for Arbitration, the Motion to Dismiss Demand for Arbitration for Lack of Jurisdiction jointly submitted by the Respondent and Affected Athlete, and the parties' respective briefs, exhibits, cited AAA and Court of Arbitration for Sport awards, and arguments during a July 30, 2019 telephonic hearing, does hereby, AWARD, as follows:

THE PARTIES

Claimant Yianni Diakomihalis is a world-class wrestler who competes in the 65kg classification of Men's Freestyle Wrestling. He is represented by Howard L. Jacobs and Katy

Freeman, Law Offices of Howard L. Jacobs, Westlake Village, California as well as Craig Benedict, Cazenovia, NY.

Respondent United States of America Wrestling Association d/b/a USA Wrestling Association, Inc. (“USA Wrestling”) is the National Governing Body (“NGB”) for the sport of wrestling in the United States, which is recognized by the USOC and United World Wrestling (“UWW”). It is represented by Stephen A. Hess, Sherman & Howard, LLC, Colorado Springs, Colorado.

Affected Athlete Zain Retherford is a world-class wrestler who competes in the 65kg classification of Men’s Freestyle Wrestling. He is represented by Steven J. Thompson, Nixon Peabody, LLC, Chicago, IL.

PROCEDURAL BACKGROUND

On July 12, 2019, Claimant filed a “Demand for Arbitration” based on his June 29, 2019 Section 9 Complaint asserting that USA Wrestling is denying him the opportunity to participate in the UWW’s 2019 Senior World Championships as a result of its refereeing delegate’s improper review of the scoring in the second match of his best of three match competition with Mr. Retherford during the Final X World Team Trials for the 65kg classification at Rutgers University on June 8, 2019.

He requests the following relief:

As a primary request, as a result of the re-scoring that was outside the authority of the referee to make, [that] Claimant be declared the winner of match 2 of the Final X World Team Trials and the contest be permitted to proceed to match 3 to determine the Final X World Team Trials champion at 65 kilograms

As a second alternative request, and only if the primary request is denied, declare the result of match 2 of the Final X World Team Trials a nullity; order Mr. Diakomihalis and Mr. Retherford to re-wrestle match 2 of the Final X match; and if Mr. Diakomihalis wins the re-match, then Mr. Diakomihalis and Mr. Retherford be ordered to wrestle a match 3 of the Final X match to determine the 2019 World Championships team member in the men’s 65 kg classification.

Claimant identified Mr. Retherford as the only Affected Athlete.

On July 25, 2019, a telephonic preliminary hearing was held in which all of the foregoing counsel for the parties participated. Pursuant to their request, the Arbitrator permitted USA Wrestling and Mr. Retherford to file a motion to dismiss this arbitration for lack of jurisdiction pursuant to AAA Commercial Rule R-33, established a briefing schedule, and set a hearing date for oral arguments regarding this motion.

On July 30, 2019, a telephonic hearing of approximately 75 minutes in duration was held during which Messrs. Hess, Thompson, and Jacobs argued on behalf of their respective clients regarding the motion. Ms. Freeman and Mr. Benedict also participated in the hearing. The Arbitrator agreed to render his decision regarding this motion in a written reasoned award by August 4, 2019, so that Mr. Retherford would know it before flying to Lima, Peru on August 5, 2019 to participate in the 2019 Pan-American Games wrestling competition. If the Arbitrator denies the motion to dismiss this arbitration proceeding, the Arbitrator and counsel agreed that an evidentiary hearing by videoconference regarding the merits of Mr. Diakomihalis' Section 9 claims would be held on August 8, 2019 at 8am PT/9am MT/10am CT/11am ET.

MATERIAL FACTS ASSUMED AS TRUE FOR PURPOSES OF THIS MOTION

For the sole purpose of adjudicating the joint motion by USA Wrestling and Mr. Retherford to dismiss this arbitration proceeding for lack of jurisdiction and without making any specific findings of fact, the Arbitrator assumes that the following facts alleged by Mr. Diakomihalis in his demand for Section 9 arbitration are true:

Mr. Diakomihalis and Mr. Retherford are world-class American wrestlers who compete in the 65kg classification of Men's Freestyle wrestling. They both aspire to represent the United States in this weight classification at the 2019 Senior World Championships to be contested in Nur-Sultan, Kazakhstan from September 14-22, 2019.

USA Wrestling selects its team members who will compete in the 2019 Senior World Championships World Team through a series of trial competitions among individual wrestlers, culminating in the Final X World Team Trials, which are described in USA Wrestling's two published selection procedures: (a) "2019 General World Team Trials Procedures;" and (b) "2019 World Team Trials Qualifications & Procedures – Men's Freestyle."

In the Final X World Team Trials match to determine USA Wrestling's 2019 Senior World Championships 65kg team member, Mr. Diakomihalis faced Mr. Retherford in a best-of-three match competition.

The Final X World Team Trials were conducted by USA Wrestling and subject to the UWW's International Wrestling Rules ("UWW Rules") as well as the USOPC's Bylaws.

Mr. Retherford won the first match against Mr. Diakomihalis.

When time in the second match expired, the official scoreboard showed Mr. Diakomihalis as the winner over Mr. Retherford by a score of 8-6.

In the final seconds before time expired in the second match, Mr. Retherford's coach threw a foam brick onto the mat to indicate that Mr. Retherford may want to challenge the referee's prior scoring, which Mr. Retherford affirmed that he wanted to do.

In conjunction with referee Sam Julian, judge Robyn Vanhouten and mat chair Zach Erret (collectively the "refereeing body" pursuant to Chapter 4, Article 16 of UWW's Rules), "refereeing delegate" Richard Tucci conferred and conducted an extensive review of the official video regarding Mr. Retherford's challenge to the referee's scoring.

The refereeing delegate did not change any of the referee's scoring related to the five seconds of wrestling immediately prior to the initiation of Mr. Retherford's challenge by his coach's throwing of the foam brick onto the mat.

At the request of Mr. Retherford, refereeing delegate Richard Tucci extended his review of the official video beyond the five seconds of wrestling immediately prior to his coach's scoring challenge to at least approximately the last 45 seconds of the match (at which point Mr. Diakomihalis led 6-4). His review encompassed referee scoring that occurred with approximately 43 seconds left in the match, at which time each wrestler was awarded two points. This scoring was posted on the official scoreboard with approximately 35 seconds remaining in the match and showed that Mr. Diakomihalis had an 8-6 lead over Mr. Retherford.

After reviewing the 8-6 scoring posted on the official scoreboard with 35 seconds remaining in the match, refereeing delegate Richard Tucci changed the scoring to a 6-6 tie at the 35-second mark. Because neither wrestler scored any points in the last 35 seconds of the match, he determined the final score to be a 6-6 tie, and Mr. Retherford won the match based on criteria in accordance with UWW's Rules.

After refereeing delegate Richard Tucci announced his re-scoring decision and determination that the wrestlers' second match ended in a 6-6 tie, Mr. Diakomihalis' coach immediately threw his challenge brick on the mat to protest his review of the referee's scoring beyond the five seconds of wrestling immediately prior to the initiation of Mr. Retherford's coach's challenge. Mr. Diakomihalis' challenge was summarily rejected without being considered by refereeing delegate Richard Tucci or the refereeing body.

Mr. Diakomihalis was ordered to return to the center of the mat, and Mr. Retherford was declared the winner of the second match on the mat.

Because he won the first match as well as the second match because of refereeing delegate Richard Tucci's re-scoring decision and the UWW Rules' tie-breaking criteria, USA Wrestling declared Mr. Retherford the winner of the Final X World Team Trials 65kg classification and selected him as a member of its team to compete in the 2019 Senior World Championships.

**APPLICABLE 2019 GENERAL WORLD TEAM TRIALS PROCEDURES,
UWW RULES, AND USOPC BYLAWS**

The 2019 General World Team Trials Procedures provide:

I. Eligibility

. . . .

4. *The Competition will be contested by UWW rules except as modified by this document.*

VI. World Team Trials Officiating, Pairing, and Protest Procedures

1. *All bouts shall be officiated as prescribed by UWW rules, by an officiating team comprised of a referee, judge, and mat chairman.*

Their decision on all technical aspects of the bout shall be final and shall not be subject to protest.

a. Matside video will be made available. Matside review will be done in accordance with UWW rules. Upon review of action, the decision of the officiating team is final.

b. The matside computer and video shall be accepted as the official result of the bout, unless the officiating team determines that an error has been made.

USA Wrestling’s published “2019 World Team Trials Qualifications and Procedures – Men’s Freestyle” expressly incorporate the 2019 General World Team Trials Procedures therein.

Article 16 of the UWW Rules establishes a three-person “refereeing body” for each match, including a mat chairman, a referee, and a judge. The UWW Rules reference the “refereeing delegate” and this person’s authority in various provisions, but do not define this term.

Articles 21, 32, and 54 of the UWW Rules provide as follows:

Article 21 – The Mat Chairman

...

(i) During a bout, when the coach considers that a blatant refereeing mistake has been made against his wrestler and calls for a challenge, the mat chairman must wait for the action to go to neutral and stop the match. The refereeing delegate (or his substitute) and the mat chairman must review the video evidence. If the refereeing delegate (or his substitute) agrees that the refereeing body was right, the mat chairman must make sure that no other challenge will be granted to the wrestler in question during the remaining of the match.

After the review of the video evidence, the refereeing delegate (or his substitute) solely renders its decision. Its decision is final and cannot be challenged.

Article 32 – The Challenge

The challenge is the action through which the coach is allowed, on behalf of the wrestler, to stop the action and request the refereeing delegate (or his substitute) and the mat chairman to watch the video evidence in case of a disagreement with the call. This possibility only exists during competitions in which the video control is formally established by UWW and the Organizing Committee.

The coach must request the challenge by pushing a button provided to him immediately after the refereeing body has awarded or failed to award points to the contested situation. If the wrestler disagrees with the coach's decision, he must reject the challenge directly and the match continues.

If during a competition, the system with buttons (for the challenges) are not provided for the coaches, the organizer will have to provide a sponge that will be used to ask the challenge..

. . . .

No challenge can be requested after the end of the regular time of a period, except when the points are added to the scoreboard after the referee's whistle or in case action occurred just before the time is over. The coach has 5 seconds from the time the questioned score is posted on the official scoreboard to request a challenge.

. . . .

After having reviewed the action and after a consultation with the mat chairman, the refereeing delegate (or his substitute), renders its decision. He intervenes and renders its decision in all cases. His decision will be final and may not be discussed.

It is not possible to request a "counter challenge" once a final decision has been made.

Article 54 – The Protest

No protest after the end of a match or any appeal before CAS or any other jurisdiction against a decision made by the refereeing body may be lodged. Under no circumstances may the result of a match be modified after victory has been declared on the mat.

The relevant provisions of the USOPC Bylaws provide as follows:

Section 1.3 -- Definitions

w) "protected competition" means:

1) any amateur athletic competition between any athlete or athletes officially designated by the appropriate NGB or PSO as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in

accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which, by its terms, requires that entrants be expressly restricted to members of a specific class of amateur athletes such as those referred to in Section 220526(a) of the Act; and

2) any domestic amateur athletic competition or event organized and conducted by an NGB or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in 1) above.

Section 9.1 Opportunity to Participate. *No member of the corporation [e.g., USA Wrestling] may deny or threaten to deny any amateur athlete the opportunity to participate in . . . a World Championship competition, or other such protected competition as defined in Section 1.3 of these Bylaws . . . The corporation shall, by all reasonable means, protect the opportunity of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States in any of the aforesaid competitions. . . .*

Section 9.13 Field of Play Decisions. *The final decision of a referee during a competition regarding a field of play decision (a matter set forth in the rules of the competition to be within the discretion of the referee) shall not be reviewable through or the subject of these complaint procedures unless the decision is (i) outside the authority of the referee to make or (ii) the product of fraud, corruption, partiality or other misconduct of the referee. For purposes of this Section, the term “referee” shall include any individual with discretion to make field of play decisions.*

LEGAL ANALYSIS

In support of their motion to dismiss Mr. Diakomihalis’ Section 9 arbitration demand for lack of jurisdiction, USA Wrestling and Mr. Retherford contend that the express language Article 54 of UWW’s Rules (particularly its second sentence, which states “*Under no circumstances may the result of a match be modified after victory has been declared on the mat.*”) absolutely bars any Section 9 arbitral review of the conduct or decisions of USA Wrestling’s “refereeing delegate” as matter of law even assuming the truth of his allegations. They also contend that the discretionary determinations by the “refereeing delegate” that the challenge by Mr. Retherford’s coach was made in a timely manner enabling him to review video

evidence of the match beyond the immediate five seconds prior to this challenge is a “field of play” decision as was his determination that there was a referee scoring error occurring with approximately 35-43 seconds left in the match requiring correction. In their view, any Section 9 arbitral review of either of these two refereeing delegate discretionary decisions is prohibited by Section 9.13 of USOPC’s Bylaws as a matter of law.

In addition, Mr. Retherford contends that “if this matter proceeds to a hearing, the evidence will show a pattern and practice regarding the application of the five-second rule, resulting in at least 10 challenges allowed at the World Team Trials that Claimant would consider untimely. Allowing Claimant to second-guess that exercise of discretion by match officials in this arbitration has the potential to up-end many results of the World Team Trials.” *Motion of Zain Retherford (Affected Athlete) to Dismiss Demand for Arbitration* at p. 2, note 1.

In response, Mr. Diakomihalis asserts that USA Wrestling is estopped under California law from contending that his Section 9 complaint is not subject to arbitral review because of statements made by its Executive Director Rich Bender in a media interview concerning his second match with Mr. Retherford during the Final X World Team Trials. He asserts that Article 54 does not bar arbitral review of his Section 9 complaint because 1) its first sentence is inapplicable to conduct and decisions by the refereeing delegate; and 2) this UWW rule “cannot usurp” his ASA statutory right to a Section 9 arbitration hearing (during which he will attempt to prove USA Wrestling’s refereeing delegate violated Articles 21 and 32 of the UWW’s Rules thereby causing him irreparable harm) before being denied an opportunity to participate in a protected competition. In addition, he asserts that “the refereeing delegate’s decision to re-score the match by reaching back well beyond the 5-second review period, constitutes a referee decision that was outside the authority of the refereeing delegate to make” is not a “field of play” decision and that it is subject to arbitral review pursuant to Section 9.13 of USOPC’s Bylaws. *Claimant’s Opposition to Respondent’s Motion to Dismiss* at p. 8. He asserts that “a central feature of wrestling is the athletes know the score contemporaneously with the progression of the match [and] are then able to emphasize offense or defense accordingly within the time remaining.” *Id.* at p. 9. He further contends that if Article 54 bars modification of the result of match 2 and consequently USA Wrestling’s determination that Mr. Retherford is winner of the Final X World Team Trials 65kg classification, the Arbitrator has the authority “to disregard this

impermissible result” and to order “a new best-of-three match be held to determine the 2019 World Championship team member in the men’s 65 kg classification. *Id.* at pp. 10-11.

Pursuant to AAA Commercial Rule R-7 (a), the Arbitrator has “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” The claimant has the burden of proving the arbitrator’s jurisdiction by a preponderance of evidence. *Mertes v. USA Gymnastics*, AAA Case No. 51 190 00775 12 (July 15, 2014).

The 2019 Senior World Championships is a “protected competition” pursuant to the ASA, 36 U.S.C. §§ 220522(c)(5) and 220522(a)(4)(B), and Sections 1.3 (w) and 9.1 of the USOPC Bylaws.

Because successful athlete competitors in the designated weight classifications for the Final X World Team Trials directly qualify as a member of USA Wrestling’s 2019 Senior World Championships team, this national wrestling competition is a “protected competition” pursuant to the ASA, 36 U.S.C. §§ 220522(c)(5) and 220522(a)(4)(B), and Sections 1.3 (w) and 9.1 of the USOPC Bylaws.

“In a Section 9 team selection dispute, it is well established that an athlete claimant has the burden of proving by a preponderance of evidence his claimed denial of a fair opportunity to compete for selection as a member of a team that will participate in a ‘protected competition’ (i.e., UWW 2019 Senior World Championships). *Tibbs v. United States Paralympics*, AAA Case No. 71 190 E 00406 12 (August 28, 2012) at 14 (citing several prior Section 9 awards). ‘Section 9 jurisprudence requires [him] to prove [USA Wrestling] breached its approved and published Athlete Selection Procedures for the [2019 Senior World Championships], applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against [them], and/or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act).’ *Id.* See also *Komanski v. USA Cycling*, AAA Case No. 01-15-0004-9907 (Nov. 15, 2015) at 5 (adopting this substantive standard for evaluating the merits of a team selection dispute).” *Keter v. USATF*, AAA Case No. 01-19-0002-0105 (July 2, 2019) at 11-12.

“Although not expressly incorporated or referenced therein, ‘[i]t is well accepted that the [arbitral] standard of review for cases arising under Section 9 of the USOC Bylaws is de novo.’

Komanski at 5. ‘In exercising de novo review in a team selection dispute, the arbitrator ensures that: 1) the athlete is given adequate procedural due process by providing a full and fair opportunity to be heard regarding his claims; and 2) the merits of an NGB’s challenged decision comply with the foregoing requirements of the law of private associations by analyzing whether its athlete selection procedures are valid; were followed and applied consistently; its discretionary decision was rational/reasonable (i.e., not arbitrary or capricious) and in good faith (i.e., without any bad faith or bias); and complies with applicable federal and state laws.’ *Liu and USA Table Tennis, Inc.*, AAA Case No. 01-19-0002-0105 (June 20, 2019) at 17.” *Keeter* at 12.

In essence, Mr. Diakomihalis claims that USA Wrestling denied him a fair opportunity to compete for selection as a member of its 2019 Senior World Championships team because its refereeing delegate breached Articles 21 and 32 of the UWW Rules by reviewing the referee’s scoring beyond the five seconds of wrestling immediately prior to the initiation of a scoring challenge by Mr. Retherford’s coach and changing the 8-6 score in his favor with approximately 35 seconds left in the match to a 6-6 tie and by refusing to consider his subsequent and immediate protest.

There is no clear legal basis or arbitration jurisprudence squarely on point that supports the contention of movants’ that the Arbitrator has no jurisdiction to consider the merits of his claims as a matter of law even if Mr. Diakomihalis’ assertions are true. Movants and Mr. Diakomihalis both cite *Abdevali v. United World Wrestling*, CAS ad hoc Division (AG Incheon) 14/004 (award of 17 December 2014) in support of their respective positions.

In *Abdevali*, the CAS panel found that the referee determined that a semi-final match between Iranian and Korean wrestlers in the 71kg Greco-Roman competition during the Asian Games “was over by tapping his hand on the mat [to signify a ‘fall’ defined by UWW rules as ‘when the defensive wrestler is held by his opponent with his two shoulders against the mat for a sufficient time to allow the referee to observe the total control of the fall’]—with the agreement of the other relevant officials—and that [the Iranian wrestler] had won.” Before the referee raised his hand as the victor, the UWW Jury of Appeal reversed the 4 points awarded to the Iranian wrestler for the fall based on its video review of the match after the Korean coach’s objection, which “was raised considerably more than 5 seconds after the [referee’s] decision

awarding [him] the requisite points for the fall and after the bout had ended.” *Id.* at ¶2.9. As a result, the Korean wrestler was declared the winner of the semi-final match and subsequently won the gold medal by winning the finals match against another wrestler.

The CAS panel dismissed the Iranian wrestler’s appeal because it had no authority to grant his request for a rematch of the semi-final and final matches in Asian Games 71kg Greco-Roman competition for the following reason:

On the assumption that the Panel does have the right to intervene, the Panel is of the unanimous view that Mr. Abdevali cannot succeed as it is not possible to reconvene the Asian Games and have the semi-finals and finals rematched. The other athletes involved who are not parties to this appeal and have not been heard on the point are not obliged to return for another competition. Neither is the OCA, which organizes the Games, a party to these proceedings. For relief to be granted, if at all it could be granted, Mr. Abdevali should have filed his appeal to the CAS immediately after the decision was made at about 15.30hrs on 29 September 2014 so that a decision could have been made before the final was held at 19.30hrs on 30 September 2014. Mr. Abdevali appears to have used this time to appeal to Respondent’s Technical Delegate, Mr. Constantin Mikhailov, who did not respond.

In sum, there is no relief upon which the Panel can grant the Athlete and therefore, the Panel unanimously dismissed this appeal.

Id. at ¶¶2.19-2.20.

In this case, neither USA Wrestling nor Mr. Retherford contend that either Mr. Diakomihalis’ Section 9 complaint or demand for arbitration were not filed in a timely manner. Unlike a major continental sports competition with participating athletes from numerous countries with immutably fixed competition dates, the Final X World Team Trials for the 65kg classification of Men’s Freestyle Wrestling involves only two wrestlers, both of whom are parties to this arbitration proceeding and reside in the U. S. Movants do not contend that there is not sufficient time for Mr. Diakomihalis and Mr. Retherford to engage in any necessary future Final X World Team Trials matches in order to enable USA Wrestling to select the wrestler who will compete in this classification as a member of its 2019 Senior World Championships team. Therefore, unlike the *Abdevali* CAS ad hoc Division panel, the Arbitrator is not wholly precluded as a practical matter from granting effective relief to Mr. Diakomihalis (if he prevails on the merits of his Section 9 claims) that will enable him to achieve his on-mat competition objectives.

The *Abdevali* panel did not determine whether Article 54 (or any then-existing UWW Rules with the same or substantially similar language as its second sentence) bars any arbitral modification of the results of a wrestling match “after victory has been declared on the mat” regardless of the underlying factual circumstances. Although it notes the Korean coach’s objection to the referee’s determination of a fall ending the match “was raised considerably more than 5 seconds” thereafter, the *Abdevali* panel did not consider (much less hold) that it had no jurisdiction to adjudicate the Iranian wrestler’s appeal even if this objection was untimely and barred any video review of the referee’s decision by the Jury of Appeal or otherwise violated UWW’s Rules. There is a clear and material factual distinction between video review of a fall immediately ending a wrestling match (which is not objected to for more than five seconds thereafter) as compared to video review of referee scoring occurring approximately 35-43 seconds before time elapses in a match, which is not reviewed until after the match has ended and without re-wrestling from the time a corrected scoring error occurred through the remaining time in the match.

In dicta, the *Abdevali* panel cited and considered Article 22 of the UWW’s 2014 Rules, which is somewhat similar to the first sentence of Article 54, and states: “No further appeal can be lodged in the FILA Bureau, CAS, or any other court once a decision has been made by the refereeing body (agreed by the mat chairman) or by the Jury of Appeal.” Reading Article 22 together with paragraph 11 of section III of the “Sport Technical Handbook for the 17th Asian Games Incheon 2014” (which states “*Any Athlete/NOC can appeal to CAS, in case he feels that there is violation of IF/AF Technical Rules or OCA Constitution which is not related to reversing the decision of the referee or result.*”), a 2-1 panel majority concluded that the CAS *ad hoc* Division does not have the power to alter the semi-final match results in the 71kg Greco-Roman competition during the Asian Games. They explained: “These are rules and regulations prescribed by the governing body of the sport and cannot be rewritten or read down.” *Id.* at ¶2.16.

On the other hand, the *Abdevali* panel minority member concluded that “these provisions apply only to field of play decisions and that allowing the Korean coach’s objection after the five second period and changing the result after the end of the bout are not field of play decisions.” *Id.* at ¶2.16. Based on Article 44 of the then-existing UWW Rules, which provided in relevant

part that “[i]t will not be possible to request any challenge in case of a fall, being understood that the fall must be validated by the mat chairman following the judge or the referee’s decision,” he concluded:

[I]n the present case, when the referee had obtained confirmation from the judges, the referee confirmed the fall and brought the match to an end under the rules. After that there was simply no power under the rules for the other judges to reverse that decision and entertain a challenge that was out of time.

Id. at ¶2.26.

This Arbitrator does not consider the *Abdevali* panel majority’s dicta to be persuasive authority that requires dismissal of Mr. Diakomihalis’ Section 9 arbitration demand for lack of jurisdiction as a matter of law. He finds the *Abdevali* panel minority member’s view that the untimely reversal of a referee’s decision by other wrestling match officials after the conclusion of a match in violation of UWW’s rules is not a “field of play” decision precluding arbitral review to be more convincing. At this stage of this arbitration proceeding, which requires an assumption that Mr. Diakomihalis’ allegations are true as well as individual and collective interpretation of at least three different UWW Rules and Section 9.13 of the USOPC’s Bylaws, the Arbitrator rejects movants’ assertion that *Abdevali* mandates dismissal of this Section 9 arbitration demand for lack of jurisdiction prior to an evidentiary hearing.

The Arbitrator has reviewed, but does not find any of the other cases cited by movants or submitted by either of them after the hearing to be dispositive or relevant authority supporting their motion to dismiss this arbitration proceeding for lack of jurisdiction: *Lemmons v. United States Equestrian Federation, Inc.*, AAA Case No. 01 19 0000 5250 (March 4, 2019) at 6 (“Being that [Claimant] has not been denied access to any event, has not been denied an equal opportunity to be selected for the Squad, has not been selected or rejected for the Squad, and the selection procedures are not yet final, the Arbitrator does not have jurisdiction under Section 9 of the USOC Bylaws to hear and rule on this dispute.”); *Abdallah and USA Taekwondo, Inc.*, AAA Case No. 30 190 00797 07 (October 4, 2007) at 8 (after an evidentiary hearing, arbitrator dismissed athlete’s Section 9 claims based on findings that the “evidence Claimant has offered in support of her claims are of the referee’s final decisions during a competition regarding field of play decisions . . . not outside the authority of the referee to make, and were not the product of partiality or other misconduct of the referee.”); *Klug and US Ski & Snowboard Ass’n*, AAA Case

No. 30 190 00056 06 (January 26, 2006) (resolving merits of a Section 9 arbitration proceeding in NGB's favor after an evidentiary hearing; arbitrator's jurisdiction not challenged)

Based on the allegations in his Section 9 complaint (which must be assumed to be true), the Arbitrator rules that dismissing Mr. Diakomihalis' demand for arbitration for lack of jurisdiction as a matter of law would deny him a full and fair opportunity to be heard in this proceeding in violation of the ASA and the USOPC Bylaws.¹ Therefore, the Arbitrator rejects movants' assertion that Article 54 of UWW's Rules and/or Section 9.13 of USOPC's Bylaws mandates the dismissal of Mr. Diakomihalis' Section 9 arbitration demand as a matter of law for the following reasons. This ruling, however, does not constitute a conclusion or determination that the Arbitrator has jurisdiction and authority to grant his requested relief. Nor does it make any findings of fact or resolve the merits of his Section 9 claims.

By its express language, the first sentence of Article 54 is inapplicable because Mr. Diakomihalis alleges that the "refereeing delegate" (not the "refereeing body") made the decision being challenged in this proceeding.

Without any undisputed and supporting factual evidence that the phrase "[u]nder no circumstances" must be literally applied regardless of the underlying factual circumstances and adverse effects on athletes (e.g., UWW's objectives, interpretation, historical application, etc.), the Arbitrator declines to accept the movants' assertion that Article 54's second sentence bars any Section 9 arbitral review even for the limited purpose of conducting an evidentiary hearing 1) to determine if Articles 21 and 32 prohibit the refereeing delegate from reviewing video evidence of a scoring error beyond "5 seconds from the time the questioned score is posted on the official scoreboard" *CNOSF, BOC, & USOC and FEI & NOCG and IOC, CAS ad hoc Division (OG Athen) 04/007 (award of 21 August 2004) at ¶8.4 (nullifying modification of Ground Jury's "marks . . . awarded for [competition] performance" by Appeal Committee, which "at no stage had the power, authority, competence or jurisdiction to entertain the appeal" and violated the FEI's rules, and reinstating Ground Jury's decision); and 2) if so, to determine*

¹ Because of this conclusion and ruling, it is unnecessary for the Arbitrator to consider or resolve Mr. Diakomihalis' assertion that USA Wrestling is estopped from contending that his Section 9 complaint is not subject to arbitral review because of statements made by its Executive Director in a media interview regarding his second match with Mr. Retherford during the Final X World Team Trials.

whether the refereeing delegate's breach of UWW's Rules violates a U.S. athlete's Section 9 right not to be denied a fair opportunity to compete for selection as a member of a team that will participate in a "protected competition." *Hyatt and United States Judo, Inc.*, AAA Case No. 01-14-0000-7635 (June 27, 2014) at 11 ("team selection rules create the legitimate expectation that an athlete who satisfies the published qualification criteria will be selected for the team;" an NGB "is required to follow its own rules and cannot preclude their valid application to the benefit of [an athlete] by creating an entirely new unauthorized athlete selection procedure, even if its motivation is "the interest of equity and transparency").

Without any supporting factual evidence, the Arbitrator also cannot accept the movants' contention that the refereeing delegate has both the authority and discretion pursuant to UWW's Rules to determine if video review of referee scoring beyond "5 seconds from the time the questioned score is posted on the official scoreboard" is appropriate on a case-by-case basis, thereby rendering it a "field of play" decision as a matter of law under USOPC Bylaw, Section 9.13 not subject to Section 9 arbitral review.

The Arbitrator rejects Mr. Retherford's contention that this Section 9 arbitration proceeding should be dismissed to prevent Mr. Diakomihalis from "second-guess[ing] th[e] exercise of discretion by match officials [in applying the 5 seconds rule in Article 32] in this arbitration [which] has the potential to up-end many results of the World Team Trials." *Hyatt* holds that NGB competition officials' subjective refusal to follow team selection rules with objective requirements or their inconsistent application of them violates an athlete's Section 9 rights:

exercise of discretion pursuant to an unwritten custom or practice of granting extensions of time to weigh in to athletes based on individual circumstances was not expressly prohibited by United States Judo's team selection rules. But it is inconsistent with the facially uniform applicability of these rules to all athletes, which do not explicitly or implicitly permit any exceptions in individual cases or grant tournament directors the authority to exercise subjective discretion regarding when it is appropriate to grant extensions of time to weigh in. Moreover, this resulted in the inconsistent application of United States Judo's team selection rules to athletes similarly situated . . .

Id. at 10-11.

The Arbitrator's foregoing reasoning for denying the motion to dismiss this proceeding does not identify all of the potentially relevant and material issues and facts necessary to determine whether the Arbitrator has jurisdiction and the authority to grant Mr. Diakomihalis' requested relief; nor does it even attempt to do so. The Arbitrator will consider and resolve any specific issues of relevance and materiality as raised by any of the parties before or during the evidentiary hearing.

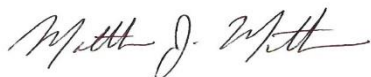
DECISION AND AWARD

Based on the foregoing material facts that must be assumed to be true for purposes of this motion and legal analysis, the Arbitrator decides and awards as follows:

The joint motion of USA Wrestling and Mr. Retherford to dismiss Mr. Diakomihalis' Section 9 demand for arbitration for lack of jurisdiction as a matter of law is denied.

This Award does not make any findings of fact, resolve the merits of Mr. Diakomihalis' Section 9 claims, or determine that the Arbitrator has jurisdiction and authority to grant any of his requested relief.

An evidentiary hearing by videoconference to determine the material and relevant facts necessary to resolve the merits of Mr. Diakomihalis' Section 9 claims, including, but not limited to, the existence of the Arbitrator's jurisdiction and authority to grant his requested relief, will be held on August 8, 2019 at 8am PT/9am MT/10am CT/11am ET.



August 2, 2019

Matthew J. Mitten, Arbitrator