

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

Matthew Fogarty

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v.

AAA Case No. 01-19-0000-7585

USA Badminton

FINAL ARBITRATION AWARD

I, the undersigned arbitrator (“**Arbitrator**”), having been designated in accordance with the Ted Stevens Olympic and Amateur Sports Act (“**Act**”) and Section 9 of the United States Olympic Committee (“**USOC**”) Bylaws, having been duly sworn, and having duly heard the proofs and allegations, and considering any and all evidence provided by Matthew Fogarty (“**Fogarty**”) on the one hand and USA Badminton (“**USAB**”) on the other hand (individually “**Party**” or collectively the “**Parties**”) hereby finds, concludes, determines, and awards as follows:

I. Procedural History

On March 7, 2019, Fogarty submitted his *Commercial Arbitration Rules Demand for Arbitration* and his *Section 9 of USOC Bylaws Complaint Form* in which he stated: “[t]he Badminton World Federation (“BWF”) Constitution establishes (1) the right of all BWF athletes to submit entry into all BWF Sanctioned Events including the 2019 Pan Am Games. All athlete's [sic] have a right to submit their entry into the Pan American Games 2019 and the BWF, according to statute, will process and accept entries in order of BWF World Ranking, to be affirmed or denied by AAA.”

On April 27, 2019, Fogarty submitted his *Amended Commercial Arbitration Rules Demand for Arbitration* and requested an expedited hearing in accordance with Section 9.9 of the USOC Bylaws.¹

On May 2, 2019, the Arbitrator was appointed to serve as the arbitrator in this proceeding. During the Preliminary Hearing on May 6, 2019 and prior to beginning the evidentiary hearing on June 10, 2019, the Parties confirmed there was no objection to the undersigned serving as the Arbitrator in this matter. No subsequent objection was filed or made.

¹ During the preliminary hearing, Fogarty confirmed that USAB has not prohibited him from competing in any event or competition. As a part of the *Preliminary Hearing Report and Scheduling Order*, USAB agreed and were ordered to not prohibit Fogarty’s access to open badminton competitions while this matter is pending as long as he was a member in good standing of USAB.

On May 6, 2019, a preliminary hearing conference was conducted during which a briefing schedule was discussed and agreed upon.² The Parties agreed to present pre-hearing briefs and dispositive motions no later than May 10, 2019, which were timely filed. The Parties agreed to conduct the evidentiary hearing on May 20, 2019 at 9:00 a.m. PT.

On May 17, 2019, the Arbitrator denied the competing dispositive motions filed by the Parties. Shortly thereafter, Fogarty requested a continuance of the final hearing setting. Such request was granted and the final hearing was rescheduled for June 10, 2019 at 9:30 a.m.

The final hearing was held via telephone conference on June 10, 2019 commencing at 9:30 a.m. CT and concluding at 2:56 p.m. CT. During the hearing, Fogarty appeared pro se and USAB appeared by and through its counsel, William J. Robers of Sparks Wilson Borges Brandt & Johnson, P.C. At the conclusion of the hearing, the Parties confirmed they were provided a full and fair opportunity to submit and argue necessary facts, allegations, legal arguments, evidence, and present all witnesses they deemed appropriate. During and at the conclusion of the hearing, no party or counsel filed an objection or indicated additional time was necessary to fully and fairly present this matter for consideration.³

The Arbitrator and AAA closed the hearing on June 11, 2019.

II. Evidence Submitted by the Parties

In accordance with the *Preliminary Hearing Report and Scheduling Order* issued on May 6, 2019, the Parties were required to submit exhibits on or before May 13, 2019. The Parties submitted the exhibits and called witnesses as set forth below:

A. Fogarty

Fogarty submitted exhibits labeled CA1-CA37. In addition to the documents and evidence submitted prior to the hearing, Fogarty called the following witnesses at the final hearing who were sworn in and provided testimony: Jeff Dyrek and Matthew Fogarty. Both witnesses were administered an oath and testified under oath.

B. USAB

USAB submitted exhibits labeled R1-R13. USAB did not call any witnesses at the final hearing, but did cross-examine the witnesses called by Fogarty.

² As set forth in the *Preliminary Hearing Report and Scheduling Order*, the Parties were to file stipulations and a joint list of uncontested facts on or before May 13, 2019. There was no such filing.

³ On June 15, 2019, Fogarty requested that the Arbitrator re-open the hearing because he intended to offer “new expert testimony...in both writing and testimony which refutes USAB’s testimony and position and only came to light after the hearing was closed.” The Arbitrator inquired about the identity of the witness, what the testimony will add, the documentation to be provided, why the witness was not previously disclosed, and why the witness was not able to testify during the hearing. In response, Fogarty indicated he would be calling himself as an expert witness to discuss “the application of IOC, USOC, BWF, PABC, and USAB rules and regulations....” The Arbitrator ruled that testimony was previously elicited discussing these rules and this is not new information and, accordingly, denied the request to re-open the hearing. As a result of such denial, on June 16, 2019, Fogarty filed an objection and again requested that the Arbitrator re-open the hearing.

III. Jurisdiction

An arbitrator has jurisdiction over disputes if the dispute is protected under the Act, 36 U.S.C. § 220501, *et seq.*, and the controversy involves the opportunity to participate in national and international competition representing the United States. Section § 220522(a)(4) of Act states:

An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it...agrees to submit to binding arbitration in any controversy involving . . .the opportunity of any amateur athlete...to participate in amateur athletic competition, upon demand of...any aggrieved amateur athlete..., conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws...

Additionally, Section § 220522(a)(8) of Act states that a national governing body ("**NGB**") must:

[P]rovide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate...

Section 9.1 of the USOC Bylaws provides as follows:

No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in the Olympic Games, the Pan American Games, the Paralympic Games, a World Championship competition, or other such protected competition as defined in Section 1.3 of these Bylaws nor may any member, subsequent to such competition, censure, or otherwise penalize, (i) any such athlete who participates in such competition, or (ii) any organization that the athlete represents. 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. In determining reasonable means to protect an athlete's opportunity to participate, the corporation shall consider its responsibilities to the individual athlete(s) involved or affected, to its mission, and to its membership.

Under USOC Bylaws Section 1.3(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 or 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.

USOC Bylaws Section 9.7 provides that, “[i]f the complaint [under Section 9.1] is not settled to the athlete’s satisfaction the athlete may file a claim with the AAA against the respondent for final and binding arbitration.”

IV. Factual Background

Fogarty is a longtime badminton competitor and member of USAB who has competed in badminton for over forty (40) years. USAB is the national governing body for the sport of badminton in the United States and is a member of the USOC and, thus, is subject to USOC Bylaws and the Act. The Badminton World Federation (“**BWF**”) is the international federation that governs and administers the sport of badminton throughout the world.

This dispute arose as a result of the creation of the Athlete Selection Procedures (“**Procedures**”) for the 2019 Pan American Games to be held from July 26 to August 11, 2019 in Lima, Peru (“**Games**”). USAB established a committee to prepare the Procedures that was comprised of Jeff Dyrek (CEO of USAB), Mohan Subramaniam (USAB National Team Coach), and Rena Wang (USOC Athletes’ Advisory Council Representative) (“**Committee**”). On October 17, 2018, USAB, by and through the Committee, finalized the Procedures and submitted the same to the USOC for review. On October 18, 2018, the USOC approved the Procedures and the Procedures were subsequently disseminated to the athletes by posting the same online on October 22, 2018. In accordance with the Procedures, to be eligible to compete for Team USA at the Games, athletes were required to compete at the Pan American Games Trials (“**Trials**”). The deadline for registration for the Trials was December 6, 2018. The minimum requirements for registration for the Trials were as follows: 1) the athlete must hold a valid U.S. passport that will not expire for six (6) months after the conclusion of the Games; 2) the athlete must be eligible under the BWF and the Pan American Sport Organization (“**PASO**”); 3) the athlete successfully complete all registration requirements by the stated deadline for the Trials. The Trials was an open event and held from January 4, 2019 to January 6, 2019 at the Orange County Badminton Club in Orange, California. The selection to participate for Team USA was a direct result of the athlete’s place finish at the Trials.

Fogarty competes on a mixed-doubles team with Isabel Zhong (“**Zhong**”). Zhong is also a member of USAB and a longtime badminton competitor. As of the date of the hearing, Fogarty and Zhong were ranked #73 in the world with a win/loss record of 3-25. In the last fifty-two (52) weeks, Fogarty and Zhong have competed in fifteen (15) tournaments and have accumulated the most points of any American mixed doubles team despite a winning percentage of less than eleven percent (11%). Despite being well aware of the date and location of the Trials, Fogarty indicated he did not attend the Trials because he was working. Accordingly, Fogarty was not selected to represent the United States as a member of Team USA at the Games. USAB was allocated four

(4) male competitors and four (4) female competitors for the Games. Those spots were filled by the winners at the Trials in men's singles, women's singles, men's doubles, women's doubles, and mixed doubles.

V. Discussion and Analysis

The undersigned has considered all the facts, allegations, arguments, testimony, and evidence submitted by the Parties in the present proceeding. In drafting and explaining the *Arbitration Award*, the arbitrator refers in this *Arbitration Award* only to the submissions and evidence considered necessary to explain the reasoning in this decision. After considering all evidence submitted, based on the preponderance of the evidence, the undersigned makes the following findings:

A. *Standard of Review and Burden of Proof*

The applicable standard of review in Section 9 cases is *de novo*. *Crowell v. US Equestrian Federation*, AAA Case No. 77 190 E 00193 09 JENF (May 3, 2009); *Nadmichettu v. US Table Tennis Ass'n*, AAA Case No. 77 190 169 10 JENF (Apr. 23, 2010); *Craig v. USA Taekwondo*, AAA Case No. 77 190E 00144 11 JENF (Aug. 21, 2011). Section 9 proceedings are not appeals of NGB decisions and there is no requirement for an arbitrator in these proceedings to give deference to any prior decision. In Section 9 proceedings based on a selection decision, it is well established that a claimant has the burden of proving his or her claim by a preponderance of the evidence. *Craig v. USA Taekwondo*, AAA Case No. 77 190E 00144 11 JENF (Aug. 21, 2011).

B. *Whether an athlete may submit an entry into the Games and must be accepted based on his world ranking as determined by BWF.*

Fogarty's primary contention is that an athlete should be permitted to submit his or her name for competition solely based on his or her world ranking as determined by BWF. Accordingly, he argued the trials process, as set forth in the Procedures, violates the terms of the BWF Constitution and General Competition Regulations ("BWF GCR"). In support of his position, Fogarty cites to Sections 11.5, 12.1, and 12.2 of the BWF GCR, which state as follows:

11.5 The seeding of the draw at all BWF Sanctioned Tournaments shall be done using the World Ranking for Grade 1, 2 and 3 as published on the reference date (Time Lines for Tournaments (BWF Statutes, Section 5.3.2)) even if results are missing. In each Event, the entry which is ranked highest shall be seeded number 1, and the next highest number 2, and so on until all seeds required by Regulation 11.7 are decided.

...

Principle of qualifying

12.1 Where entries exceed places in the main draw, the Tournament organisers are required to play qualifying rounds, as provided for in Regulations 12.2 to 12.5.

Determination of main draw, qualifying draw or reserve list for entries received

12.2 The World Ranking shall be used to determine the Players / pairs whose entries can be accepted in the main draw, with the principles of Regulations 11.7.1 and 11.7.2 used to modify the World Ranking regardless of whether or not a pair has competed during the ranking period.

Conversely, USAB argued that the Act and the BWF GCR permit USAB to select the members representing the United States at the Games by and through the Trials established by the Procedures. Section 220523(a)(6) of the Act allows an NGB, like USAB, to “recommend to the [USOC] individuals and teams to represent the United States in the Olympic Games, the Paralympic Games, and the Pan-American Games.” USAB, then, pointed to the following BWF GCR as the controlling provisions relating to the Games and selection of competitors:

1.3 The GCR apply to all categories of international Tournaments that are defined in Regulations 2.2 to 2.6, except where separate regulations are defined by a Multi-Sport Games/Tournament organiser for Tournaments defined in Regulation 2.6 (International Multi-Sport Games and Tournaments).

...

2.6 International Multi-Sport Games and Tournaments

Official international sporting games containing several different sports including Badminton or Tournaments organised by Multi-Sports organisations.

...

6.6 Notwithstanding the foregoing regulations, in the case of any officially-recognised competitive multi-sport international games in which Badminton is included, the qualifications for the representation of a Member shall be in full accordance with the conditions laid down by such a multi-sport international games.

...

7.3 For team Tournaments, specific regulations for team entry may apply as defined by BWF, Continental Confederation or the Tournament organiser.

The Parties agreed that the Games constitutes a Multi-Sport Games/Tournament, as used in Section 1.3 of the BWF GCR, organized by the Pan American Sports Organization (“**PASO**”). The Parties further agreed that Badminton Pan America Confederation (“**BPAC**”) is endorsed by BWF as the continental confederation of badminton for Pan America. BWF has endorsed BPAC, as continental confederation, to “promote, develop and regulate [b]adminton” in Pan America in accordance with Section 1.1, Clause 9 of the BWF Statutes.

As clearly stated in Sections 1.3, 2.6, 6.6, and 7.3 of the BWF GCR, a Multi-Sport Games/Tournament is permitted to establish “separate regulations” or “qualifications” for entry

into the competition. PASO established the Regulations for the Games. Section II, Article 12 of the Regulations for the Games states the organizing committee for the Games “shall publish the Qualification System for each sport...and will distribute the Manuals of all the sports to...each Member...” The Manual for the Games for badminton states “[t]he allocation belongs to the country and not to the athlete individually. Each NOC can develop its own procedure to select its competitor(s) to participate in the Badminton competition. To be entered, each competitor must also be eligible to participate in the XXVIII Pan Am Games LIMA 2019.” As such, under the terms of the BWF GCR and the regulations for the Games, USAB was permitted to establish a selection criteria that included a competition like the Trials.

In response, Fogarty argued USAB is “taking” his private property right in the world ranking points he achieved from competing in events leading up to the Games. On cross examination, Fogarty acknowledged that he is aware that the USOC and associated NGBs are not considered governmental actors and, thus, are not subject to constitutional scrutiny. Case law has consistently held the USOC and associated and affiliated entities are not governmental actors. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987); *Behagan v. Amateur Basketball Ass'n of U.S.*, 884 F.2d 534 (10th Cir. 1989); *DeFrantz v. United States Olympic Committee*, 492 F. Supp. 118 (D.D.C. 1980). As a result, the Arbitrator finds that USAB is not a governmental actor and, thus, USAB is not required to comply with or afford Fogarty with protections established by the United States Constitution. Additionally, Fogarty offered no evidence, other than conclusory statements and allegations, to establish that USAB took his private property rights or violated any other provision of the United States Constitution.

In conclusion, after review of all of the evidence submitted and testimony, the BWF GCR does not establish the right of the athlete to submit his/her entry to the Games based solely on world ranking points. The BWF GCR provides a Multi-Sport Games/Tournament, like the Games, the right to establish regulations for entry into the event. PASO granted authority to the member, in this case USAB, to develop criteria for the representation of the United States in the Games. USAB created the Trials, which was a permissible selection criteria under the terms of Manual for the Games as established by PASO. Accordingly, Fogarty failed to meet his burden to establish by the preponderance of the evidence that USAB acted inconsistent with the BWF GCR.

C. *Whether the selection criteria for the Games established by USAB is unreasonable.*

Secondarily, Fogarty argued the Procedures are unreasonable, because USAB posted the Procedures online before PASO set the number of competitors allocated to the United States for the Games and, thus, it was “impossible” to determine what event to enter. In *Quigley v. Union International de Tir*, the panel, in pertinent part, stated as follows:

Regulations that affect the careers of dedicated athletes should be predictable...and not the product of an obscure process of accretion. Athletes and officials should not be confronted by a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.

Quigley v. Union International de Tir, CAS 94/129 (Apr. 20, 1995). The arbitrator must determine whether USAB breached the approved and published Procedures, applied the Procedures inconsistently to athletes similarly situated, acted in bad faith towards or with bias against the athlete, and/or violated applicable federal or state laws. *Craig v. USA Taekwondo, Inc.*, AAA Case No. 77 190E 00144 11 JENF at 5 (Aug. 21, 2011); *Hyatt v. USA Judo*, AAA 01 14 0000 7635 at 10 (June 27, 2014); *Casey Tibbs v. United States Paralympics*, AAA 71-190-E-00406 12 JENF at 14 (Aug. 28, 2012). Other arbitrations filed under the Act have determined this review to mean that a decision by USAB must have no rational basis, *i.e.* is unreasonable, arbitrary or capricious, will not meet the Act's requirements. *Rivera v. USA Cycling, Inc.*, AAA Case No. 01 16 0002 6302 at 3 (July 26, 2016). The Arbitrator's role is not to determine whether USAB chose the best process for selecting teams, or to substitute lay judgment for the expert professional judgement of USAB in establishing the Procedures. *Id.* at 3-4. Rather, it is a *de novo* review, with no deference, of the application of the Procedures to the facts of the individual case. *Komanski v. USA Cycling*, AAA Case No. 01-15-0004-9907 at 5 (Nov. 15, 2015).

On October 17, 2018, USAB, by and through the Committee, finalized the Procedures and submitted the same to the USOC for review. On October 18, 2018, the USOC approved the Procedures and they were subsequently disseminated to the athletes by posting the same online on October 22, 2018. The procedure for entering the Trials was straight forward and set forth explicitly in the Procedures. The minimum requirements for registration for the Trials were as follows: 1) the athlete must hold a valid U.S. passport that will not expire for six (6) months after the conclusion of the Games; 2) the athlete must be eligible under the BWF and PASO; 3) the athlete successfully complete all registration requirements by the stated deadline for the Trials. The Trials was an open event and held from January 4, 2019 to January 6, 2019 at the Orange County Badminton Club in Orange, California. The selection to participate for Team USA was a direct result of the athlete's place finish at the Trials.

When asked whether he was aware of the Procedures and the Trials, Fogarty responded "oh yeah." Fogarty said he did not attend the Trials because he was working and he believed he should be able to enter the Games based solely on his world ranking. Other than his argument relating to entry based on world ranking, Fogarty argued only that he was unsure of what events to enter because PASO had not yet informed USAB of how many participants would be allocated to the United States for the Games. Fogarty did not assert that he was denied entry to the Trials or that he was not made timely aware of the Trials.⁴ Furthermore, Fogarty did not argue that USAB breached any provision of the Procedures.

Based on the undersigned's review of the Procedures, the Procedures were created to obtain an objective result that was determined on the badminton court. The winner of the competitions in men's singles, women's singles, men's doubles, women's doubles, and mixed doubles were selected to represent the United States at the Games. USAB was afforded no discretion under the Procedures to modify representatives of the United States at the Games. Although fully aware of the Trials and the Procedures, Fogarty and his mixed doubles partner chose not to participate in the Trials and, thus, were not selected to represent the United States at the Games. There was no evidence in the record to show that USAB failed to follow the Procedures in selecting the individuals who were chosen to represent the United States at the Games. Further, there was no

⁴ USAB believes it has used a trial procedure for selection for the last three (3) Pan American Games.

evidence in the record to show that Fogarty was discriminated against in any regard pertaining to the Trials or the Procedures. Fogarty voluntarily chose not to participate in the Trials and, therefore, was not chosen to represent the United States in the Games.

In conclusion, after review of all of the evidence submitted and testimony, there was no evidence to establish that USAB breached the Procedures, applied the Procedures inconsistently to Fogarty or athletes similarly situated, acted in bad faith towards or with bias against Fogarty, and/or violated applicable federal or state laws. Further, there was no evidence in the record to show that USAB acted unreasonably, arbitrarily, or capriciously in adopting the Procedures or establishing the Trials. The Arbitrator will not substitute lay judgment for the expert professional judgment of USAB in establishing the Procedures. Accordingly, Fogarty failed to meet his burden to establish by the preponderance of the evidence that USAB acted unreasonably in adopting the Procedures.

D. Whether Fogarty brought this case in bad faith.

USAB argued that Fogarty brought this proceeding “frivolously, vexatiously and without merit.” USAB and Fogarty have been feuding for over twenty (20) years. Fogarty acknowledged that he has “filed complaints [against USAB] for twenty (20) years” and many of which have pertained to selection procedures and criteria.

USAB pointed out that Fogarty took the complete opposite position in another AAA arbitration decided on January 27, 2006. In *Fogarty v. USA Badminton*, Fogarty argued “team selection [should be] decided by competition” to wit USAB changed its selection criteria for team competition to a competition format. *Fogarty v. USA Badminton*, AAA 30 190 01374 05 at 2 (Jan. 27, 2006). The Arbitrator denied Fogarty’s claims. Next, in 2007, Fogarty filed a complaint against USAB pursuant to Article VIII, Section 8.1 of the USOC Bylaws and Section 220527 of the Act complaining about the selection procedures for 2007 Pan American Games and the 2008 Olympic Games. The USOC hearing panel denied Fogarty’s claims. In 2008, Fogarty again filed a complaint against USAB with the USOC and argued USAB created selection procedures that were more restrictive than the international federation’s requirements for selection in violation of the Act. The USOC hearing panel again denied Fogarty’s claims calling his filings “persistent, duplicative, and manipulative legal filings” and awarded costs and fees.

USAB further argued that Fogarty has filed numerous actions against USAB including: 1) seven (7) Article VII complaints since 2004, 2) six (6) Article IX complaints since May 2018, 3) five (5) AAA arbitrations since 2000; 4) three (3) Court of Arbitration for Sport arbitrations since 2003; and 5) numerous internal grievances since 2004. Fogarty does not shy away from the volume of disputes he has had with USAB, but argued that he is adamant that USAB is violating the Act and has sought to enforce his rights as an athlete.

The vast majority of the claims and disputes between the Parties occurred between 2006-2008, which was between eleven (11) and thirteen (13) years ago. As the regulations change and new policies for entry to events are established, the Act and USOC Bylaws permit Fogarty to challenge these regulations and policies. In prior cases where Fogarty was sanctioned, he was challenging the same set of criteria over and over again. This case must stand alone from the others. Although

the Arbitrator has authority to apportion fees in accordance with Rule 47 and sanction a party in accordance with Rule 58, the Arbitrator chooses not do so in this matter.

VI. Decision

Based on the foregoing findings and analysis, the undersigned decides and awards as follows:

- 1) All of Fogarty's claims and requested relief are denied;
- 2) USAB's request for sanctions and payment of administrative fees, expenses, arbitrator's compensation, and attorneys' fees is denied;
- 3) The Parties shall bear their own attorneys' fees and costs associated with this arbitration.
- 4) The administrative fees for AAA totaling \$1,000.00 are to be borne as incurred.
- 5) The compensation of the arbitrator totaling \$8,487.50 shall be borne as incurred.
- 6) This award is in full settlement of all claims submitted in this arbitration. All claims not expressly granted herein are hereby denied.



Christian Dennie, FCI Arb
Arbitrator

Date: June 21, 2019