Arbitration CAS 2008/A/1636 Andrew Hoy v. Fédération Equestre Internationale (FEI), award of 27 January 2009

Panel: Mr Luc Argand (Switzerland), President; Mr Patrick Lafranchi (Switzerland); Mr Michele Bernasconi (Switzerland)

Equestrian (jumping)
Disciplinary proceedings conducted for an alleged horse abuse
Compensation of costs incurred in proceedings before an international federation
Application of general legal principles to decide the issue of cost compensation
Admissibility of a breach of private interest of athletes
Parallel with the allocation of costs by the CAS

1. **A specific provision on the allocation of costs should supersede any general legal principles – whatever they are – when deciding the amount of costs to be allocated to the prevailing party.**

2. **According to "general legal principles" of Swiss procedural law, successful parties in civil proceedings are usually awarded a mere minor participation to their costs, which rarely covers the full legal costs. The regulations of international sport federations are even stricter and often provide that no claim for legal costs can be made by an athlete against the federation. Therefore, no full compensation can be deducted from these regulations.**

3. **A breach of private interests of athletes – such as personality rights – by a sport federation is in principle lawful and justified by the overwhelming interest of the international fight against doping in sport and, more generally, the protection of the welfare of horses.**

4. **The core principle when an indemnity for costs is allocated by CAS is that a procedure should be "fast, fair and free". However, in that sense, "free" should not be understood as free of any cost or charge but rather that costs should not be considered as a barrier for one of the parties.**

Mr Andrew Hoy ("Mr Hoy") is a very well known event rider and trainer, member of the Equestrian Federation of Australia who has been competing internationally on the highest level for some 30 years. He has represented Australia at 6 Olympic Games between 1984 and 2004.

The Fédération Equestre Internationale (FEI) is a non-governmental association of national federations recognised as the international federation governing horse sport as defined in its Statutes under all forms worldwide. Its registered office is in Lausanne, Switzerland.

The matter decided on 23 July 2008 by the FEI Tribunal in Case 2008/01 ("the Decision") dealt with an alleged horse abuse committed by Ms Madeleine Brugman, the Competitor, and by Mr Andrew Hoy, the alleged trainer of the Competitor, on the Competitor's horse, Sundancer 6, while warming-up for the jumping phase of the CCI 3* Barroca d'Alva event in Portugal on 9 March 2008. The Appellant had been suspected, together with Ms Brugman, of having used illegal spiked overreach boots on Sundancer 6, in order to enhance the horse's performance in the jumping competition.

The FEI conducted investigations and presented the evidence gathered at a hearing before the FEI Tribunal.

The FEI Tribunal held that no sufficient evidence was available to sanction Ms Brugman and/or Mr Hoy for horse abuse and, accordingly, ruled the following in its decision:

> *"5.1 As a result of the foregoing, the Tribunal concludes that the FEI did not meet its burden of proof and did not provide sufficient evidence to substantiate a case of abuse against either the Competitor* [Ms Brugman] *or the Trainer* [Mr Hoy].
>
> *5.2 The Tribunal notes that, in defending the case, the PRs* [Persons Responsible, i.e. Ms Brugman & Mr Hoy] *had limited travel costs (travel to the hearing of the PRs, one witness and their Swiss counsels). The somewhat prolonged hearing resulted partially from certain repetition in the various briefs submitted by PRs counsels before, during and after the hearing from the fact that such briefs were overly broad and not pin pointed to the key arguments available in defence. It is also noted that certain delays were caused in this case due to numerous pleadings made by the PRs and their counsels following the hearing and the teleconference. These required further unnecessary deliberations by the Tribunal, delaying the submission of this decision. Taking these into account, the Tribunal assessed limited costs in the amount of CHF 3'000.- to be paid by the FEI to the Competitor and to the Trainer, to be divided equally between them* [i.e. CHF 1'500.- was to be paid to each of them]*".*

On 21 August 2008, Mr Hoy filed his Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered on 23 July 2008 by the FEI Tribunal. He made the following application:

> *"Request for Relief:*
>
> *1. That n° 5.2 of the decision of the FEI Tribunal of 23 July 2008 regarding reimbursement of the cost be annulled.*
>
> *2. That Appellant be compensated for travel costs and for legal fees related to the investigation by the Respondent and to the hearing before the FEI Tribunal in the FEI Horse Abuse Case 2008/01 (Sundancer 6) and therefore be awarded CHF 53'781 by Respondent.*
>
> *3. The Respondent shall bear the costs of the arbitration and the legal costs of Appellant".*

On 1 September 2008, Mr Hoy filed his Appeal Brief with CAS. He indicated that in case of a hearing he wanted to hear 2 witnesses. Also, he reiterated the same request for relief made in his Statement of Appeal.

On 23 September 2008, the FEI filed its Answer to the Appeal Brief with CAS. It made the following application:

> *"The (...) [FEI] respectfully requests the CAS Panel to make an Award to:*
>
> - *Dismiss in its entirety the appeal filed by Mr Andrew Hoy and to confirm the decision of the FEI Tribunal dated 23 July 2008;*
> - *Order Mr Andrew Hoy to pay any and all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the (...) [FEI];*
> - *Dismiss any other relief sought by M. Andrew Hoy".*

On 20 November 2008, the Parties signed the Order of Procedure, confirming their agreement that no hearing be held in this procedure.

Neither party raised any further objection to the constitution of the Panel, the procedure or with regard to its right to be heard. Also, neither party contested that it had been treated equally with the other party in these arbitral proceedings and that it had had a fair chance to present its position.

LAW

Jurisdiction

1. Rightfully, the FEI raises in its brief dated 23 September 2008 the question of CAS jurisdiction concerning this matter, since the Appellant seems (a) to rely his claim on tort law and since (b) civil actions brought against the FEI are to be referred to the civil courts in Lausanne (article 34.2 of the FEI Statutes). However, in order to have this matter fully and efficiently decided at once without further costs, the FEI says that it will not raise any jurisdictional objections and accepts that the case be dealt with by CAS, as long as this case is not considered as a precedent.

2. CAS jurisdiction is therefore explicitly recognized by the parties in their respective briefs and is further confirmed in the Order of Procedure which was duly signed by both parties.

3. Accordingly, since none of the parties object to CAS jurisdiction, the Panel will deem itself competent without needing to verify whether or not it ought to be competent in application of the above-mentioned FEI rules.

4. It follows that CAS has jurisdiction to decide on the present dispute.

Scope of the Panel's review

5. With respect to its power of examination, the Panel observes that the present appeal proceeding is governed by the provisions of articles R47ff of the Code. In particular, article R57 of the Code grants a wide power of examination as well as a full power to review the facts and the law. CAS may thus render a new decision in substitution for the challenged decision, either annulling the latter or sending the case back to the previous authority.

Absence of hearing

6. Article R57 para. 2 of the Code provides the following:

"After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. (...)".

7. Both parties were consulted on this issue by the Panel beforehand. In particular, the Appellant, who, at first, requested a hearing, confirmed on 17 October 2008 that he would accept that no hearing be held if the Panel considered itself to be sufficiently well informed and was to decide against a hearing.

8. Since the prayer for relief of the Appellant are limited to the annulment of the point of the Decision regarding the costs awarded to the Appellant (point n° 5.2), since the whole context of the case has been explained extensively in the various briefs and since the Appellant accepted *in fine* that no hearing be held, de Panel decided on 24 October 2008 not to hold a hearing.

9. Also the acceptance to the absence of hearing is further confirmed in the Order of Procedure, which was duly signed by both parties on 20 November 2008.

10. Accordingly, the Panel has decided to render its decision only on the basis of the parties' written submissions.

Applicable Law

11. Article R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

12. Pursuant to the FEI Statutes, the CAS, as an independent court of arbitration, *"(...) shall judge all appeals properly submitted to it against decisions of the FEI Tribunal, as provided in the Statutes and General Regulations"* (article 35.1 FEI Statutes). Also, *"The Parties acknowledge and agree that the seat of the*

CAS is in Lausanne, Switzerland and that proceedings before the CAS are governed by Swiss law" (article 35.3 FEI Statutes).

13. Accordingly, the Panel must decide the dispute according to the relevant FEI rules (FEI Statutes, 22nd edition, effective as of 15 April 2007; General Regulations [GR], 22nd edition, effective as of 1 June 2007; FEI Tribunal Internal Regulations as of 15 April 2007, and last modified 1 February 2008 [IR]) and Swiss law.

Admissibility of the appeal

14. Mr Hoy's Statement of Appeal was filed within the deadline provided by Article 170 GR, i.e. within 30 days after notification of the Decision. It furthermore complies with all the other requirements of Article R48 Code.

15. Accordingly, it is admissible.

Merits

16. The Panel notes that the present matter is very limited in scope, the Appellant seeking solely to obtain full compensation of costs allegedly incurred in the proceedings before the FEI Tribunal.

17. Accordingly, the only matter at hands is whether or not the FEI Tribunal did rightfully grant Mr Hoy a CHF 1'500.- indemnity whereas he did indeed prevail in the proceedings initiated by the FEI against him and Ms Brugman (who was also granted CHF 1'500.- but did not appeal), and if not, which indemnity should be paid by the FEI to Mr Hoy.

18. The Panel will now specifically discuss each argument raised by the Appellant and the Respondent in light of its conclusions on the submissions and evidence of the parties.

A. Cost compensation

19. The Panel notes that while the FEI is of the opinion that the issue of cost compensation is to be decided solely on article 24.3 IR, the Appellant, on the contrary, believes that it ought to be decided according to article 174.11 GR and/or other *"general legal principles"*:

20. Article 24.3 IR provides as follows:

"The Panel [of the FEI Tribunal] shall be entitled to make such orders in relation to costs as it deems appropriate".

The Panel finds that article 24.3 IR is a specific provision on the issue of costs allocation by the FEI Tribunal, which – likewise to article R 64.5 and/or article R 65.3 CAS Code – leaves full

discretion to the FEI Tribunal to fix the amount of costs allocated to the prevailing party as it deems appropriate.

21. Article 174.11 GR provides as follows:

"Decision of the FEI Tribunal may also impose on unsuccessful parties the payment of costs borne by the FEI for the judicial procedure in the amount of CHF 500.- to 7'500.-. In addition, a party may be ordered to pay further costs not exceeding CHF 10'000.- if the costs of the procedure borne by the FEI have been increased by conducting a hearing or by excessive prolongation of the procedures or other exceptional cause".

The Panel finds that article 174.11 GR is – according to its express language – only applicable to "PRs" who were unsuccessful in the proceedings and that there is no room for interpretation that could conduct to the application of this rule *mutatis mutandis* to the FEI in case a PR is – as in the present case – successful before the FEI Tribunal.

Likewise, the Panel is also convinced that there is no reason to look for any analogy in article 174.11 GR since a specific provision – article 24.3 IR – exists as to the discretionary power of the FEI Tribunal to award costs as it deems appropriate.

22. Concerning any applicable *"general legal principles"*, the Panel is convinced that a specific provision on the allocation of costs by the FEI Tribunal such as article 24.3 IR should supersede any such principles – whatever they are – when deciding the amount of costs to be allocated to the prevailing party.

Also, if *"general legal principles"* of Swiss procedural law were to be considered a fundamental rule, no full compensation could also be granted to the Appellant since successful parties in civil proceedings are usually awarded a mere minor participation to their costs, which rarely covers the full legal costs. The regulations of international sport federations are even stricter and often provide that no claim for legal costs can be made by an athlete against the federation, so no full compensation can also be deducted from these regulations.

23. Therefore, the Panel is convinced that the issue of cost allocation by the FEI Tribunal ought to be decided solely according to articles 24.3 IR and will decide accordingly.

B. Tort liability

24. The Appellant further claims an indemnity amounting to CHF 53'781.- based on article 41 Swiss Code of Obligations (CO). Said provision reads as follows:

"Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable for damages".

25. The Appellant, as the alleged "victim" in the present case, bears the burden of proof concerning the following four cumulative requirements which shall be met in order for a party to be liable towards the "victim":

(i) Damage: There is no need for the Panel to decide – as submitted by the FEI – whether the claimed amount to CHF 53'781.- is justified or not, the other requirements of article 41 CO being not met in the present case.

Accordingly, the Panel will leave this issue open.

(ii) Unlawful act: An unlawful act within the meaning of article 41 CO may derive from the breach of an absolute personality right (such as physical integrity, personality or property).

To that respect, the Appellant submits (a) that a breach of his personality rights occurred due to the risk of damage to his reputation in case of horse abuse and (b) that the FEI violated article 7 para. 1 Swiss Cartel Law (SCL).

(a) The Panel notes that in its decision, the FEI Tribunal held that no horse abuse was committed and that the Appellant was released from any charge. Thus, the Appellant's personality rights have not been breached by the FEI since his reputation has been cleared by the Decision.

Also, the Panel notes that in a recent leading precedent in horse-related doping-case (ATF 134 III 193), the Swiss Federal Supreme Court held that a breach of private interests of athletes – such as personality rights – by a sport federation is in principle lawful and justified by the overwhelming interest of the international fight against doping in sport and, more generally, the protection of the welfare of horses. Likewise to the FEI, the Panel is also convinced that said rule must apply *mutatis mutandis* to the present case.

(b) Concerning an alleged breach of SCL, the Panel is also of the opinion, likewise to the FEI, that the Appellant failed to provide any explanation as to the relevance of article 7 SCL in this case. In particular, no evidence was submitted as to (a) an alleged dominant position of the FEI, (b) an abuse of that dominant position to the detriment of the Appellant within the meaning of article 7 SCL and (c) how and why the Decision may have infringed this provision, all the more so because the decision was favourable to the Appellant and dismissed the case brought by the FEI.

Accordingly, since no unlawful act has been committed by the FEI towards M. Hoy, under no circumstances can the Appellant claim an indemnity based on article 41 CO.

(iii) Causation between the unlawful act and damage: Since no unlawful act has been committed by the FEI towards the Appellant, no causal link can exist with the alleged damage.

(iv) Fault: The Panel notes that the Appellant has failed to prove any negligent or wilful conduct of the Respondent which could be classified as fault within the meaning of article 41 CO, the FEI having simply followed its standard procedure in case of horse abuse suspicion.

26. Accordingly, since the requirement of article 41 CO are not met, the Panel concludes that the Appellant's claim for damages must be dismissed entirely.

C. Cost allocation by the FEI Tribunal

27. In light of the foregoing, the issue of cost allocation by the FEI Tribunal ought only to be discussed according to article 24.3 IR.

28. To that respect, the Panel believes that it ought to make a parallel with the way an indemnity for costs is allocated by CAS, i.e. by keeping in mind the core principle that a procedure should be "fast, fair and free". However, in that sense, "free" should not be understood as free of any cost or charge but rather that costs should not be considered as a barrier for one of the parties.

29. In the present case, the Panel feels that the extensive disciplinary procedure initiated against Mr Hoy and Mrs Brugman on mere assumptions that a presumed horse abuse on Sundance 6 may have been committed on 9 March 2008 – the Appellant having been suspected, together with the rider, of having used illegal spiked overreach boots on Sundance 6, in order to enhance the horse's performance in the jumping competition – and which led to a successful end for both Mr Hoy and Ms Brugman, should have also led the FEI Tribunal, upon discharging them, to grant them a higher indemnity than a mere CHF 1'500.- each, amount which did not even cover their travelling costs.

30. Accordingly, the Panel finds it appropriate, in accordance with article 24.3 IR, that the Appellant should be awarded the following amounts:

- For travel costs: CHF 2'100.- (two thousand one hundred Swiss Francs).
- For attorney costs: CHF 10'000.- (ten thousand Swiss Francs).

31. In light of the foregoing and in accordance with article R57 of the Code, the Panel will therefore hold that the FEI Tribunal decision should be set aside as far as the issue of costs is concerned (paragraph 5.2) and decides that Mr. Hoy is to be awarded the above-mentioned amounts for the costs incurred before the FEI Tribunal. If the FEI has already paid the amount of CHF 1'500.- awarded by the FEI Tribunal in the Decision, such amount shall be deducted.

32. Against this background, all other prayers for relief shall be rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Hoy against the Decision rendered on 23 July 2008 by the FEI Tribunal is admissible;

2. Paragraph 5.2 of the Decision rendered on 23 July 2008 by the FEI Tribunal is set aside;

3. The Appellant shall be compensated for travel costs in the amount of CHF 2'100.- (two thousand one hundred Swiss Francs) and for legal fees related to the investigation and to the hearing before the FEI Tribunal in the FEI Horse Abuse Case 2008/01 (*Sundancer 6*) in the

amount of CHF 10'000.- (ten thousand Swiss Francs). The amount of CHF 1'500.- (one thousand five hundred Swiss Francs) granted by the FEI Tribunal to Mr Hoy in the Decision rendered on 23 July 2008 shall be deducted from these amounts if already paid by the FEI;

(…)

6. All other prayers for relief are dismissed.