



**Arbitration CAS ad hoc Division (OG Athens) 04/007 Comité National Olympique et Sportif Français (CNOSF), British Olympic Association (BOA) & United States Olympic Committee (USOC) v. Fédération Equestre Internationale (FEI) & National Olympic Committee for Germany (NOCG), award of 21 August 2004**

Panel: The Hon. Justice Deon van Zyl (South Africa), President; Mr Pantelis Dedes (Greece); Prof. Richard McLaren (Canada)

*Equestrian (show jumping)*

*Failure to complete a show jumping event within the required time limit*

*Legal nature of the decision to impose a time penalty*

**The ruling of the FEI Ground Jury in deciding to impose a time penalty on a rider is of a purely factual nature falling within its exclusive jurisdiction. Such ruling does not involve an interpretation of rules or a construction issue giving the power, authority, competence or jurisdiction to the FEI Appeal Committee to entertain an appeal against the decision.**

This is an appeal against the decision of the Appeal Committee of the Fédération Equestre Internationale (FEI) setting aside the Ground Jury ruling that a time penalty be imposed on the German equestrian athlete Bettina Hoy (“Ms Hoy”), for failing to complete a jumping event within the required time limit.

The effect of the Ground Jury ruling was that, in the individual competition, Leslie Law of Great Britain won the gold medal, Kimberly Seversen of the United States the silver and Ms Funnell of Great Britain the bronze. In the team competition France won the gold medal, Great Britain the silver and the United States the bronze. The effect of the Appeal Committee’s decision was that Ms Hoy was awarded the gold medal in the individual competition while the German team (Hoy, Dibowski, Klimke, Ostholt and Romeike) received the gold medal in the team competition. Law and Severson were downgraded to silver and bronze in the individual competition and France and Great Britain to silver and bronze in the team competition. Ms Funnell and the United States lost their bronze medals.

The basis of the appeal is that the Appeal Committee had no jurisdiction to consider the Ground Jury ruling at the instance of Ms Hoy and the National Olympic Committee for Germany (“NOCG”). In the alternative, even if it did have the required jurisdiction, it had failed to apply the principles of due process by not notifying the interested parties of the appeal proceedings.

Both the FEI and the NOCG, as Respondents, opposed the appeal, the latter representing also the German Equestrian team and its individual riders who stand to lose their gold medals.

The French, British and United States National Olympic Committees (“NOCs”), as Appellants and their National Equestrian Federations were all represented before the Panel. In view of their shared interest in the appeal proceedings, they agreed at the outset that Ms Sara Friend, a British lawyer, and Mr Jeffrey Benz, a United States lawyer, would present submissions on behalf of all three Appellants. Dr Bo Helander, Secretary General of the FEI, appeared for the FEI, while Dr Jens Adolphsen, a German lawyer, acted on behalf of the NOCG and its equestrian teams. Ms Hoy appeared in person. Ms Pavlovic was present as an invited party representing the International Olympic Committee (“IOC”).

The hearing was held on 20 August 2004, after the parties had indicated that they had no objection to the Panel as presently constituted. An interpreter in the English and German languages assisted throughout the proceedings.

The salient facts giving rise to the issues under consideration may be summarised briefly.

The Equestrian Eventing Competition consists of three phases, namely dressage, cross-country and two rounds of show jumping. For purposes of the team competition, all riders contest the dressage, cross-country and first round of show jumping. Only the top 25, with a maximum of three per nation, qualify for the individual competition and contest the second round of show jumping. Their scores in all four phases are used in determining their individual standings.

The Eventing Competition is judged by a Ground Jury comprising three persons. Among its responsibilities are to rule on all times and penalties in the show jumping events. In terms of Article 551 of the FEI’s Rules for Eventing (21<sup>st</sup> edition effective from 1 January 2003, including modifications up to December 2003) (“FEI Rules”), the Ground Jury *“is ultimately responsible for the jumping of the event and for settling all problems that may arise during its jurisdiction”*.

In terms of Article 203 read with Article 537.6 of the FEI Rules, a bell is used to signal the start of the round for the particular individual competitor. After it has been rung, the rider has 45 seconds within which to cross the start line and is regarded as having started when he or she crosses the start line or when the 45 seconds have elapsed, whichever is the earlier. At that moment, a computerised timing device is automatically triggered and commences measuring the time taken by the rider to complete the course. This must be accomplished within a maximum period of 90 seconds after the starting line has been crossed.

Simultaneously with the computerised timing device, the stadium clock in the arena is started by a member of the Ground Jury. This clock may be stopped and restarted when the need arises.

In the present matter, Ms Hoy was engaged in competing in the first round of show jumping during the evening of 18 August 2004. The bell rang and the 45 second count-down commenced. She increased the pace of her horse to a canter and crossed the start line, thereby automatically triggering the computerised timing device. As she approached the first jump she turned her horse away and made a wide circle which brought her once again behind the start line. She then proceeded to cross the start line a second time. Immediately before she did so, the stadium clock was apparently reset to zero and indicated her time from the moment of her second crossing of the start line. The computerised timing device, however, continued to measure her time from the moment of the first

crossing. This had the effect that, although the stadium clock indicated that she had completed the course in less than the allotted 90 seconds, her actual time as recorded by the computerised timing device was some 12,61 seconds slower, namely 102,61 seconds.

After lengthy deliberations, the Ground Jury ruled that Ms Hoy should be penalised with 13 time penalties. This prompted Ms Hoy and the NOCG to appeal to the FEI's Appeal Committee during the late evening of 18 August 2004. The Appeal Committee commenced its proceedings by considering whether it had jurisdiction to entertain the appeal. The three members of the Committee were unanimously of the view that they were indeed clothed with the required jurisdiction inasmuch as the case was not of a factual nature but constituted an issue of interpretation of the FEI Rules, as provided in Article 163.6.1 of the FEI General Regulations. Their decision reads as follows:

*"The Appeal Committee started by considering whether they had jurisdiction to deal with the case presented. The Committee agreed that the case came under art 163.6 as an interpretation of the rules and so agreed to proceed with the bearing.*

*The Appeal Committee considered the appeal of the German Federation against the time penalties awarded to Bettina Hoy during the Eventing Team Jumping and Individual Qualifier.*

*The Committee concluded that the countdown had been restarted resulting in a clear injustice to the rider concerned. The Committee therefore removed the time penalties".*

It is common cause that no notification of the appeal proceedings was given to the teams or individual competitors directly affected thereby.

## LAW

1. The present appeal has been lodged in terms of Article 1 of the CAS Arbitration Rules for the Olympic Games ("CAS ad hoc Rules") as read with Rule 74 of the Olympic Charter.
2. These proceedings are governed by the CAS ad hoc Rules enacted by the International Council of Arbitration for Sport. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987, in terms of the provisions of Articles 7 and 17 of the CAS ad hoc Rules regarding the seat of arbitration and the law governing its proceedings.
3. The CAS ad hoc Division established for the Olympic Games in Athens, and hence the Panel as presently constituted, has jurisdiction in terms of Articles 1, 2, 3, 11 and 12 of the CAS ad hoc Rules as read with Rule 74 of the Olympic Charter. This Panel has the authority to conduct the current proceedings in accordance with the provisions of Article 15 of the CAS ad hoc Rules. It is likewise empowered, in terms of Article 16 of such Rules, *"to establish the facts on which the application is based"*.
4. More specifically, the CAS ad hoc Division has jurisdiction over NOCs in terms of the provisions of Rules 4.1, 31 and 74 of the Olympic Charter. It likewise has jurisdiction over

International Federations (“IFs”) in accordance with the provisions of Rules 4.3, 29, 30 and 74 thereof. By virtue of the benefits accruing to such organisations consequent upon their recognition of the IOC, each may be deemed to have subscribed to the arbitration clause contained in the said Rule 74 of the Olympic Charter. This is consonant with their obligation to promote the spirit and content of the Olympic Charter.

5. Article 59 of the FEI Statutes and Articles 161.3.1 and 161.3.2 read with Articles 166 and 170.1.2 of its General Regulations (“FEI General Regulations”) give specific recognition to the jurisdiction of CAS. The purported exclusion of appellate jurisdiction in terms of Article 170.2.2 is clearly in conflict with the express recognition and acceptance of CAS’s jurisdiction in Article 170.1.2 and in the numerous other provisions set forth above.
6. It follows that the CAS ad hoc Division is fully empowered to hear, consider and arbitrate upon the present appeal.
7. On behalf of the three appellants, Ms Friend (in the main argument) and Mr Benz (in reply) emphasised that the Appeal Committee had erred in holding that the appeal brought before them by Ms Hoy and the NOCG involved a question of interpretation of rules. No rule had been cited in their report and no interpretation took place. The issue was clearly one of fact and was not appealable in terms of Article 163.6.1 read with Article 170.2.1.
8. In the alternative Ms Friend and Mr Benz argued, with reference to the provisions of Article 161.6, that the Appeal Committee had failed to apply due process by not giving notice to the various bodies and individuals directly affected by the appeal.
9. In any event, it was argued, a number of CAS awards have made it clear that CAS does not review decisions taken or rulings made on the playing field except in cases where bad faith or malice had been demonstrated or was otherwise involved (See CAS OG 00/013 para 7 and 23; CAS OG 02/007 para 5; TAS 2003/A/490 para 29; CAS 2000/A/305 para 5).
10. Dr Helander submitted on behalf of the FEI that the Appeal Committee had correctly held that the issue was one of interpretation rather than fact. It was not in issue that Ms Hoy had crossed the start line twice. What was in issue was whether the time measured by the computerised timing device should be accepted or not. That, he said, was a question of interpretation of the relevant rules.
11. Dr Helander referred to the preamble to the rules for jumping events, where it is stated:

*It is not possible to provide for every conceivable eventuality in these Rules. If there is no rule to deal specifically with a particular circumstance, or if the nearest interpretation of the pertinent rule would result in an obvious injustice, it is the duty of those responsible to make a decision based on common sense and fair play, thus reflecting as closely as possible the intention of these Rules and of the General Regulations.*

On this basis, he submitted, the Appeal Committee had correctly upheld the appeal on the grounds of fairness to Ms Hoy, who had clearly been misled by the resetting of the stadium clock at the time of her second crossing of the start line.

12. Dr Adolphsen submitted at the outset that the CAS ad hoc Division did not have jurisdiction to hear the present appeal by reason of the provisions of Article 170.2.2 of the FEI General Regulations. In accordance with this Article appeals against decisions of the Appeal Committee on appeal from the Ground Jury were not appealable, regardless of whether the Appeal Committee had jurisdiction or not. There is no merit in this submission, which was not supported by Dr Helander in his argument on behalf of the FEI. As mentioned before, Article 170.2.2 is in conflict with Article 170.1.2 and a variety of other binding provisions relating to the jurisdiction of CAS.
13. On the issue of interpretation as opposed to an issue of fact in terms of Article 163.6.1 of the said regulations, Dr Adolphsen relied on the provisions of Article 203.1.2 of the FEI Rules, which give the Ground Jury the right to interrupt the 45 second countdown should unforeseen circumstances arise. This, he argued, was a question of interpretation and not of fact.
14. Finally, Dr Adolphsen submitted that there had been no violation of due process at the hearing of the appeal by the Appeal Committee. The other competitors had no right to be heard and in any event could not have made any contribution to the case.
15. Ms Hoy gave a brief description of what she had experienced as a result of the resetting of the stadium clock and averred that she had, in all good faith, accepted that she had more than enough time to complete the course. She was clearly upset by the events that have culminated in the present appeal and made the emotional observation that medals should be won on the playing field and not around a table.
16. For present purposes it is not necessary to deal with the FEI Rules other than to take note of the preamble cited above and the provisions related to the bell as set forth in Article 203 and referred to above. The parties are in agreement as to the applicability of the rules governing the jumping test as provided in Article 537 and 538. They are likewise agreed on the Ground Jury's authority, in terms of Article 540.2, to penalise a rider by one penalty point per second, or part thereof, when he or she exceeds the time allowed for completing the course.
17. The duties of the Ground Jury are dealt with in Article 163 of the FEI General Regulations. The relevant provisions thereof, for purposes of considering the appeal before us, are contained in Article 163.1 and 163.6, of which Article 163.6.1 is of crucial importance:

***Article 163 - Ground Jury – Duties***

*The Ground Jury shall be competent to deal with all Objections and Reports which relate to anything occurring during or in direct connection with an event and are presented within the period of its jurisdiction.*

...

*There may be an objection under Art. 167, but there is no appeal against decisions of the Ground Jury in the following cases:*

*6.1. Where the question for decision was what in fact happened during a competition or where marks are awarded for performance;*

*Examples (which are not exhaustive): whether an obstacle was knocked down, whether a horse was disobedient, whether a horse refused at an obstacle or knocked it down while jumping, whether a rider or horse has fallen, whether a horse circled in combination or refused or ran out, what was the time taken for the round, or whether an obstacle was jumped within the time; whether, according to the Rules, the particular track followed by a competitor has caused him to incur a penalty. Contrast questions involving interpretation of the Rules, which can be the subject of appeal.*

18. Article 164 deals with the duties of the Appeals Committee. The relevant provisions appear from Article 164.2, which reads:

***Article 164 - Appeal Committee – Duties***

...

*The Appeal Committee shall deal with the following matters:*

*Appeals against decisions of the Ground Jury. In these cases the decision of the Appeal Committee is final.*

19. Article 170.1 provides for the lodging of an appeal by any person or body with a legitimate interest against any decision of an authorised person or body, provided it is admissible in terms of Article 170.2, which reads:

***Article 170 - Appeals***

...

*An Appeal is NOT admissible:*

*Against decisions of the Ground Jury in cases covered by Art. 163.6.1–4.*

20. In determining the issues it is the function and duty of this Panel to give careful consideration to the relevant facts and circumstances, the submissions put forward by the respective parties and the applicable provisions of the FEI General Regulations as set forth above.
21. It is clear that the ruling of the Ground Jury in deciding to impose a time penalty on Ms Hoy was of a purely factual nature falling within its exclusive jurisdiction. There is no merit in the suggestion by the FEI and NOCG that this ruling involved an interpretation of rules as apparently envisaged, with no particular lucidity, in the last sentence appended, it would seem, to Article 163.6.1.
22. If it had been an interpretation or construction issue, one would have expected, at the very least, an explicit reference to the rule or rules giving rise to such issue. No such reference occurs and none can be inferred. The mere assumption by the Appeal Committee, in deliberating the appeal, that it concerned an interpretation of rules could not have the effect of creating such issue or of converting a factual issue into a legal one relating to the interpretation of a rule or rules.
23. It follows that, in terms of Article 163.6.1 read with Article 170.2.1, the Ground Jury's ruling was clearly not appealable and the Appeal Committee at no stage had the power, authority, competence or jurisdiction to entertain the appeal by Ms Hoy and the NOCG. Therefore, the

decision was demonstrably a nullity and in fact amounted to a non-decision.

24. Although the alternative submission relating to the failure of due process is, on the face of it, a persuasive one, it is not necessary, in view of our above findings, to deal with it.
25. It is likewise not necessary to deal with the merits or demerits of the Ground Jury's ruling, which was clearly a "field of play" decision made within its competence during the course of an event falling under its exclusive control.

**In view of the above considerations, the CAS has decided to uphold the appeal and to order as follows:**

1. The decision of the FEI Appeal Committee is set aside and declared null and void.
2. The ruling of the FEI Ground Jury is reinstated.