Arbitration CAS ad hoc Division (OG London) 12/003 Denis Lynch v. Horse Sport Ireland Limited (HSI) & Olympic Council of Ireland (OCI), award of 29 July 2012

Panel: Mr Allan Sullivan QC (Australia), President; Mr Stuart McInnes (United Kingdom), Mr Sharad Rao (Kenya)

Equestrian (jumping)
Nomination for selection to the Irish Olympic Games team
CAS jurisdiction with regard to the arbitration agreement
CAS jurisdiction with regard to the time when the dispute arose

1. **The jurisdiction of CAS, be it as it ordinarily arises or as it arises when the Ad hoc Division is involved, is contractual in nature. There has to be an arbitration agreement between the relevant parties which confers jurisdiction on CAS to resolve the particular dispute. If there is no contractual documentation, nor any contractual provision which confers upon CAS jurisdiction to hear appeals from the challenged decision of the Olympic Council of Ireland (OCI)/Horse Sport Ireland Limited (HSI) Monitoring Group made or purported to be made under the Selection Criteria for Showjumping for the London Games 2012, CAS has no jurisdiction.**

2. **According to Article 1 of the CAS Arbitration Rules for the Olympic Games, the Ad Hoc Division of CAS has no jurisdiction if the dispute at stake arose more than ten days preceding the Opening Ceremony of the Olympic Games.**

The Applicant, Mr Denis Lynch is an international equestrian show jumping rider of Irish Nationality. He wishes to compete for Ireland in the individual equestrian show jumping event at the 2012 London Olympics which commences on 4 August 2012 (*"the event"*).

The first Respondent, Horse Sport Ireland Limited (HSI), is the governing body for equestrian sport in Ireland. HSI is the body entitled to nominate Irish athletes for selection in equestrian events to the Olympic Council of Ireland (OCI) which is the second Respondent to this appeal. OCI is the only body which has the power to select athletes to represent Ireland at the London Olympics. It can only select equestrian athletes, or combinations of athletes and horses, who are nominated for selection by the HSI and, even if an athlete or combination is nominated, OCI maintains an absolute discretion to refuse to select the nominated athlete (see clauses 1.1 and 1.5 of *"Agreement for the selection of athletes for the Sport "Equestrian"* made on 9 August 2010 between HSI and OCI – *"the Agreement"*).

In accordance with the Agreement, the first Respondent published Selection Criteria for Showjumping the London Games 2012 (the *"Nomination Criteria"*) in March 2012. Under the

Nomination Criteria, the Chef d'Equipe is responsible for picking the horse/rider combinations for nomination to the Second Respondent. As per paragraph 1.3 of the Nomination Criteria, *"these combinations will be proposed to the OCI by HSI. The proposed combinations shall be subject to approval of the OCI"*. Although the Nomination Criteria speak in terms of "selection", it is clear, as the parties have accepted, that where the word *"selection"* is used, it is used in the sense of selection for nomination rather than actual selection for the Olympic Team which, as stated, is at the sole discretion of OCI (see e.g. clauses 1.2 and 1.3 of the Nomination Criteria).

It is common ground, or beyond dispute, that the Agreement and the Nomination Criteria are contractually binding upon the Applicant and HSI.

In accordance with the Nomination Criteria, on 29th June 2012 the first Respondent decided to nominate the Applicant and his horse, Abbervail van het Dingheshof, as one of the two combinations for selection in the event. It was also decided to nominate Billy Twomey and Tinka's Serenade. These nominations were communicated by the first Respondent as the shortlist of riders who were in contention to be nominated so as to allow riders not selected to appeal.

As of 10 July 2012, OCI had not exercised its power to select the Applicant for the event and, indeed, in circumstances more fully explained below, on 6 July 2012, HSI wrote to the OCI requesting that it delay *"ratifying"* the nomination of the Athlete, (that is selecting him for the London Olympics), pending HSI's consideration of the disqualification of the horse *"Lantinus"* at a show jumping event in Aachen in July 2012.

At the Aachen event, Lantinus was disqualified for hypersensitivity of its legs based upon a report of the Veterinary Commission CHIO Aachen 2012 (*"the Veterinary Commission Report"*). The Veterinary Commission Report stated that the precise cause of the hypersensitivity could not be established.

Hypersensitivity is an extremely serious condition affecting horses in show jumping. It refers to tenderness, pain or soreness in a horse's legs which can be caused by natural causes, by less than perfect animal husbandry, or it can be deliberately induced or caused.

To a lay person it might seem hard to believe that someone would wish to deliberately cause a horse's legs to become hypersensitive, but in show jumping it can be advantageous for a horse to be hypersensitive. That is because the hypersensitive horse will lift its legs higher in seeking to clear jumps to avoid further injury or pain to its hypersensitive legs which might be occasioned if it hits the jump.

It is understandable, therefore, why hypersensitive horses are disqualified from show jumping events, not only to protect them from further injury, but also to prevent such horses and their riders from gaining an unfair competitive advantage.

Further, sometimes it may not be possible to determine whether hypersensitivity has occurred naturally, (e.g., as a result of the horse hitting a hurdle or knocking its leg), or whether it is the result of poor animal husbandry or deliberate human conduct such as the application of a substance to the horse's legs which makes them hypersensitive, (e.g. capsaican).

In the 12 months prior to the Aachen event, two other horses ridden by the Applicant in competition had been disqualified from competitions because of hypersensitivity. There is no evidence currently before this Panel which would indicate whether the causes of their condition on each of those occasions was *"natural"* or *"unnatural"*. On another occasion, at the 2008 Beijing Olympics, the Applicant and the horse, Lantinus (i.e. the same horse as involved in the Aachen event) were disqualified.

Moreover, at the 2004 Athens Olympics, an Irish rider, Mr Cian O'Connor was initially awarded the gold medal in the show jumping event only to have it taken away when his horse was tested positive for a prohibited substance.

Given what has occurred to Irish rider/horse combinations at the previous two Olympics, it is understandable that HSI would be concerned to avoid any further incident involving an Irish rider and horse at the London Olympics.

As a result of what happened in Aachen, in the context of the previous history of hypersensitivity as summarized above, HSI sent an email dated 7 July 2012 to the Applicant's brother and agent, Mr Shay Lynch which read as follows:

> *Dear Denis,*
>
> *In line with section 2.8 of the first HSI selection criteria for Showjumping for the 2012 London Olympic Games, you are required to meet with the OCI/HSI monitoring group to address concerns arising out of the disqualification of your horse Lantinus from Aachen CHIO on Friday, July 6th in the context of similar previous disqualifications.*
>
> *The meeting will take place in the Clarion Hotel in Dublin airport at 9:30 am Irish time on Monday morning next, July 9th. As the decision must be made on Monday, if you decide not to attend, the group will make a decision in your absence. If you have any written submission you wish to make you can submit this up to 8am Irish time on Monday July 9th to dmcdonald@horsesportireland.ie*
>
> *This group will decide whether HSI should proceed with your nomination to the OCI to represent Ireland in Showjumping at the Olympic Games in London.*
>
> *AS a decision of HSI in relation to nominations for the Olympics is appealable to the OCI, in order to preserve your entitlement to such further appeal, the nominees of the OCI on the Monitoring Group will not participate in this meeting.*
>
> *I would appreciate if you could confirm your attendance by return.*

That email referred to section 2.8 of the Nomination Criteria which provides as follows:

> *2.8 While the main objective is to select the best combination to represent Ireland, HSI must be satisfied that any combination selected for the Olympic Games will be disciplined and cooperative and will not bring Ireland into disrepute. An Athlete who is being considered for selection shall be required to attend a meeting of the OCIIHSI Monitoring Group to address any concerns in this regard, which the group may have or which are referred to it concerning that athlete. If the group is not satisfied with the explanation provided or commitments given by the athlete, they can deem the athlete ineligible for selection.*

The proposed meeting did in fact take place in Dublin on 9 July 2012. Present were the Applicant, his brother Shay and his lawyer, Ms Gattiker as well as the members of the OCI/HSI Monitoring Group other than the OCI members of that Group who decided not to attend because of a perceived conflict between being party to a decision under section 2.8 and being involved in a possible appeal from that decision.

Notes were taken of the meeting. There is some dispute as to whether those notes are entirely accurate and complete, but it is not necessary for this Panel to resolve that dispute. What is clear is that the members of the Monitoring Group who were present were not satisfied with the explanation provided by the Applicant in relation to the Aachen incident and were not satisfied that if the Applicant was nominated and subsequently selected, for the Olympic Games team he would *"not bring Ireland into disrepute"*.

If this Panel had jurisdiction to hear this appeal it would be necessary for it to determine whether there was a reasonable basis for these evaluations by the members of the Monitoring Group and as to whether otherwise the *"decision"* of the members of the Monitoring Group made on 9 July 2012 was a valid one. But, as will be seen from what follows, the Panel has concluded it does not have jurisdiction to hear this appeal and, in those circumstances, it is unnecessary and inappropriate for the Panel to consider the *"merits"* of the appeal.

Towards the end of the meeting, the members of the Monitoring Group informed the Applicant of the decision under section 2.8. Although not expressed, in the precise language of section 2.8 what was conveyed to the Applicant was, in substance, that the Monitoring Group lacked the relevant satisfaction required by the section and that, therefore, the Applicant was deemed to be ineligible for nomination for selection to the Olympic Games team.

It is apparent that the Applicant expressed his disagreement with the findings indicating that it was *"not over"* for him yet.

On 10 July 2012, HSI wrote to the Applicant formally conveying the decision of the Monitoring Group.

That letter reads as follows:

> *The purpose of this letter is to formally notify you of the decision of the Monitoring Group which was communicated orally to you yesterday at the conclusion of the Monitoring Group meeting attended by you, your legal advisor and your agent. The documentation relevant to the decision is enclosed as per the Schedule to this letter.*
>
> *Section 2.8 of Showjumping Olympic Games Criteria states that Horse Sport Ireland must be satisfied that any combination selected for the Olympic Games will be disciplined and cooperative and will not bring Ireland into disrepute.*
>
> *Your horse Lantinus was disqualified at the CSIO5* show in Aachen on Friday 6th July after testing positive for hypersensitivity. Following receipt of the relevant documentation from the FEI, a meeting from the Monitoring Group was convened in accordance with the Showjumping Olympic Games Criteria to address concerns arising*

from the disqualification of Lantinus, the third disqualification for hypersensitivity of a horse for which you are the person responsible, in the last twelve months.

The Olympic Council of Ireland has the exclusive power to decide upon entries to the Olympic Games proposed by national federations. As you from my emails to your agent on 7th July, the Olympic Council of Ireland nominees on the Monitoring Group withdrew from the meeting in order to preserve any entitlement you have to appeal the matter to the Olympic Council of Ireland.

As you know, the independent veterinary member and HSI member of the Monitoring Group were not satisfied with the explanation provided or the commitments offered at the meeting and decided that you should be deemed ineligible for selection for the 2012 Olympic Games.

On 13 July 2012, Ms Gattiker, on behalf of the Applicant, sent an email to HSI which stated that the decision of the Monitoring Group was *"a legal matter"* and setting out reasons why the decision was legally flawed and hence *"null and void"*. The letter asked for details of the appeal procedure in respect of the decision, (asserting that HSI had already been asked twice to provide the Applicant with details of the procedure). The letter also expressly stated that the Applicant did *"not accept what (had) happened"* and indicated that the Applicant was preparing to sue HSI in Germany because of the unacceptable consequences resulting from the Aachen "*situation*".

On the same day, Mr Rice of Beauchamps, Solicitors, acting on behalf of the HSI, responded to Ms Gatticker's email. Relevantly, that letter read:

We reserve our entitlement to respond to any issues raised in your email in due course. As regards your deadline of 5.00 p.m. CET, the appropriate route of appeal is to the Olympic Council of Ireland. This was clearly indicated to your client in the email from Damian McDonald to Shay Lynch on 7th July and again in Mr. McDonald's letter to your client of 10th July.

As you know, Horse Sport Ireland nominates athletes to the Olympic Council of Ireland which then selects the athletes to represent Ireland at the Olympic games. Under the Olympic Charter and its bye-laws and the Agreement between Horse Sport Ireland and the Olympic Council of Ireland, the Olympic Council of Ireland has the exclusive power to decide upon the entry of athletes for the Olympic Games, we are not aware of whether there is any deadline for entries, as this a matter for the Olympic Council of Ireland and/or the International Olympic Committee.

Apparently later on Friday, 13 July 2012, Ms Gattiker telephoned Mr Rice who was unable to take her call. She left a voice message which was not received by Mr Rice until Monday, 16 July 2012. Mr Rice then sent an email to Ms Gattiker responding to her voice mail message. Once more, that email asserted that the Applicant had an appeal to the OCI and referred indirectly to cl. 5.2 of the Agreement asserting that it was a provision which enables an appeal to be heard by the OCI Executive Committee or a sub-committee appointed by the Executive Committee.

There appears to have been no further relevant communication between the parties. On 26 July 2012, the Applicant lodged with the Court Office of the Court of Arbitration for Sport (CAS) a *"statement of appeal"* challenging the decision of the Monitoring Group. It was unclear whether the Applicant wished to have his appeal dealt with by the "ordinary" CAS appeals arbitration procedure in Lausanne pursuant to Art. R47 *et seq*. of the Code of Sports-related Arbitration ("*the Code*") or whether he wished

it to be heard by the CAS ad hoc Division in London pursuant to the CAS Arbitration Rules for the Olympic Games ("*the Ad Hoc Rules*").

During the night between 26 July 2012 and 27 July 2012, the Applicant indicated that he wished the appeal to be dealt with under the Ad Hoc Rules and his application together with exhibits was forwarded to the CAS ad hoc Division in London.

Following receipt of the papers by the Ad Hoc Division the presently composed Ad Hoc Panel was constituted to hear the appeal. The CAS Ad hoc Court Office circulated by email the documents received from the Applicant to the Respondents and Interested Parties on 27 July 2012. It became apparent for the first time when the hearing of the appeal commenced, shortly after 8 pm on 28 July 2012, that OCI claimed it had not yet received all the documents relied upon by the Applicant, particularly the 46 paragraph written submission relied upon by the Applicant in the appeal.

As will be explained below, it is unnecessary to determine whether the claim by the OCI was correct. The Panel made directions for the filing of an answer by the Respondents and Interested Parties by 10am on Saturday 28 July 2012 and fixed the hearing of the matter for 8 pm that night.

The Answer filed on behalf of HSI included submissions challenging the jurisdiction of this Panel to hear the appeal.

The hearing of the appeal commenced shortly after 8 pm on 28 July 2012. Present were those persons listed on the Attendance Sheet as follows:

For the Applicant: Mr Denis Lynch, Applicant; Ms Monika Gattiker, attorney-at-law; for Horse Sport Ireland Ltd: Mr David Casserly, Barrister; Mr Gary Rice, Solicitor; Mr Damian McDonald, Secretary General HIS; Mr Marcus Swail, Team Vet; Mr Robert Splaine, Chef d'Equipe of the Irish Equestrian Team; for the Olympic Council of Ireland: Mr William O'Brien - 1st Vice President Olympic Council of Ireland; Mr Dermot Sherlock, Honorary General Secretary Olympic Council of Ireland; Mr Peadar Casey; Honorary Treasurer of the Olympic Council of Ireland; for the IOC: Mr André Sabbah, Legal Counsel; for the FEI: Ms Lisa Lazarus, General Counsel; for Cian O'Connor: Mr Neville Byford, Ms Lucy Webster, Mr JP Chapman QC.

Shortly after the hearing began, Mr O'Brien of the OCI indicated that OCI had not received all of the Applicant's documents and that OCI wished to seek an adjournment of the hearing so as to be able to receive and consider those documents and to brief counsel to appear on behalf of OCI. This was the first occasion on which anyone became aware the OCI was claiming it had not received all the documentation relating to the appeal.

The Panel heard submissions in respect of OCI's application on the assumption that what it asserted was correct, namely that it had not received all relevant documentation. Although all parties were anxious to have the appeal determined as quickly as possible, to their credit, none of them wished that to occur in circumstances where OCI was not given a proper opportunity to be heard after having received and had the opportunity of considering all relevant documents.

Mr Casserly, representing HSI, very sensibly submitted that an appropriate procedure was to hear the challenge to the Panel's jurisdiction on 28 July 2012 and to then hear the appeal *"on the merits"* in the event that the Panel determined it had jurisdiction to hear the appeal. Each of the parties including the Applicant, Respondents and the Interested Parties agreed with this approach or did not oppose the HSI submission.

Accordingly, the Panel proposed the following rulings:

(a) The hearing on 28 July 2012 would be confined to the issue of whether the Panel had jurisdiction to hear the appeal.

(b) With the express agreement of the OCI as communicated by Mr O'Brien, no further submission on jurisdiction would be made other than those which were to be made on 28 July 2012.

(c) The Panel would endeavour to give its decision on jurisdiction by lunchtime on Sunday 29 July 2012.

(d) In the event that the Panel decided it had jurisdiction to hear the appeal, it would hear the appeal *"on the merits"* commencing at 7pm on Sunday 29 July 2012.

(e) If the Panel determined it had no jurisdiction to hear the appeal then the proposed hearing of the appeal *"on the merits"* would not take place.

All parties agreed to the proposed rulings which were then made by consent, and the Panel embarked upon the hearing of argument as to where it had jurisdiction to hear the appeal.

The hearing in respect of jurisdiction concluded at about 12.30am on the morning of Sunday 29 July 2012. This document constitutes the Panel's unanimous decision in respect of the jurisdiction issue.

LAW

Legal framework

1. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the *"CAS ad hoc Rules"*) enacted by the International Council of Arbitration for Sport ("ICAS") on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 *("PIL Act"*). The PIL Act applies to this arbitration as a result of the express choice of law contained in Art. 17 of the CAS ad hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Art. 7 of the CAS ad hoc Rules.

2. The jurisdiction of the CAS ad hoc Division arises out of the entry form signed by each and every participant in the Olympic Games as well as out of Rule 61 of the Olympic Charter.

3. Under Art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate"*.

4. According to Art. 16 of the CAS ad hoc Rules, the Panel has *"full power to establish the facts on which the application is based"*.

5. Each of the Applicant and the Respondents are Irish residents and all contractual arrangements between them were made in Ireland. Moreover, the dispute between the parties involves the Applicant's deemed ineligibility for nomination for selection in the Irish Olympic team. In those circumstances, the Panel considers that the appropriate substantive law to the appeal is the law of Ireland and it notes that all submissions made to it by all parties proceeded upon the basis that the law of Ireland was the substantive law to be applied. No one submitted to the contrary. The governing law of the arbitration is, however, Swiss law (see Article 7 of the Ad hoc Rules).

6. Article 1 of the Ad hoc Rules imposes a temporal limit on the jurisdiction of any CAS Ad hoc Panel. It limits the jurisdiction of such Ad hoc Panel to disputes *"insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games"*.

7. The Opening Ceremony for the London 2012 Olympics took place on Friday 27 July 2012 so that, for the purpose of Article 1 of the Ad hoc Rules, this Panel's jurisdiction to resolve disputes is confined to those which have arisen on or after 17 July 2012.

8. Article 1 of the Ad Hoc Rules also provided that in the case of a request for arbitration against a decision pronounced by a National Olympic Committee, the Claimant must, before filing a request for the dispute to be heard by the Ad hoc Division, have exhausted all internal remedies available to him unless the time needed to exhaust the internal remedy would make the appeal to the Ad hoc Division ineffective. In so far as the Applicant appeals against the decision of the OCI to select another athlete for the show jumping team this aspect of the Article may be of relevance.

Consideration of Jurisdiction issue

9. The parties made submissions on the jurisdiction issue, namely the Applicant, HSI and the Interested Parties, Mr O'Connor. Those submissions have greatly assisted the Panel in its deliberation.

10. For the reasons which follow, the Panel has concluded that it has no jurisdiction to hear this appeal. There are two principal reasons, each sufficient in itself, why the Panel has reached this conclusion:-

    (a) First, because the jurisdiction of CAS, be it as it ordinarily arises or as it arises when the Ad hoc Division is involved, is contractual in nature. There has to be an arbitration agreement between the relevant parties which confers jurisdiction on CAS to resolve the

particular dispute. The Panel, having examined all relevant contractual documentation, cannot find any contractual provision which confers upon CAS jurisdiction to hear appeals from a decision of the Monitoring Group made or purported to be made under section 2.8 of the Nomination Criteria.

(b) Secondly, even if CAS did have jurisdiction to hear such an appeal, the Ad Hoc Division of CAS does not have that jurisdiction because the dispute arose prior to the 17 July 2012 and thus Article 1 of the Ad Hoc Rules precludes the Ad Hoc Division from dealing with such an appeal.

A. No contractual conferral of Jurisdiction.

11. Contrary to the submissions of HSI and of Mr O'Connor, to which the Panel shall later refer, the Applicant submitted that the relevant statutes or rules of HSI made no provision for an appeal from a decision of the Monitoring Group pursuant to section 2.8. For the reasons which follow, the Panel agrees with this submission but not with the consequence of that submission as made by the Applicant.

12. The consequences, according to the Applicant, of there being no contractual provision for an appeal is that there had to be a right to appeal such a decision to CAS. According to Ms Gattiker this was because there is a basic rule in sport that everything goes to CAS so that where there is no appeal procedure in place for an internal appeal, or an appeal to the OCI, the Applicant had the right to appeal to CAS directly.

13. With respect, the Panel disagrees. There is no basic rule as submitted by the Applicant. As stated, the jurisdiction of CAS is contractual in nature. If the relevant contractual documents do not provide expressly or by necessary implication for an appeal to CAS, then CAS does not have any inherent right to hear such an appeal. In such a case, the aggrieved party must seek whatever relief may be available in a court of law which has jurisdiction to consider such matters. He, she or it cannot come to CAS.

14. Alternatively, the Applicant submits that the General Rules of HSI expressly or by necessary implication authorised an appeal to CAS from a decision of the Monitoring Group. The Applicant relied on General Rules 1.3.2, 1.3.4 and 1.3.5 as well as General Rule 14.

15. There are a number of insuperable problems with this submission. First, the General Rules are those of HSI alone whereas the Monitoring Group is a joint body set up by agreement between the HSI and OCI comprising representatives of both bodies and an Independent Representative (see the Appendix to the Agreement under the heading *"Terms of Reference"*).

16. Absent the agreement of the OCI and the Independent Representative, of which there is no evidence, rules made solely by the HSI could have no application to a body so comprised.

17. Secondly, General Rules 1.3.2, 1.3.4 and 1.3.5 do not confer any jurisdiction on CAS in respect of the decision in question. General Rule 1.3.2 acknowledges the agreement of the parties to

submit to the authority of CAS "as applicable". The phrase "as applicable" requires an examination of the relevant contractual documents to determine where, and in respect of which decision, CAS has been given authority. It is only in respect of decisions where CAS has been given such authority that General Rule 1.3.2 obliges a party to submit to the jurisdiction of CAS. Neither the General Rules nor any other relevant document confer any such authority on CAS.

18. General Rule 1.3.4 relates solely to disciplinary matters and breaches of the General Rules, and as the Applicant accepts and the notes of the meeting of 9 July 2012 make clear, the decision in question was not one involving a disciplinary matter or an allegation of breach of the General Rules.

19. General Rule 1.3.5 is merely a provision whereby the parties agree not to go to court where there has been a submission to the jurisdiction of CAS. This, it does not by itself confer jurisdiction on CAS.

20. Likewise, General Rule 14 does not confer any jurisdiction on CAS in respect of the impugned decision. First, General Rule 14 only applies to decisions of a *"hearing committee"* or a disciplinary committee (General Rule 14.1). The Applicant accepts that the Monitoring Group was not a disciplinary committee. Nor is it a *"hearing committee"*. Hearing committees are committees formed upon receipt of a reference from the Secretary General of OCI (see General Rules 12.1). As stated the Monitoring Group is not so formed, it is formed pursuant to the Agreement (see paragraph 15 above). Moreover, the referral from the Secretary General referred to in General Rule 12.1 is one which arises only in the circumstances set out in General Rule 11.2, namely when the Disciplinary Officer determines that there has been a breach of the General Rules. There has been no such determination here.

21. It follows that the decision of the Monitoring Group was not a decision of a hearing committee within the meaning of General Rule 14, so that rule has no application.

22. Further, even if the Monitoring Group was a *"hearing committee"* for the purposes of General Rule 14, the appeal from it has to be to an appeal committee of HSI (General Rules 14.4 – 14.7). An appeal to CAS only lies from a decision of the appeal committee (General Rule 14.8). Here, the Applicant did not seek to appeal to an appeal committee constituted under General Rule 14 and thus there has been no decision of any such appeal committee. Therefore, General Rule 14.8 confers no jurisdiction on CAS to hear this appeal.

23. It follows that this Panel is not persuaded by the Applicant's submissions that CAS has jurisdiction to hear this appeal. However, it has not arrived at this conclusion by the principal routes urged on us by either HSI or Mr O'Connor and the Panel briefly sets out why it has not adopted their submissions.

24. HSI acknowledges that there is no express provision dealing with appeals from decisions of the Monitoring Group. However, it says that a right of appeal to the OCI is conferred by clause 5.2 of the Agreement which provides:-

"Appeals to the OCI may be heard by the OCI Executive Committee.... It is agreed by the parties that the decision of the OCI is final".

25. In the Panel's view, clause 5.2 does not confer any jurisdiction on the OCI to hear any appeal let alone one from the Monitoring Group under section 2.8 of the Nomination Criteria which were not in existence when the Agreement was entered into. Rather, clause 5.2 merely provides which body or committee within the OCI may hear an appeal which is otherwise provided for somewhere in the contractual documentation. As stated, an appeal from a decision such as the one in question is not otherwise provided for in the contractual documentation (cf. the express conferral of appeal jurisdiction on the OCI in respect of decisions contemplated by the HSI Selection Appeals Procedure document dated 29 June 2012 – see clause 9).

26. The Panel would, therefore, not have declined to hear the appeal for the principal reason advanced by HSI.

27. In contrast to the position adopted by HSI, Mr O'Connor submitted that, properly construed, the HSI Selection Appeals Procedure provided for an appeal of the relevant decision and, as the Applicant had not availed himself of this appeal opportunity, he had not exhausted his internal remedies.

28. Even if the Panel were to accept all the other attractive submissions as to construction of this document made on behalf of Mr O'Connor, the Panel is of the firm view that the Selections Appeals Procedure only applies to decisions made by the Team Manager of HSI (see clause 2.1 and the heading thereto and clauses 7.1, 7.2, 8.1.2 and 8.5). Whilst the text of a provision must be construed in its context including in the context of the contractual language as a whole and the purpose of the contract, in the Panel's view the language of clause 2.1 viewed in the light of the contract as a whole is clear, unambiguous and intractable. The only decisions to which the Selection Appeals Procedure relates are those of the Team Manager. The Monitoring Group, self-evidently, is not the Team Manager.

29. For these reasons the Panel would not have declined jurisdiction on the principal basis submitted by Mr O'Connor.

B. In any event, the dispute arose before 17 July 2012

30. Both HSI and Mr O'Connor submit that an additional sufficient reason for this Ad Hoc Panel not having jurisdiction is that the dispute arose more than ten days preceding the Opening Ceremony of the Olympics (that is before 17 July 2012) with the result that Article 1 of the Ad Hoc Rules denies jurisdiction to the Ad Hoc Division. They rely on the reasoning of a differently composed Panel of the Ad Hoc Division of CAS in the decision of CAS OG 12/002 delivered in London on 26 July 2012.

31. The Panel accepts the submission of HSI and Mr O'Connor in respect of this matter and, with respect, although not obliged to follow the decision in CAS OG 12/002, agrees with the decision and the reasoning expressed therein.

32. Applying that reasoning to the present case the Panel is of the view that:

    (a) The Applicant was informed of the rationale for the decision of the Monitoring Group by, at the latest, 10 July 2012.

    (b) By, at the latest, 13 July 2012 the Applicant, through his lawyer, was asserting that he did not agree with that decision and that he disputed it. By that time he was foreshadowing legal action in respect of the decision, albeit somewhat inexplicably, legal action in Germany rather than in Ireland.

33. It follows that the dispute arose no later than 13 July 2012. Article 1 of the Ad hoc Rules thus precludes this Panel from hearing this appeal.

34. Further, as noted by Mr O'Connor, even the Applicant submitted that he was in dispute by 16 July 2012. The Applicant submitted that although 16 July 2012 was not within 10 days of the date of the Opening Ceremony, he should be allowed a day or more from the dispute arising to approach the Ad Hoc Division. The Panel does not accept the Applicant's submission. The language of Article 1 of the Ad Hoc Rules is clear and unambiguous. The Panel has no discretion to extend the period contemplated by Article 1 or to dispense with compliance with its requirements.

35. It follows that the Panel also finds that it has no jurisdiction to hear this appeal by reason of Article 1 of the Ad Hoc Rules.

36. Since the Panel has no jurisdiction to hear the appeal it is unnecessary and inappropriate as agreed by the parties for it to embark upon a hearing of the *"merits"* of the appeal and the Panel vacates the proposed further hearing of this matter at 7pm on Sunday 29 July 2012.

The ad hoc Division of the Court of Arbitration for Sport rules:

1. It has no jurisdiction to resolve the dispute which is the subject matter of the application.

2. The application filed by Mr Denis Lynch on 27 July 2012 is dismissed.