



**Arbitration CAS 2004/A/704 Yang Tae Young & Korean Olympic Committee (KOC) v. International Gymnastics Federation (FIG), award of 21 October 2004**

Panel: The Hon. Michael Beloff QC (United Kingdom); Mr Dirk-Reiner Martens (Germany); Mr Sharad Rao (Kenya)

*Gymnastics*

*Protest against a marking error at an Olympic event*

*Reversal of a judging error*

*CAS jurisdiction in connection with a field of play decision*

- 1. When there is a relevant procedure in place to resolve field of play decisions, the CAS generally accepts the decision reached as final except where it can be demonstrated that there has been arbitrariness, fraud or corruption in arriving at this decision. This position is consistent with traditional doctrine and judicial practice which have always stated that rules of the game, in the strict sense of the term, should not be subject to the control of judges.**
- 2. The CAS should abstain from correcting the results by reliance of an admitted error by an official so that the “field of play” jurisprudence is not directly engaged. An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing the result of a competition. Each sport may have within it a mechanism for utilising modern technology to ensure a correct decision is made in the first place or for immediately subjecting a controversial decision to a process of review, but the solution for error, either way, lies within the framework of the sport’s own rules; it does not licence judicial or arbitral interference thereafter.**

On 28 August 2004 a Korean gymnast for the Republic of Korea, lodged an application with the CAS ad hoc Panel (“the ad hoc Panel”) complaining about a marking error made on 18 August 2004 in respect to the parallel bars in the context of the Men’s Individual Gymnastics Artistic All-round Event Final (“the Event”). The start value for Yang was given as 9.9 instead of 10. It is asserted by Yang (and originally accepted by FIG) that but for the error, Yang would have received the gold medal and not the bronze, and the recipient of the gold medal, Hamm, a gymnast from the United States of America, the silver medal.

On the same day FIG informed the CAS ad hoc office that key persons would be unable to attend any hearing on the 29 August 2004 (the day of the closing ceremony) and that, in any event, a hearing scheduled for that date would leave it with inadequate time to prepare its defence. Again on the same day, the US attorneys for Hamm, a vitally interested party, sent a fax to the CAS ad hoc office asking

for a substantial adjournment of the hearing. In summary, while the ad hoc Panel was ready to hear the application on the 29 August 2004, the parties (save possibly Yang) were not in a position to proceed. Accordingly, the ad hoc Panel acting under Article 20 of the CAS ad hoc Rules referred the dispute to arbitration by the (ordinary) CAS under the Code of Sports-related Arbitration (“the Code”).

On 27 September 2004, a hearing was held at the Hotel Beau Rivage at Lausanne.

In gymnastics scores are awarded by a combination of start values based on the degree of difficulty in a particular routine and on execution (Code of Points (CP) Ch 4 Article 11 Rules 1-4). The assessment of start values is in part subjective and in part objective (CP Article 12.15). Elements to make up start values are objectively identified, eg: a Belle or a Morisue. Whether any element has been performed is a matter of subjective judgment (as a *fortiori* is execution).

The following judges served on the A Jury (in charge of determining the start value of the exercises, article 7.8.2 and 7.10.1 Technical Regulations (TR) at the parallel bars:

- Buitrago (Columbia), designated as A2 judge based on a draw made before the final of the Event,
- Bango (Spain) designated as A1 judge before the Olympic Games,
- Beckstead, Chair, (USA), designated as Chair of Judges Panel before the Olympic Games.

The judges of the B Jury consisted of 6 judges in charge of determining the execution scores for the parallel bars exercises (Articles 7.8.2 and 7.10.1 TR). One of these judges was Dong Min Kim, Korea (“Judge Kim”).

The President of the Men’s Technical Committee was Adrian Stoica (Rumania) (“Stoica”). By virtue of articles 7.9 and 7.8.1 of the TR, he presided over the Superior Jury, which has the power to take the necessary action in case of serious judging errors during the competition and, also, to control the judges’ scores.

A start value of 9.9 (grade D) was given to Yang for his routine on the parallel bars: video analysis showed that the Start Value should have been 10.0 A Belle had been misidentified as a Morisue.

The Medal Ceremony began at 22:48 pm. At approx. 23:20pm, Hamm was awarded the gold, Kim, the silver, and Yang the bronze medal.

It is common ground that KOC protested about the Start Value attributed to Yang for the parallel bars. It is in issue as to when, where and to whom any such protest was made. Yang relies (in the alternative) on three incidents:

- (i) a dialogue between Judge Kim and Buitrago at the conclusion of the parallel bar rotation,
- (ii) a meeting between the Korean coaches and FIG officials later in the evening,
- (iii) written protests by the KOC from 19 August onwards.

In connection to Yang's case as to the first incident, we conclude that, whatever may have been Judge Kim's inner state of mind (a Korean judge of the B jury), he gave no indication of continued dissatisfaction to Buitrago. Judge Kim did not suggest to us that he asked Buitrago to take the matter further.

In connection to Yang's case as to the second incident, Lee (coach of the Korean Gymnastics Team), accompanied by Yoon Chang Soon (Senior Head Coach of the Korean Gymnastics Team) ("Yoon") and Jung Jin Soo (Assistant Coach of the Korean Gymnastics Team) ("Soo") raised the matter with the 'A' Judges and Stoica (President of the Men's Technical Committee). There is a conflict of evidence between the testimony of the KOC and the FIG witness. It is sufficient for our purposes to note that there was a protest but made too late to affect the medal ceremony.

Yang's case as to the third incident is as follows.

On 19 August 2004, Mr. Shin Bark Jae, Chef de Mission of the Korean Delegation ("Shin"), sent a fax entitled "Official Request for Correction of Start Value" to Stoica.

On 19 August 2004 Shin sent a fax to Mr. Bruno Grandi, President of FIG ("Grandi").

On 10 August 2004 Grandi and Mr. Norbert Bueche (Secretary-General of FIG) ("Bueche") sent a reply to the two KOC faxes. This stated:

*Our technical delegate has confirmed that the Parallel Bar routine of your Korean gymnast Yang Tae-Young was given a start value of 10 at the Qualifying Competition (I) and at the Team Final (competition IV). At the All Around Final (Competition II) the judges gave a start value of 9.9. Our rules do not allow a protest against judges' marks. The judges' marks have to be accepted as a final decision and cannot be changed.*

*We can assure you that we are analysing all the judges marks and that we will take severe sanctions against all judges who have not judged correctly and made serious mistakes...*

*We are very sorry that such an occurrence took place and regret not being able to give you a more favourable answer.*

On 20 August 2004 Shin sent a fax to Mr. Gilbert Felli, Executive Director IOC ("Felli") (and copied to Mr. Jacques Rogge, President of the IOC) ("Rogge") requesting IOC to conduct a "thorough investigation" of the case "to safeguard athletes from any form of misjudgement and to help the Olympic spirit of fairness".

On 22 August 2004 USOC and KOC met with the IOC and proposed that two gold medals be awarded. Rogge confirmed that IOC would not issue two gold medals, but would respect a request from FIG to have the scoring error corrected and the medals re-allocated.

On 26 August 2004 a letter was sent by FIG entitled "Fair Play" to Hamm regarding comments allegedly made by him to American Press that he would return the Gold Medal if FIG requested him to do so.

However, USOC rejected the proposal in FIG's letter of 26 August 2004 and refused to forward the letter to Hamm. USOC also requested a withdrawal of the FIG letter.

Thereafter Yang filed the application with the Ad Hoc Panel.

## LAW

### Applicable Law

1. The CAS Rules provide so far as material as follows:

*“R58 Law Applicable*

*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”.*

2. In our view the applicable Regulations are contained in the various FIG instruments set out below. We must also refer to the CAS jurisprudence on field of play decisions as part of the *lex sportiva* appropriate to the Olympic Games as to other competitions.
3. The relevant Articles of the FIG Statutes provide so far as material<sup>1</sup>:

*Article 18: Technical Committee and General Gymnastics Committee*

*Article 18.1:*

*Composition “... bodies are elected to administer and manage the ... discipline of FIG (Men’s Artistic Gymnastic)*

*Article 18.3 – the functions of the Technical Committees include controlling ... the activities of judges in accordance with the Technical Regulations, the Code of Points and Judges Guidelines”.*

*Ensuring in conjunction with the Executive Committee the ... Technical Regulations ... are observed at the Gymnastics Competitions of the Olympic Games.*

*Making decisions on any technical matters of urgency subject to reporting this to the next meeting of the Executive Committee.*

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<sup>1</sup> ‘Material’ means for this purpose either germane, directly or indirectly, to our conclusions or relied on by the parties.

4. The FIG Technical Regulations (2002 CD) provide, so far as material as follows:

**REG. 7 JUDGES & JUDGING OF COMPETITIONS**

**REG. 7.8 ORGANISATION AND RESPONSIBILITY OF JURIES AT OFFICIAL COMPETITIONS OF FIG**

**Reg. 7.8.1 Superior Jury**

*This consists of the Technical President and two experts appointed by the Technical Committee (Technical Committee members or highly experienced judges).*

**The functions of the Superior Jury are:**

1. **To supervise the competition and to deal with any breaches of discipline or any extraordinary circumstances affecting the conduct of the competition.**
2. **Where there is a grave error of judgement on the part of one, or several, judges to take such action as they consider necessary.**
3. **Continually, to review the marks awarded by the judges and to issue a warning to any judge whose work is considered to be unsatisfactory or showing partiality.**
4. **Following the unsatisfactory result of any warning, to remove and replace any judging personnel.**

**Reg. 7.8.3 Jury of Appeal and Competitions' Supervisory Board**

[...]

**The Jury of Appeal deals at an appropriate time following the conclusion of each session with any appeals made by judges who have been warned or excluded by the Superior Jury.**

*The Jury of Appeal also monitors that the requirements of the Statutes, Technical Regulations, Rules and Guidelines are observed. In case of any offence the Jury of Appeal reports to the responsible body for taking any action.*

5. FIG Code of Points 2001 ("CP") applicable to the Men's Artistic Gymnastic Competitions at the Olympic Games provided as follows:

*Chapter 2 Regulations for Gymnasts, Coaches, and Judges*

*Article 2*

*Rights and Responsibilities of the Gymnast*

1. **Among other things, the gymnast has the right:**
  - a) **To have his performance judged correctly, fairly, and in accordance with the stipulations of the Code of Points.**
  - ...
2. **Among other things, the gymnast has the responsibility:**
  - a) **To know the Code of Points and conduct himself accordingly.**

...

*Article 3*

***Rights and Responsibility of the Coach***

...

3. ***Among other things, the coach has the responsibility:***

a) ***To know the Code of Points and conduct himself accordingly.***

...

*Article 5*

***Rights and Responsibilities of the Men's Technical Committee***

1. ***All official FIG Competitions, the members of the FIG Men's Technical Committee will serve as follows:***

a) ***The President of the Men's Technical Committee or his representative will serve as Chair of the Competition Jury. His Responsibilities include:***

I. ***To deal with competition related appeals in accordance with the Technical Regulations that apply to that competition.***

II. ***To call and chair all judges' meeting and instruction sessions.***

III. ***To apply the stipulations of the Judges' Regulations and Technical Regulations that apply to that competition.***

...

*Article 6*

***Rights and Responsibilities of the Judges***

1. ***Among other things, each member of the Appartus Jury has the Responsibility:***

...

j) ***To remain in his assigned seat and to refrain from having contact or discussions with gymnasts, coaches, or other judges during the competition.***

...

*Article 10*

***Functions of the Apparatus Jury during Competition***

1. ***The Chair of the Apparatus Jury has, among others, the following functions:***

...

f) ***To assure that the gymnast is given the correct score for his performance by taking action, with the approval of the Chair of the Competition Jury and as outlined in the current Technical Regulations, to change an extremely incorrect score. Such action may result in penalties to one or more judges.***

...

2. ***The judges of the A-jury have, among others, the following functions:***

...

b) **Judge A1 and A2 have the function:**

I. To evaluate the content of the exercise. This task includes:

...

- **Calculating the correct Start Value**

...

**Part II – The Code of Points**

Chapter 4 The Evaluation of Competition Exercises

Article 11

General Rules

...

**3. The A-jury establishes the Start Value of an exercise and the B-jury registers the execution errors related to technique and body position.** The highest and the lowest sums of execution errors are eliminated. The average of the four remaining sums is subtracted from the Start Value in order to determine the Final Score for an exercise.

6. There is no doubt that a mechanism exists for reversing judging errors, although there did not appear to be universal familiarity with it even among those responsible for its operation, in particular, there was an unresolved issue as to whether special forms had to be used for the purposes of protest. The Chair of the Apparatus Jury has the power, with the approval of the Chair of the Competition Jury, to change “an extremely incorrect score” (CP Article 10.1.(f)) (See also CP Article 5(1)(a) which states that the President of the Men’s Technical Committee will double up as Chair of the Competition Jury). The TR Reg. 7.8.1 & 2 provides also for the Superior Jury, on which the same person also sits, to supervise the competition where there is a grave error of judgment on the part of one or several judges to take such action as they consider necessary – (words large enough to embrace reversing marks as well as disciplining judges) – and continually to review the marks awarded by judges.
7. It is, however, notable that all the provisions we have recited refer to the role of the persons/bodies **vis a vis a competition**; the heading to Article 10(1) CP refers expressly to “functions during competition” and TR Reg. 7.8. to responsibilities “at official competitions”. We consider that this sufficiently identifies that any appeal must be dealt with during, not after a competition. After a competition, the person/body is effectively *functus officio*. This interpretation conforms with the natural expectation of both participants, spectators and the public at large that at the close of a competition in any sport, gymnastics included, the identity of the winner should be known, and not subject to alteration thereafter save where exceptionally, for example, the purported winner is proved to have failed a drug test and so been disqualified.
8. Moreover we do not consider that Yang has established that the rules anywhere contemplate an appeal being made after the competition has ended. The functions of the Executive Committee under the Statutes to take necessary decisions “where there are no existing rules” cannot

be performed where such rules exist (Article 14.4); nor can the ancillary or related powers to take any “*necessary action to deal with matters of an urgent nature*” (*ditto*) be stretched to cover acting as an appellate body for a completed competition. The functions of the Technical Committee under the statutes to control the activities of judges in accordance with the TR and CP Article 18.3 do no more than point to the role it enjoys under those other instruments; it does not enlarge it. Nor does the Technical committee’s power under TR 13 to deal with “*unforeseen events when the existing regulations do not provide for them*” apply to a situation where the Regulations do provide for appeal during the competition. Under the TR the role of the jury of appeal Article 7.8.3 appears to be confined to appeals **by** judges, not **against** judges decisions, and to monitoring judges performance with a view to possible sanctions against the judges, not to reversing the decisions which provoked such sanctions.

9. We accept that there was no unanimity among the witnesses, as to whether the right to appeal was further confined in point of time so that even an appeal made within the framework of the competition might be ineffective. On the USA side persons experienced in gymnastics, e.g. Jay Ashmore, Peter Kormann and Kevin Mazeika emphasised that in a multi rotation event, it was necessary for the athletes to know before a fresh rotation was embarked upon what their target should be in the light of the subsisting points score of themselves and of their competitors. It was urged upon us in particular that the value of the seeding would be undermined if the top seed could not perform last with an exact appreciation of what he must score to win the competition overall. However it was accepted, for example, by Hamm’s coach Milo Avery that even if appeals had to be made within the scope of a single rotation, athletes might not know with certainty where they stood (if for example the first athlete on any apparatus did not appeal until the second athlete ‘had completed’ his routine, and only won an appeal thereafter). FIG appeared to work on the basis that an appeal before the end of the competition overall was possible: (see e.g. Jackie Fie, President of the Women’s Technical Committee and Stoica) and Robert Colarossi, President of USA Gymnastics, appeared to agree. This may represent a trade off between the ideal and the realistic, and between justice and certainty, but it seems to us that, whatever may be the merits of alternative views, FIG’s approach is consistent with the text of the rules themselves.

10. We must add, however, that the matter would be outside the realm of debate if the 1982 version of the Technical Regulations, had been still in place in 2004. These provided, so far as material to the rules in the 1982 as follows:

*“Each Technical Committee forms a Jury of Appeal which functions during or after the competitions provided that those directing the competition cannot settle the case ... The rights, duties and powers of the Jury of Appeal, of the Director of the Competition and of Arbitrators and Judges are set out in the Technical Regulations and the Codes of Pointage. Exceptional and unforeseen cases will be dealt with by the Technical Committees of the FIG” (Article 27-3 of the Technical Regulations).*

*“Decisions of the Jury of Appeal are irrevocable. The Jury of Appeal is entitled to maintain, increase or decrease a gymnast’s marks” (Article 27-4 of the Technical Regulations).*

*“Complaints, written in French or German, are to be handed over personally to the President of the Jury, or his replacement, at the latest 15 minutes after the incident. A complaint may only concern the team or the gymnast of the complainant’s own federation. Only the heads of delegation or of the teams have the right to lodge complaints. All other interventions by other people will be refused”.*

*“Each complaint must be examined by the Jury of Appeal and the decision is to be communicated in writing to the federation which complained specifying the reasons for the decision” (Article 27-5).*

11. FIG were not able to enlighten us as to why the TR had been changed – or even when – although US advocates informed us that the amendments appear to date from 1989. Nor was there any indication in the material before us that the purpose of the change was to enlarge the time for appealing. We were consoled to hear from FIG that, as a result of the focus which this dispute has placed on the limitation issue, the rules may be revised and thus attain their previous clarity.
12. The TR and CP do not identify who may make a protest which may result in the reversal of a judging error. In our view a judge, whether or not from the same country as the gymnast whose marks are controversial, cannot do so, to make a protest would be inconsistent with his judicial functions (TR Article 7.13 CP Article 6.7(g)). The gymnast himself could in theory properly do so: but the prime candidate is surely the coach. He has an obligation to be familiar with the points scoring system (CP Article 3.3): he has privileged access to the arena (TR Article 4.11). There was copious unchallenged evidence from coaches from the USA (Jay Ashmore, Miles Avery, Peter Kormann, Kevin Mazeika) that this is one of a coach’s prime responsibilities, supplemented by detailed and convincing evidence as to how US coaches are pre-prepared for the possibility of an appeal. It is notable that, as and when apprised of the start value accorded to Yang’s performance on the parallel bars by Judge Kim, it was the two Korean coaches who indeed took the matter up with the FIG judges and officials: indeed on an earlier occasion during the team competition they had made a protest (albeit unsuccessfully) to Stoica about a score given to one of their athletes, Cho Seong Min (“Cho”) for his performance on the parallel bars.
13. The extent to which, if at all, a Court including CAS can interfere with an official’s decision is not wholly clear. An absolute refusal to recognize such a decision as justiciable and to designate the field of play as *“a domain into which the King’s writ does not seek to run”* in Lord Atkin’s famous phrase<sup>2</sup> would have a defensible purpose and philosophy. It would recognize that there are areas of human activity which elude the grasp of the law, and where the solution to disputes is better found, if at all, by agreement. It would contribute to finality. It would uphold, critically, the authority of the umpire, judge or referee, whose power to control competition, already eroded by the growing use of technology such as video replays, would be fatally undermined if every decision taken could be judicially reviewed. And, to the extent that the matter is capable of analysis in conventional legal terms, it could rest on the premise that any contract that the player has made in entering into a competition is that he or she should have the benefit of honest “field of play” decisions, not necessarily correct ones.
14. Sports law does not, however, have a policy of complete abstention. In CAS OG 96/006 where the challenge was to a referee’s decision to disqualify a boxer for a low blow the CAS ad hoc Panel accepted jurisdiction, even over a game rule, but considered it inappropriate to exercise it. It said

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<sup>2</sup> *Balfour v Balfour* 1919 2 KB at p. 919.

12. *The Panel is competent. However, exercising this competence must, in our view, be tempered by the respect due to the particularities of each sport as defined by the rules established by the sports federations.*
13. *In casu, the referee's decision, is a purely technical one pertaining to the rules which are the responsibility of the federation concerned. It is not for the ad hoc Panel to review the application of these rules. This restraint is all the more necessary since, far from where the action took place, the ad hoc Panel is less well-placed to decide than the referee in the ring or the ring judges. The above-mentioned restraint must be limited to technical decisions or standards; it does not apply when such decisions are taken in violation of the law, social rules or general principles of law which is not the case in this particular instance.*
15. In CAS OG 00/013 where the challenge was to a referee's decision that a walker had "lifted" contrary to the rules of walking, the Panel said:
  - [17] *CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what is sometimes called "rules of the game". (One exception among others would be if such rules have been applied in bad faith, e.g. as a consequence of corruption.) If they happen to have been present at the relevant event, CAS arbitrators were mere spectators with no official role. Moreover, they are not, unlike on-field judges, selected for their expertise in officiating the particular sport.*
  - [18] *The Respondents are therefore correct when they assert that this Panel does not have the function of reviewing, as a technical matter, the determination that Mr. Segura on three occasions failed to comply with the rules of racwalking.*
16. In CAS OG 02/007, when KOC appealed from a decision of the ISU Council denying a protest in respect of the disqualification of a Korean skater, Kim Dung-sung in the final of the men's 1,500 metre short track skating event, the Panel said expressly:
  - [5] *It is clear that CAS Panels do not review "field of play" decisions made on the playing field by judges, referees, umpires or other officials, who are responsible for applying the rules or laws of the particular game.*
17. In short Courts may interfere only if an official's field of play decision is tainted by fraud or arbitrariness or corruption; otherwise although a Court may have jurisdiction it will abstain as a matter of policy from exercising it.
18. Contrary to FIG's preliminary point, we do not consider that Yang had failed to exhaust his internal remedies. He sought to persuade FIG to alter the results of the event. FIG would not do so. Therefore there was nothing further that he could do internally to FIG, before appealing to CAS.
19. The essence of the defence mounted on behalf of all the Respondents is that whether the subject matter of the appeal is justiciable at all, the protest was made too late, by the wrong person and not in conformity with the rules.
20. We uphold that defence:
  - (i) For reasons already set out above, (i) we consider that any protest to be effective within the ambit of the FIG rules had to be made before the end of the competition.

- (ii) For reasons already set out above we consider that the first effective protest was made after the competition ended. The first incident relied on by Yang did not constitute a protest.
21. In our view it was for Lee, as Yang's coach, to set the appeal machinery in motion. Unfortunately Lee did not protest the controversial start value during the competition. He says – and we do not doubt – that he was unaware of it until apprised by Judge Kim. He did not see the arena screen at the time when the start value was displayed, as his view was blocked by TV cameramen. However he realistically and candidly accepted that he could have put himself in a position to see that the start value at the material time had he either asked the cameramen to move, or moved himself. We conclude that since he had no reason to believe that Yang would be accorded a start value for the exercise which differed from that which it had received on previous occasions during the Olympics, and had other duties to perform such as carrying Yang's bags to the next apparatus and preparing him for his performance on it, he did not give this function (which he accepted) of checking the start value the priority it deserved. We do not wish to be unduly critical of Lee, but had he been alert to the difference between the previous and the present start values accorded to Yang's performance on the parallel bars, events might – we stress might – have taken a different turn.
22. It was argued also on Yang's behalf that the Judges field of play decision was arbitrary or in breach of duty thus engaging CAS's supervisory powers. The basis for this contention was that in truth the 3 judge decision was the decision of one. Bango had, through his head being lowered at the start of Yang's routine, missed a second of the initial sequence. He had had to consult with Buitrago. His failure to see the entire routine had not been communicated to Beckstead. Beckstead for his part did not have any reason to dispute what appeared to be a joint view of the A Judges.
23. We consider that this argument devalues the concept of arbitrariness. As was said in CAS OG 02/007:
- 5.1 *The jurisprudence of CAS in regard to the issue raised by this application is clear, although the language used to explain that jurisprudence is not always consistent and can be confusing. Thus, different phrases, such as "arbitrary", "bad faith", "breach of duty", "malicious intent", "committed a wrong" and "other actionable wrongs" are used, apparently interchangeably, to express the same test ([...], CAS OG 96/006 and [...], CAS OG 00/013).*
- 5.2 *In the Panel's view, each of those phrases means more than that the decision is wrong or one that no sensible person could have reached. If it were otherwise, every field of play decision would be open to review on its merits. Before a CAS Panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases means that there must be some evidence of preference for, or prejudice against, a particular team or individual. The best example of such preference or prejudice was referred to by the Panel in [CAS OG 00/013], where they stated that one circumstance where a CAS Panel could review a field of play decision would be if a decision were made in bad faith, eg. as a consequence of corruption (See Para, 17). The Panel accepts that this places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision. [...]*

- 5.3 *Accordingly, the onus is on the Applicant who challenges that decision, to prove that in making the decision on technical matters specific to short track speed skating, the Respondent, by its appointed referees acted in bad faith in the sense described above (para 5.3).*
- 5.4 *It is not simply the making of a decision that Mr. Kim disagrees that is a wrong against him which would entitle the Panel to overturn Mr. Hewish's decision. When the CAS jurisprudence speaks of the commission of a wrong in this context, it is speaking of a breach of duty and not merely the making of a decision with which the Applicant disagrees.*
24. Consultation between judges is expressly provided for in CP Article 1a 2(b) III. At worst (and this is unproven) Bango's unsightedness for the initial sequence was the cause of – at any rate – his error. But neither Buitrago nor Beckstead were affected or infected by it: each properly had his own view.
25. While in this instance we are being asked, not to second guess an official but rather to consider the consequences of an admitted error by an official so that the 'field of play' jurisprudence is not directly engaged, we consider that we should nonetheless abstain from correcting the results by reliance of an admitted error. An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition. We can all recall occasions where a video replay of a football match, studied at leisure, can show that a goal was given, when it should have been disallowed (the Germans may still hold that view about England's critical third goal in the World Cup Final in 1966), or vice versa or where in a tennis match a critical line call was mistaken. However, quite apart from the consideration, which we develop below, that no one can be certain how the competition in question would have turned out had the official's decision been different, for a Court to change the result would on this basis still involve interfering with a field of play decision. Each sport may have within it a mechanism for utilising modern technology to ensure a correct decision is made in the first place (e.g. cricket with run-outs) or for immediately subjecting a controversial decision to a process of review (e.g. gymnastics) but the solution for error, either way, lies within the framework of the sport's own rules; it does not licence judicial or arbitral interference thereafter. If this represents an extension of the field of play doctrine, we tolerate it with equanimity. Finality is in this area all important: rough justice may be all that sport can tolerate. As the CAS Panel said in CAS OG 02/007:
- "There is a more fundamental reason for not permitting trial, by television or otherwise, of technical, judgmental decisions by referees. Every participant in a sport in which referees have to make decisions about events on the field of play must accept that the referee sees an incident from a particular position, and makes his decision on the basis of what he or she sees. Sometimes mistakes are made by referees, as they are players. That is an inevitable fact of life and one that all participants in sporting events must accept. But not every mistake can be reviewed. It is for that reason that CAS jurisprudence makes it clear that it is not open to a player to complain about a "field of play" decision simply because he or she disagrees with that decision".*
26. There is another and powerful consideration, well articulated on behalf of Hamm. Had the competition been on one apparatus only ie the parallel bars, then the conclusion that the judging error led to a disarray in the medal positions would follow as night follows day. (We put on one side the contention supported, in *inter alia* by Buitrago, Beckstead and Harry Bjerke (a B Judge) that Yang had the benefit of the error – a failure by AB Judges to deduct points for a gymnastic

- fault exceeding the stipulated number of pauses during his exercise [CP Article 42 5(9) Article 44] as well as the burden of another – the misidentification of the proper start value, because CAS is in no position to adjudicate upon its merits). But the event was not a single apparatus event, but an all around one. After the parallel bars there was one more apparatus on which the competitors had to perform ie the high bar. We have no means of knowing how Yang would have reacted had he concluded the competition in this apparatus as the points leader rather than in third position. He might have risen to the occasion; he might have frozen (his marks on the high bar were in fact below expectation and speculation is inappropriate). So it needs to be clearly stated that while the error may have cost Yang a gold medal, it did not necessarily do so.
27. We would respectfully suggest that FIG itself, in what may be inferred from the minutes of the earlier emergency meeting an understandable anxiety to maintain public confidence in the judging of Olympic competitions, can be shown with the benefit of hindsight, to have made three mistakes, albeit, we are certain in entire good faith. Firstly, they publicly accepted without qualification that there was an error in the judging of their own officials. True it is that there was an error in the start value identifiable when Yang's performance was analysed with the aid of the Technical Video. However, an error identified only after a competition is complete is immaterial to the result of the competition under FIG's rules: only an error identified during it, and successfully appealed, can affect such a result. Secondly, they publicly said that, but for such error, Yang would have won the event. This, for reasons we have already discussed, is something in realm of speculation, not of certainty. Thirdly, they sought to persuade Hamm to surrender his gold medal to Yang when there was no reason for him to do so.
  28. There was an instance drawn to our attention where in the World Trampoline Championship of 2001 an error in judging was made and the beneficiary of it, Ms Ka Aeva gave her gold medal "*in the spirit of friendship and fair play*" to the runner up Ms Dogonadze. She did so because there was, as was perceived, no way other than by an act of grace that the consequences of the error could be corrected. Hamm was invited to do the same by FIG. He declined to do so. He is, in our view, not to be criticized for this. He was not responsible for the judges' error; and, as we have already observed, he can be no more certain than we as to what the outcome would have been had the judges not made the mistake.
  29. There are two victims of this unusual sequence of events, Hamm and Yang. Hamm because, as he eloquently explained a shadow of doubt has been cast over his achievement in winning the sport's most prestigious prize. Yang because he may have been deprived of an opportunity of winning it. Both Hamm and Yang are superb athletes at the pinnacle of their sport: neither was in any way responsible for the Judge's error: each has comported himself with dignity which this controversy has subsisted. Nonetheless the Court of Arbitration is not Solomon: nor can it mediate a solution acceptable to both gymnasts or their respective NOCs. CAS must give a verdict based on its findings of fact viewed in the context of the relevant law.
  30. For the reasons set out above, we dismiss this appeal.

**The Court of Arbitration for Sport rules:**

1. The appeal is dismissed.

(...).