



**Arbitration CAS 2021/A/8119 Alexandra Kiroi-Bogatyreva v. Gymnastics Australia, award of 18 October 2021 (operative part of 16 July 2021)**

Panel: Mrs Tricia Kavanagh (Australia), Sole Arbitrator

*Gymnastics (rhythmic gymnastics)*

*Eligibility*

*Field of play doctrine*

**CAS does not review “field of play” decisions made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game, an exception is nevertheless possible if such rules have been tainted by fraud, arbitrariness, corruption or applied in bad faith. The rationale for the “field of play” doctrine is that CAS Panels are not sufficiently trained in the rules of any or all sports and do not have the advantage to observe the event. All submissions by a party in relation to the judging and scoring of a competition are within the “field of play” doctrine and cannot be reviewed by a CAS Panel. Consequently, any challenge to the assessment of difficulty in a performance, assessment of artistry and execution – including the results of the performances – are all matters within the doctrine of “field of play”. Any challenge on technical breaches in the athletes’ performance are always matters requiring the expertise and judgment by those experts in the “field of play”. If a video recording was a procedural aspect that led to the decision-making in the “field of play”, its use is not open to review.**

## **I. THE PARTIES**

1. Mrs Alexandra Kiroi-Bogatyreva (the “Appellant” or “Mrs Kiroi-Bogatyreva”) is an Australian athlete who competes in the sport of rhythmic gymnastics under the jurisdiction of Gymnastics Australia (“GA”).
2. GA (the “Respondent”) is the Australian National Federation (“NF”) responsible for the administration, development and promotion of the sport of gymnastics in Australia. It is a member of the International Gymnastics Federation (French title: Federation Internationale de Gymnastique (“FIG”)), which is the governing body of competitive gymnastics worldwide.
3. Mrs Lidiia Iakovleva (the “Affected Party”) is an Australian athlete who competes in the sport of rhythmic gymnastics under the jurisdiction of GA.

## II. INTRODUCTION

4. The Appellant appeals the decision of GA dated 29 June 2021 not to nominate her to the Australian Olympic Committee (“AOC”) for selection by the AOC as the competitor representing Australia in the Rhythmic Gymnastics Individual All Around event (the “Event”) to be held at the 2020 Tokyo Olympic Games (“Tokyo Games”) which have been re-scheduled to be held from July-August 2021 due to the global COVID-19 pandemic.

## III. BACKGROUND FACTS

5. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions and evidence. Additional facts and allegations may be set out, where relevant, in the connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the legal submissions, facts and evidence submitted by the Parties in the present proceedings, this Award refers only to the submission facts and evidence considered necessary to explain its reasoning.
6. In 2020 FIG prepared a Qualification System which guided GA in their task to nominate the athlete that would compete for Australia in the Event at the Tokyo Games (the “FIG Qualification System”). The FIG Qualification System is created and administered by the FIG with the approval of the International Olympic Committee (the “IOC”). Earning a qualification place pursuant to the FIG Qualification System is the only way an athlete or a National Olympic Committee (“NOC”) wishing to send athletes to the Tokyo Games is able to earn the right to participate at the Tokyo Games.
7. The AOC had been allocated a quota of one athlete that it could select for the Event at the Tokyo Games.
8. Criteria 3 of the FIG Qualification System (as amended) under the heading “D: Qualification Pathways” stated:

*“The Continental Championships held in 2021 will serve as Olympic Qualification, regardless if a Continental Championships is also held in 2020, unless the 2020 Continental Championships have already been completed as the Olympic Qualification and in accordance with the Continent’s specific participation rights”;*

and:

*“The highest placed athletes from the Individual All-Around results of the respective Continental Championships from NOCs not already qualified under Criteria 1 (2019 World Championships) or Criteria 2 (2020 World Cup Series), provided that the respective athlete has participated at the 2019 World Championships. The quota places are allocated by name”.*

9. On 13 and 14 May 2021, the Continental Championships were held in the Gold Coast, Queensland, Australia (the “2021 Continental Championships”). There had been no 2020

Continental Championships held in Australia due to COVID-19 restrictions. Three (3) athletes competed in the Event at the 2021 Continental Championships.

10. The Affected Party qualified by name under Criteria 3 of the FIG Qualification System by reason of her performance at the 2021 Continental Championships. The Appellant placed second.
11. Under the FIG Technical Regulations, an athlete during an event may lodge an inquiry (i.e. a “protest”) but only in relation to a component of his/her score.
12. The Affected Party’s coach did lodge such an inquiry during the 2021 Continental Championships and her score was dramatically revised up – 1.9 points higher than her original score. These scores are shown on a scoreboard and adjusted, if an inquiry is successful during the competition. On completion of the competition, the Affected Party, with the revised score, was placed first. The Appellant was placed second.
13. On 15 May 2021, the Appellant lodged an appeal under Part 8.4 of the FIG Technical Regulations (the “Appeal”). The Appeal was considered by GA, the FIG and the IOC. There was, by this time, great pressure to complete the nomination process.
14. In the Appeal, the Appellant challenged the qualification of one Superior Judge who was not qualified as a Superior Judge to be the Superior Jury. She was responsible for the review of the initial score and as the Superior Jury authorised the revised score.
15. The Appellant in submitting the Appeal noted:

*“While it is clearly acknowledged there has been challenges to staging selection events for the Olympic Games in a Covid-19 impacted world, there was certainly opportunity to have senior international FIG Brevet judges included as part of makeup of the Superior Jury, viewing the 2021 Continental Championships via livestream technology, to further strengthen the judging expertise and process at this key election event. There is no reason why a Category 1 or 2 judge from FIG cannot review the video (the same video upon which the Category and non-qualified judge amended the total score by 1.9).*

*It is requested that the 8 routines of the top two competitors, Lidiia LAKOVLEVA and Alexandra KIROI-BOGATYREVA, be submitted for independent review by qualified Category 1 and 2 FIG representatives for rejudging to FIG as part of this formal appeal”.*
16. The Appeal was considered by GA, the FIG and the IOC. It was determined to order an annulment of the results of the 2021 Continental Championships and to order a rejudging of the results using the live performance video, reviewed by Category 1 and 2 Judges appointed by the FIG as International Independent Judges. The procedure was to be overviewed by the FIG Rhythmic Technical Committee.
17. GA then sought the affected two (2) athletes’ consent (and another group of athletes also affected by the decision to annul the initial results of the event) by way of asking each affected athlete to sign their agreement to the proposed appeal procedure (the “Declaration”).

18. The Declaration provided to the athletes reads as follows:

*“The 2021 Oceania Rhythmic Continental Championships (Individual and Group) was conducted with a President of the Superior Jury that was unqualified for the position based on the FIG General Judges’ Rules. Therefore, the results from these competitions will be annulled by the FIG and the Rhythmic competitions will be removed from the official calendar (event code Rhythmic 16699).*

*In light of the above, I hereby give my approval for the results and ranking of a new competition to be determined by the FIG Rhythmic Technical Committee through the use of video judging of the routines from the previously annulled event. My coach will be given 24 hours after the results have been distributed to file any inquiries. I understand that once any inquiries are resolved and the results have been signed by the Rhythmic Technical Committee President, all scores and the ranking are final and the competition will be added to the FIG calendar and results page”.*

19. By 14 June 2021, the signatures were obtained from the athletes and witnessed. The FIG, over an eight (8) day period, organised the rejudging of the results of the event using the real time video of the routines. The four (4) international Judges who reviewed the video were all based internationally and were highly qualified (Category 1 and 2 judges). They had no instruction as to the prior scoring. The re-judging by video review was done in the same way as the original inquiry was conducted by the not properly qualified Judge who sat as the Superior Jury.
20. The Affected Party was again successful. The Appellant was notified of this result.
21. On 24 June 2021, the Appellant having received the video through her lawyer notified the GA that *“she does not wish to lodge an inquiry in the prescribed form as she respects the judges appointed by the FIG would have the requisite qualification for such an important task”.*
22. The FIG qualification period ended on 29 June 2021.
23. On 29 June 2021, the Appellant received formal notice of her non-nomination as follows:

*“In accordance with the Australian Olympic Committee’s Olympic Team Nomination and Selection By-Law; FIG Olympic Qualification System – Rhythmic Gymnastics; Tokyo 2020 Olympic Games Nomination Policy – Rhythmic Gymnastics (UPDATED NOV 2020) I advise that:*

*Lidiia Iakovleva (RG Individual All Around) is nominated to the Australian Olympic Committee for selection to the Tokyo 2020 Australian Olympic Team.*

*Please note that a Non-Nominated Athlete may appeal against their non-nomination (Nomination appeal) as per article 9 of the AOC Olympic Team Nomination and Selection By-Law (20 July 2020).*

*As notification is less than 14 days before Tokyo 2020 Sport Entries close, the process of appealing non-nomination follows the AOC Dispute Resolution Process – FAST TRACK (attached).*

*Please confirm receipt of this email by return email”.*

24. On 30 June 2021 GA was formerly advised of the Appellant's intention to appeal her non-nomination.
25. On 1 July 2021, GA wrote to the Appellant providing written reason for the nomination as follows:

*"On 28 June 2021, FIG notified GA of the Rhythmic Gymnastics individual quota places for the 2020 Tokyo Olympic Games awarded to the AOC which confirmed that Lidiia Iakovleva received a quota place allocated by name. FIG did not allocate a Rhythmic Gymnastics Individual All-Around quota place to any other Australian athlete by name, nor did it allocate any other (i.e. unnamed) Rhythmic Gymnastics Individual All-Around quota places to the AOC.*

*In making that nomination decision, GA was required to act in accordance with Clause 6.3 of the GA Nomination Criteria, which states – "GA will nominate any Athlete to whom FIG allocates a quota place by name to an individual Athlete in accordance with the FIG Qualification System providing that the Athlete has demonstrated competition readiness".*

*GA was satisfied that Lidiia Iakovleva has demonstrated competition readiness and that it was therefore appropriate that she be nominated in accordance with Clause 6.3 of the Nomination Criteria".*

26. On 3 July 2021, GA and AOC officially announced the selected team for the Tokyo Games Australian Gymnastics Team.

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

27. On 2 July 2021, the Appellant:
  - a. filed a Statement of Appeal with the Oceania Registry of the Court of Arbitration for Sport (the "CAS") against the Respondent with respect to its decision to not nominate the Appellant to the AOC for selection to the Australian Olympic Team for the sport of rhythmic gymnastics for the Tokyo Games (the "Non-Nomination Decision"). The Appellant filed its application in accordance with the Fast Track Appeal Procedure provided for in Clause 9.9 of the Australia Olympic Committee's Olympic Team Nomination and Selection By-Law dated 20 July 2020 (the "AOC By-Law"); and
  - b. notified the CAS Court Office that the non-refundable filing fee of CHF500 had been paid and provided supporting evidence to this effect.
28. In accordance with Clause 9.9(b)(vi) of the AOC By-Law, on 3 July 2021, the Respondent filed its submissions in reply.
29. On 4 July 2021, the Appellant filed an Appeal Brief in support of her appeal with the CAS.
30. On 5 July 2021, the CAS Oceania Registry informed the Parties, pursuant to Clause 9.9(d)(i)(B) of the AOC By-Law and Article R54 of the Code of Sports-related Arbitration in force from 1

July 2020 (the “Code”), and in light of the exceptional and specific circumstances of this Fast Track proceeding and further to the Parties’ consent in this regard, on behalf of the President of the CAS Appeals Arbitration Division, that the Sole Arbitrator appointed to decide the present matter is the Hon. Dr. Tricia Kavanagh, Retired Judge, Sydney, Australia. In so doing, the President of the Division noted, pursuant to Article R50 of the Code, that the Hon. Dr. Tricia Kavanagh had also been appointed in a separate appeal filed with the CAS Oceania Registry by the Appellant against the AOC in respect of the AOC’s decision to not select the Appellant to the Australian Olympic Team for the sport of rhythmic gymnastics for the Tokyo Games (CAS 2021/A/8124 Alexandra Kiroi-Bogatyreva v. the Australian Olympic Committee) as these cases clearly involved the same issues.

31. On 6 July 2021, the Respondent filed submissions in response to the Appellant’s Appeal Brief with the CAS, along with an affidavit of Mrs Kitty Chiller AM, the GA CEO.
32. On 6 July 2021, the CAS Court Office informed the Parties that, given the significant overlap in issues and evidence, and further to Article R50 of the Code, the Sole Arbitrator would hear the appeal together with CAS 2021/A/8124 Alexandra Kiroi-Bogatyreva v. the Australian Olympic Committee. The Parties provided their consent that these two appeals would be heard together.
33. On 8 July 2021, the Parties signed and returned the Order of Procedure to the CAS.
34. At 9:30am (AEST) on 8 July 2021, the hearing for both appeals brought by the Appellant (CAS 2021/A/8119 and CAS 2021/A/8124) was held out of the CAS Oceania Registry Offices in Sydney. Due to COVID-19 restrictions, the Parties agreed that the hearing was to proceed by way of videoconference with all of the Parties and their representatives appearing by way of videoconference, as foreseen further to Article R44.2 and R57 of the Code. The Sole Arbitrator was assisted by Mr Sam Dutailis, Solicitor in Sydney, Australia, as ad hoc clerk. In addition, the following persons attended the hearing:

For the Appellant:

- Mrs Alexandra Kiroi-Bogatyreva (Appellant);
- Mr Paul Horvath (Solicitor);
- Mr Alexander Bogatyrev (Father of the Appellant); and
- Mrs Valeriya Clement (Mother of the Appellant).

For the Respondent:

- Mrs Elisa Holmes (Counsel);
- Mrs Brienna Anderson (Counsel);

- Mrs Kate McGurk (Solicitor); and
- Mrs Kitty Chiller AM (CEO, GA).

For the Affected Party:

- Mr Ivor North (Father of the Affected Party).

## V. SUBMISSIONS

35. The Appellant's submissions can be summarised as follows.

- a. In order for the nominated athlete's name to be put forward as the nominated athlete by GA a proper process had to be followed for that nomination. GA, the FIG and the IOC determined to annul the initial results because of the use of a non-qualified Superior Jury. In reaching that decision, the Appellant proposed GA had therein acknowledged there was a failure to follow FIG's mandatory rules.
- b. Further, implicit in the signing by the Appellant of the Declaration as to the procedure to be followed for the re-assessment of the results of the two (2) athletes, there also had to be strict compliance with the regulations the Appellant contended.
- c. On receipt of video evidence provided by GA, in time to allow an inquiry to challenge the revised results (and following the normal procedure) the Appellant became aware of breaches of the FIG Technical Regulations. She contended there must be an avenue of appeal for breach of Rule 4.10.4.1 under the FIG Technical Regulations. Firstly, she contended that Rule 4.10.4.1(A) states that "*for Olympic Games the organisers must provide a full HD video system*" and there was not that equipment at the 2021 Continental Championship. The Appellant acknowledged that, under Rule 4.10.4.1(B), it was stated the Continental Championship required only video support to assist a review. Given the 2021 Continental Championship had been elevated to an Olympic Selection event she contended the highest standard equipment as required under Rule 4.10.4.1(A) should have reasonably been met.
- d. The Appellant further submitted as to other breaches of the regulations:
  - i. There was only one (1) video live recording of the performances when, under the FIG Technical Regulations, two (2) live recordings were required for a championship event; and
  - ii. The video recording of the two athletes' performances was taken from the side and it would not allow proper visage for the judges to see aspects of each athlete's routine. As the Appellant's routine was quite difficult, some of her

moves were obscured and her throws could not be seen to completion on the video.

- e. The Appellant contended, generally, that while videos are useful to reassess difficulty scores, they do not assist in judging an athlete's artistry or execution. Two (2) videos would have assisted in determining the latter two (2) scores.
  - f. The suggestion by GA that there was no avenue for the Appellant to bring an appeal (within 24 hours of becoming aware of the reviewed score) by suggesting that once FIG named the successful athlete by name, GA had no choice but to nominate that athlete, should be a submission rejected by the Sole Arbitrator as unfair and contrary to the intention and spirit of the rules and the AOC By-Law.
  - g. The Appellant contended that the evidence therefore establishes that due to the breaches she had proven in the use of the competition live recording video to rejudge the two (2) athletes' performances, there was no material on which the GA's nomination decision could be reasonably based.
  - h. Further the Appellant contended the use of the video is not a matter within the "field of play" but rather simply records the "field of play" (CAS 2004/A/704).
  - i. The Appellant, if successful, seeks payment of costs as specified in Clause 9.10(c)(i) of the AOC By-Law.
  - j. The Appellant seeks the following orders:
    - i. that the re-judging of the 2021 Continental Championships be declared void as it is in breach of the applicable FIG rules that apply to the competition;
    - ii. that it be deemed that the 2021 Continental Championships for the Event therefore, for all intents and purposes, did not take place;
    - iii. the default position under the FIG Qualification System is therefore that in the event that the 2021 Continental Championship does not take place, the individual quota place goes to *"the next highest ranked individual athlete from the same continent [Oceania] based on individual ranking results of the individual All-Around Final of the 2019 World Championships"*; and
    - iv. that GA be strongly encouraged or directed to write to the FIG to support the eventual decision made in this CAS appeal in order to ensure it is carried out.
36. The Respondent's submissions can be summarised as follows:
- a. Under the AOC By-Law, the AOC is awarded athlete quota positions by the FIG in accordance with the FIG Qualification System. GA may nominate only the number of athletes permitted under the FIG Qualification System for the AOC selection to the



Australian Olympic Team for the Tokyo Games. Any nomination must be in accordance with the GA Nomination Criteria, the Respondent contended.

- b. On 28 June 2021, FIG notified GA of the Rhythmic Gymnastics individual quota place for the Tokyo Games that had been awarded to the AOC. The notification confirmed that the Affected Party received the quota place allocated to her by name.
- c. Pursuant to Clause 4.2 of the GA Nomination Criteria, GA was only entitled to nominate one athlete to the AOC for selection to the Australian Olympic Team in respect of the Event. Further, as the quota place had been allocated to the Affected Party by name, the quota place was unable to be transferred to another athlete by GA.
- d. In making its nomination decision for the Tokyo Games, GA was required to act in accordance with Clause 6.3 of the GA Nomination Criteria, which states:

*“GA will nominate any Athlete to whom FIG allocates a quota place by name to an individual Athlete in accordance with the FIG Qualification System providing that the Athlete has demonstrated competition readiness”.*
- e. GA submitted this is a mandatory provision and, therefore, it had no choice but to nominate the Affected Party, unless, in GA’s opinion and within its absolute discretion, it was not satisfied she had demonstrated *“competition readiness”*.
- f. The Respondent submitted that the Appellant’s ground of appeal that GA did not properly apply the GA Nomination Criteria must be dismissed. The Affected Party’s performance as the highest-ranking Australian athlete in the Event at the 2021 Continental Championships created no cause for concern that she was not competition ready. Likewise, there is no suggestion that the Affected Party was or is suffering any injury or illness that would impact her preparation for her performance at the Tokyo Games.
- g. The Respondent also submitted that the Appellant’s second ground of appeal, that there was no material on which the GA decision could be reasonably based, should be dismissed. As to the GA, FIG and IOC decision to re-judge the two (2) athlete performances at the 2021 Continental Championships, this process and procedure was suggested by the Appellant when she filed the Appeal. It was reiterated on her behalf in correspondence from her lawyer to GA. The Appellant was consulted before signing the Declaration (as were the other affected athletes). The Appellant also sought advice from her lawyer at that time and attended a video conference with Mrs Kitty Chiller AM (the CEO of GA) on 13 July 2021 to discuss the Declaration and rejudging of the 2021 Continental Championships (attended by her with the President of her Rhythmic Gymnastics Club, as a support person, and with her mother).
- h. Transcript and contemporaneous notes taken at both meetings evidence that there was time pressure, but all athletes had an opportunity to seek advice. All of the affected athletes agreed to the video being used to re-assess the two (2) performances.

- i. GA therefore contended it made the nomination in accordance with the GA Nomination Criteria and any asserted irregularities in the conduct of the 2021 Continental Championship are irrelevant.
  - j. In its supplementary submissions, the Respondent addressed the Appellant's submissions relating to the use of video footage which was not in accordance with the FIG Technical Regulations to re-judge the 2021 Continental Championships. The Respondent submitted all complaints made by the Appellant in relation to the judging and scoring of the competition in its review of the results of the 2021 Continental Championships fall within the "field of play" doctrine and cannot be reviewed by the Sole Arbitrator. Further, the Respondent submitted that matters of a technical nature in the performances were integral to the judging and the scoring of the Event. Further the use of the video recording was in the "field of play" because it was concerned with "procedural aspects" relating to the decision making (i.e. judging) in the "field of play". All submissions relied upon in the appeal are therefore not able to be reviewed by CAS. The material before CAS illustrates that the purpose, impact and significance of the relevant technical requirements are matters of expertise and judgment for those with technical knowledge within the sport.
  - k. Therefore, the Respondent sought orders dismissing the Appellant's appeal.
  - l. The Respondent sought no order as to costs.
37. The interests of the Affected Party were represented at the hearing by Mr North, her father. He asked for GA to protect her interests, with which counsel for GA agreed and complied.
38. The Sole Arbitrator has carefully considered all these submissions.

## VI. JURISDICTION

39. Article R47 of the Code provides as follows:

*"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*

40. It was agreed that Clause 9.6 AOC By-Law applied to this appeal. Clause 9.6(c)(i) provides:

*"A Non-Nominated Athlete may appeal:*

*(A) a determination made by an Appeal Tribunal in accordance with clause 9.6(b)(ix); and*

*(B) a decision made by an NF after the question of non-nomination is referred back to the NF by an Appeal Tribunal in accordance with clause 9.6(b)(ix)(G), (both the Appeal Tribunal's determination and the NF's decision, the Impugned Decision), to the CAS".*

41. Article R57 of the Code provides that the CAS has full power to review the facts and the law de novo. In accordance with Clause 9.8(a)(iv) of the AOC Selection By-Law, the power of the Sole Arbitrator to review the facts and the law pursuant to Article R57 of the Code will be initially limited to determining whether the Appellant has made out one or more of the grounds of appeal.
42. The Parties acknowledged in signing the Order of Procedure dated 8 July 2021 that the CAS has jurisdiction to determine this dispute pursuant to Clause 9.6 of the AOC Selection By-Law.
43. The Parties also acknowledged in the Order of Procedure that the dispute has been filed in the Appeals Division of the CAS and that the decision of the CAS will be final and binding on all Parties.
44. The Sole Arbitrator, therefore, confirms that the CAS has jurisdiction to hear this appeal.

## VII. ADMISSIBILITY

45. Article R49 of the Code provides:

*“... in the absence of a time limit set in the statutes or regulations of the Federation Association or sports body concerned there shall be a time limit set for appeal of 21 days after receipt of the decision appealed against”.*
46. As above, in accordance with the Order of Procedure, the Parties agreed the AOC By-Law are the relevant rules which apply in this dispute.
47. Clause 9.9 of the AOC By-Law sets a time line for the commencement of a Nomination Fast Track Appeal and specifies the time limit runs from when the non-nomination athlete receives notice of his or her non-nomination and further specifies a time limit for the filing of all relevant documentation.
48. Each identified step in the Nomination Fast Track Appeal timeline allows a party only 24 hours to file under the Fast Track procedure.
49. The Parties did not raise any objections regarding the admissibility of this appeal. The Sole Arbitrator, therefore, considers this appeal is admissible.

## VIII. APPLICABLE LAW

50. Article R58 of the Code provides as follows:

*“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”.*

51. The Parties agreed under the Order of Procedure that the AOC By-Law is the relevant rules that apply in this dispute.
52. Clause 9.9(d)(i)(A) of the AOC By-Law provides that in relation to a hearing of a Fast Track Appeal by the CAS:

*“Subject to the Olympic Charter and this By-Law, any Fast Track Appeal to the CAS must be exclusively resolved by the Appeals Arbitration Division of CAS, according to the CAS Code and applying the law of New South Wales”.*

53. It was agreed by the Parties under the Order of Procedure that the law applicable to the merits is the law of New South Wales, Australia

#### **IX. MERITS**

54. Under Clause 9.9(b)(i) of the AOC By-Law a Non-Nominated Athlete may bring a Nomination Fast Track Appeal to the CAS only on one or more of the following grounds:

*“(A) in making its decision, the NF did not satisfy one or more of the requirements set out in clause 5.3;*

*(B) the applicable Nomination Criteria was not properly applied by the Non-Nominated Athlete’s NF;*

*(C) the NF was affected by actual bias in making its decision with respect to the Non-nominated Athlete; and;*

*(D) there was no material on which the NF’s decision could be reasonably-based”.*

55. The Statement of Appeal was filed by the Appellant herself and pleaded pursuant to Clause 9.9(b)(i), her grounds of appeal. At the hearing the Appellant was represented by a solicitor who more clearly defined that reliance would be placed on the following two grounds of appeal:

- a. the Appellant contends the applicable nomination criteria were not applied by GA (ground (B) above); and/or
- b. the Appellant contends there was no material on which GA’s decision could be reasonably based (ground (D) above).

56. The Appellant’s appeal before the Sole Arbitrator is not against the decision taken by GA, the AOC and the IOC to declare the results of the 2021 Continental Championship annulled, but rather pleaded on the ground that the review of the result of the relevant competition by properly qualified international judges was conducted in breach of a number of the FIG Technical Regulations: that is, in the use of the video review of the performances, there was such a breach of the Gymnastic Rules that GA had no material on which its decision (to nominate the Affected Party) could be reasonably based.

57. The Appellant in correspondence conceded that the Judges chosen to re-score the Event were highly qualified. She did not take the opportunity to lodge a request for an inquiry into her scores. After being informed of her non-nomination by GA to the AOC, she then filed this appeal to the CAS. She seeks orders that effectively would overturn the nomination by GA of another athlete (i.e. the Affected Party) to be the athlete representing Australia in the Event at the Tokyo Games.
58. The Appellant centers her submission on the video taken of the live performances. While the procedure adopted by agreement from all athletes with the assurance it would be overviewed by the FIG Technical Committee, the design of this procedure was initially proposed by the Appellant in her initial appeal.
59. The Appellant raised numerous issues with the use of the video recording to judge the 2021 Continental Championship Event: the quality of the video has been attacked; the type of video recording (an iPad was used) has been challenged as a breach of the rules; it is asserted the video taken of the Event did not give an opportunity for a fair assessment of the Appellant's performance as it was placed on the side of the Event rather than face the athletes; it is further contended there should have been two (2) video cameras to record the Event given the 2021 Continental Championship was made the Olympic Qualifying event; while the Appellant concedes there was no mandatory obligation to have two (2) video cameras at the 2021 Continental Championships, since the competition became an Olympic Nomination event, she contends all the FIG rules and regulations should have been responsibly applied; and finally the live recording of the Event obscured the Appellant's full performance and does not assist in judging of artistry and execution.
60. The Appellant asserts a failure to consider such evidence within the grounds of appeal would be unfair. Breaches of the relevant lawful regulations must be able to be examined as a matter of fairness, she asserts.
61. Such submissions directly raised before the Sole Arbitrator an essential question which must be determined: does the evidence relied upon by the Appellant invite the CAS to enter into the "field of play"?
62. Here the Sole Arbitrator has the advantage of previous CAS decisions which provide a clear analysis of what is involved in the application of the doctrine of the "field of play", and with which the Sole Arbitrator respectfully agrees. The "field of play" doctrine is well established in the CAS jurisprudence.
63. The characteristic features of the doctrine the "field of play" as stated in the CAS jurisprudence are set out in the in the following passages:

*"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" (CAS 2004/A/704).*

and

*“The rationale for the “field of play” doctrine is self-evident. CAS Arbitrators are not sufficiently trained in the rules of any or all sports and do not have the advantage to observe the events. It would be unfair to a decisionmaker to interfere with decisions made by match officials who are the technical expert in these circumstances”* (CAS OG 16/28).

and

*“...it has been established that CAS does not review “field of play” decisions made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game, an exception is nevertheless possible if such rules have been applied in bad faith...”* (CAS 2001/A/354 and CAS 2001/A/355).

64. Further, as has also been determined under CAS jurisprudence matters “relating to” the “field of play” are also not properly the subject of review by CAS:

*“... not only is the decision not open to review on its merits, but also that the procedural aspects that led thereto cannot be revised”* (CAS 2008/A/1641).

65. In the above decision CAS 2008/A/1641, the sole arbitrator gave consideration to what might be a “procedural aspect” (at 33).

*“The rules governing the conduct of a sport are not constituted only by those defining directly technical movements or actions by the competitors (whose application cannot be review under the “field of play” decision doctrine), but also by those concerning, for instance, technical disqualification. Among those rules are therefore also those defining, from a procedural point of view, how a disqualification is to be announced and what are the remedies available in the federative system to challenge it. Indeed, in the evaluation of the conduct of an event, the Jury of Appeal (or the Referee) has to evaluate not only whether an athlete actually remained within his/her lane, but also whether a protest has been properly (i.e. timely and by the subject empowered) filed. Both evaluations – combined together – make up the decision of the “field of play” officer as to the regularity of the game and as to its results”.*

66. In CAS 2017/A/5373, the CAS further held the following at 50(d):

*“These principles preclude the appellate review of not only the merits of a “field of play” decision but also the procedural aspect leading to it ...”.*

67. There is therefore clear authority that matters “relating to” the “field of play” fall within the same doctrine and are, therefore, not properly the subject of review by CAS.

68. The Sole Arbitrator is of the view, by reference to the test elaborated in the CAS decisions cited above, and in its own analysis of them, that all submissions by the Appellant in relation to the judging and scoring of the competition are within the “field of play” doctrine and cannot be reviewed by the Sole Arbitrator. So any challenge to the assessment of difficulty in a performance, assessment of artistry and execution – including the results of the performances

- are all matters within the doctrine of “field of play”. Any challenge on technical breaches in the athletes’ gymnastic performance are always matters requiring the expertise and judgment by those experts in the “field of play”.
69. Further, the Sole Arbitrator is persuaded the use of the video recording was a procedural aspect that led to the decision making in the “field of play” and therefore, its use is not open to review by the Sole Arbitrator. In the circumstances of this dispute, the purpose of the live performance videos is to be available for review. It was essential for the rejudging of the results.
  70. The Appellant made no allegation of corruption or bad faith.
  71. It has been asserted that not to consider such evidence – especially of breaches to the FIG regulations – would be unfair to the Appellant. Such interference could also be unfair to the Superior Jurists: the decision-makers in this re-assessment of the results of the Event. The legislative provisions as contained in the AOC By-Law covering Fast Track Appeals themselves place a limit of only four (4) possible grounds for appeal from a nomination decision. Limitation placed on grounds of appeal before the CAS are both legislative and matters of policy supported by legal jurisprudence: that is, CAS precedent. Especially within sport it is necessary to speedily declare winners. Limitation clauses contribute to legal certainty. So too does the application of CAS jurisprudence such as that which has been developed in adopting the “field of play” doctrine. In the circumstances, it cannot be unfair to apply CAS jurisprudence to a CAS appeal.
  72. GA submitted that the review of the results was not a GA act and cannot be held to be a GA act. Evidence satisfies that due to COVID-19 travel restrictions, the FIG had difficulty meeting the need for the number of appropriately qualified international Judges (were used to do the reassessment of the results of a GA competition and to assist the GA) had difficulty, for the Event and its review. Given the time constraints and the need for independence, the FIG conducted the review of the results on behalf of GA. The results were assessed by the FIG Rhythmic Technical Committee in the normal course of events and then FIG notified the named person to be nominated to GA. That nomination was sent to the AOC by GA in accordance with the GA Nomination Criteria.
  73. The Affected Party was the highest placed athlete from the Event and after the review of results was nominated by name to GA. Once satisfied that the Affected Party demonstrated competition readiness, GA nominated the Affected Athlete to the AOC who selected her as the athlete to fill its quota of one athlete to compete in the Event at the Tokyo Games. The Appellant was perhaps historically the highest performing athlete of Rhythmic Gymnastics events for some years and was hopeful therefore of representing Australia in her chosen sport. But her results from the chosen nomination event have been assessed (on two (2) separate occasions) as lower than those of the Affected Athlete. Evidence persuades that it is not unusual to have an athlete chosen for selection from a performance at only one event in the chosen sport. As an elite athlete, the Appellant knows her success will be judged no matter the environment once she performs at that event.
  74. The Sole Arbitrator is thus satisfied the GA Nomination Criteria was properly applied by GA.

75. The Sole Arbitrator is further satisfied that the material before GA to satisfy its decision to nominate the Affected Party was reasonably based.
76. Thus, any other prayer or future prayer for relief must be rejected.
77. The Appeal is therefore dismissed.

### **ON THESE GROUNDS**

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

1. The appeal filed by Alexandra Kiroi-Bogatyreva on 2 July 2021 against the decision rendered by Gymnastics Australia on 29 June 2021 is dismissed.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.