Arbitration CAS 2010/A/2090 Aino-Kaisa Saarinen & Finnish Ski Association v. Fédération Internationale de Ski (FIS), award of 7 February 2011

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Olli Rauste (Finland); Mr John Faylor (USA)

Cross-country skiing
Disqualification for intentional obstruction during a race
Self-restraint of CAS to rule on field of play decisions
Exception upon proof of bias, malice, bad faith, arbitrariness or legal error
CAS power of review
Application of the field of play doctrine to sanctions
Discretionary powers of the adjudicating body in determining the appropriate sanction

1. **Abstinence by CAS from ruling on field of play decisions is not a matter of jurisdiction, but of arbitral self-restraint. The rationale for such self-restraint includes supporting the autonomy of officials; avoidance of the interruption to matches in progress; seeking to ensure the certainty of outcome of competition; the relative lack of perspective and/or experience of appellate bodies compared with that of match officials.**

2. **The doctrine at any rate applies to prevent rewriting the results of the game or of sanctions imposed in the course of competition. However, the doctrine is disapplied upon proof that decisions otherwise falling within its ambit were vitiated by bias, malice, bad faith, arbitrariness or legal error. Within those limits the doctrine is compatible with Swiss law.**

3. **If the decision of an official is subject to unrestricted appeal to an appellate body, which will be seized of it during, immediately after, or even proximate to the competition *prima facie* the same doctrine applies. Where by contrast the decision under appeal is of an appellate body within the sport whose determination in respect of the field of play decision is detached in point of location and time from that decision, and has its jurisdiction defined by its own rules, then the doctrine has no application. CAS can review the appellate decision to see whether the appellate body made, within terms of its own jurisdiction, a relevant error. However, CAS *de novo* power of review cannot be construed as being wider than that of the appellate body.**

4. **These principles apply *mutatis mutandis* to competition specific sanctions although not inflexibly, if interests of person or property are involved.**

5. **It is axiomatic that reasonable people (including sporting bodies) may reasonably have different views as to the gravity of different breaches of the rules of the sports and**

the sanctions appropriate to them. While CAS enjoys the power to form its own view on the proportionality of any sanction, it ought not to ignore the expertise of the bodies involved in the particular sport in determining what sanctions are appropriate to what offence.

The First Appellant is a cross-country skier who competes internationally for Finland ("Ms Saarinen"). The Second Appellant is the governing body for skiing in Finland (Finnish Ski Association, FSA).

The Respondent is the international federation and worldwide governing body for the sport of skiing (Fédération Internationale de Ski, FIS).

On 20 December 2009, the FIS disqualified Ms Saarinen after a World Cup 15km race at Rogla, Slovenia for a violation of the ICR Article 392.5 (intentional obstruction during a race).

On 22 December 2009, the Appeals Commission of the FIS dismissed her appeal.

On 5 March 2010, the FIS Court dismissed her further appeal against the decision of the Appeals Commission, that this appeal is brought.

In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2010 edition) (the "Code"), on 1 April 2010, Ms Saarinen and the FSA filed their statement of appeal.

On 8 April 2010, the Appellants informed the CAS Court Office that their statement of appeal should be considered as their appeal brief and added five exhibits.

On 3 May 2010, in accordance with Article R55 of the Code, the FIS filed its answer.

In accordance with Article R57 of the Code, a hearing took place on 25 October 2010 in Lausanne, Switzerland. The following persons were present:

For the Appellant:

- Mr Jaakko Hietala, Counsel
- Ms Katja Tammelin, Counsel
- Ms Aino-Kaisa Saarinen, Appellant
- Mr Juha Viertola, Representative of the Finnish Ski Association
- Mr Magnar Dalen, Head Coach of the Finnish national ski team
- T., witness

For the Respondent:

- Dr Stephan Netzle, Counsel
- Mr Marco Mapelli, FIS Technical Delegate and Head of the Jury, Witness
- Ms Guri Hetland, FIS Assistant Technical Delegate and Jury member, Witness
- Mr Uros Ponikvar, Chief of competition and Jury member, Witness
- Mr Kar-Heinz Lickert, Chairman of Subcommittee for Rules and Control Cross Country, Expert Witness

LAW

Legal Context

1. In accordance with Article R58 of the Code, the Panel had to decide the dispute according to the applicable regulations of the FIS, and to Swiss law being the law of the country in which the FIS is domiciled, *i.e.*, Switzerland.

2. The FIS statements provide so far as material, as follows [the emphasis in bold is that of the Panel]:

   A. Statutes of the International Ski Federation Edition June 2008

   (…)

   1.4 The headquarters of the FIS are in Switzerland.

   (…)

   H. The FIS Court

   40. The FIS Court decides about:

   40.1 appeals against sanctions imposed by the Council and Appeals Commissions with the exception of doping cases;

   40.2 disputes between Member Associations;

   40.3 disputes between Member Associations and competitors as long as both parties are in agreement;

   40.4 other cases on request of the Council (see: regulations for disciplinary sanctions).”

   I. The Appeals Commissions

   41. The Appeals Commissions decide:

   41.1 appeals against decisions of competition juries

   41.2 cases which are referred by competition juries

J. The Competition Juries

42. The competition juries decide:

42.1 breaches against the competition rules

42.2 If the penalty measures within the competence of a competition jury are insufficient for the serious nature of an offence, it may refer the matter to the Appeals Commission for consideration.

(…)

52. Appeals and Time Limits

52.1 Decisions of a competition jury are appealable to the respective Appeals Commission within 48 hours.

52.1.1 The official results may be appealed to the Council via the FIS Office within 30 days for matters that are outside the competence of the Jury.

52.2 Decisions of the Appeals Commission may be appealed to the FIS Court:

(…)

52.2.2 In the case of a decision of the Appeals Commission rendered pursuant to Art. 52.1 above, within 4 days. ***Such appeal will only lie to the FIS Court on a point of procedure or on the application of the rules****.*

(…)

52.6 ***Decisions of the FIS Court may be appealed within 21 days to the Court of Arbitration for Sport****.*

(…).

B. Cross-Country

International Ski Competition Rules (ICR)

Approved by the 46th International Ski Congress, Cape Town (Rsa), Edition 2008

340 Competitors during the Competition

340.1 Responsibilities

340.1.3 A competitor who is overtaken must give way on the first demand except in sprint competitions and in marked zones (see 340.1.4).

This applies in classical technique courses even when there are two tracks and in free technique courses when the skier being overtaken may have to restrict his skating action. When overtaking, competitors must not obstruct each other.

(…)

391 Penalties

A penalty will be assessed by the Jury where the competitor:

(…)

391.7 ***violates the rules of responsibility of competitor during the competition or demonstrates unsportsmanlike behaviour (art. 340.1 – 340.1.7)***

(…)

392 Disqualifications

The jury must meet and decide if a competitor is to be disqualified (see art. 223.3.3). All relevant evidence must be carefully considered and the competitor must have the opportunity to defend himself (see art 224.7).

The Jury must also take into account the level of the competition and the age of the competitors.

Examples that can lead to a disqualification.

(…)

392.2 ***either jeopardises the security of persons or property or actually causes injury or damage***

(…)

392.5 ***intentionally causes obstruction***

(…)

(…)

394 Right of Appeal

394.1 ***The Appeal***

394.1.1 It can be made

- ***against all decisions of the Jury***
- *against the official result lists. This appeal has to be directed exclusively against an obvious and proved calculation mistake.*

(…)

394.1.4 ***The decision concerning the appeals are taken by***

- ***the Appeals Commission***
- ***the FIS Court***

C. The FIS Court has procedural rules to which it is, for present purposes, not necessary or useful to refer.

Jurisdiction

3. In the light of article 52.6 of the above mentioned FIS Rules and the fact that the parties have signed the Order of procedure, CAS has jurisdiction to rule on this matter.

Factual Findings

4. We are in no doubt that the Jury, two of whom were eye witnesses to the event, had a clear view that Ms Saarinen deliberately sought to obstruct Ms Majdic and that all were of the view that, however interpreted, Ms Saarinen had committed a breach of the rule prohibiting intentional obstruction before they ever accorded to Ms Saarinen an opportunity to explain her position. Such formation of a provisional view by an adjudicating body is not unusual and is not itself a subject for criticism. However, it behoved the Jury nonetheless both to have an open mind (in the sense of being capable of being persuaded to a contrary view) but also to demonstrate that they had an open mind. They, in the Panel's opinion, had an open mind but there may be room for doubt whether they demonstrated it. If indeed the Jury had already, prior to the hearing itself, not only filled in the form on which the verdict was recorded with the offence identified but actually signed it as well, this might have been convenient, but it certainly was unwise. The Panel can well understand why Ms Saarinen, especially in the stress of the moment, with only a short time to recover from strenuous competition, and faced with the risk of disqualification, might have perceived the conduct of the hearing to be less than fair. The Panel have, however, no doubt based on her own evidence, that she was given an adequate opportunity to make her defence. The issue, was, after all, a short one - why did she do that which she indubitably did? Was it to overtake the competitor in front of her, or to block the one behind her? Her case was that it was the former, although she accepted that she did not (but claimed she did not need to) look behind her.

5. The Panel do not find that the Jury actually relayed to the media the decision to disqualify before the hearing concluded. Such behaviour would have had no possible purpose. The only evidence to support the contention that, nonetheless, that is what they did was that of Mr Gustavsson, Ms Saarinen's fiancé, who constructed the case on the basis of estimated time for certain events, *i.e.*, the end of competition flower ceremony, the press conference, the Jury Hearing, and the chronology of the doping control. The Panel stresses that it considers that he gave his evidence in good faith, but it was clearly at odds with such documentary records as exist (for example the results and the doping control forms). Mr Gustavsson formed his view not at the time, but only on seeing a recording of the press conference on television in the evening, which further reduces confidence on its accuracy.

6. The Panel notes that both appellate bodies, the Appeals Commission and the FIS Court, considered that the Jury's conclusion of deliberate blocking by Ms Saarinen of Ms Majdic was not entirely persuasive. Both relied rather on *dolus eventualis* – a concept of Swiss law which equates to common law recklessness. The explanation for the Jury's view appears to lie in their dismissal of Ms Saarinen's explanation as incredible because they wrongly perceived her to be several metres behind Ms Kowalczyk when the incident occurred, when the video (which was played to the Panel) in fact showed her to be on the heel of her skis. Further on the basis their own experience as skiers – a useful but not infallible guide – they could not credit that she was unaware that Ms Majdic was also on her (*i.e.* Ms Saarinen's) heels.

7. There is no doubt that the minutes of the Jury's decision did not record the evidence which led to the decision, but this breach was venial and led to no injustice. It was not suggested that Ms Saarinen was disabled from advancing her case on appeal before the Appeals Commission or the FIS Court, because she (or the FSA) was unaware of the case against her.

8. It is, indeed, notable that her representations as conveyed in the appeal briefs to the Appeals Commission and FIS Court were accepted. For the finding by the Jury of deliberate obstruction, there was substituted the modified version of *dolus eventualis*. The Appeals Commission, nonetheless, upheld the Jury's sanction, not only upon the ground of (a) obstruction, but also on the ground of (b) unsportsmanlike behaviour and (c) jeopardy.

9. It was suggested that both Jury and Appeals Commission were influenced by a meeting of technical delegates that took place in Zurich on 27 September 2009 to treat cases of obstruction in competition more severely than previously. It is not entirely clear to the Panel whether this guidance referred to sanctions to be imposed, or to the degree of scrutiny of incidents of alleged obstruction, or even to reliance on the *dolus eventualis* concept in Swiss law in addition to stricter legal tests of intention. The Panel is, however, confident that it did not (and could not) involve any re-writing of the rules which all three FIS bodies sought in their respective adjudications to apply.

10. The FIS Court had the following material before it: (i) the Appeals Commission's decision, (ii) a further explanatory letter from the Appeals' Commission and comments from Mr Mapelli, TD of the Competition dated 28 December 2009, (iii) the video of the incident, (iv) answers given by the FSA pursuant to the directions hearing on 7th January 2010 (during which certain questions were posed to both parties), (v) the appeal brief from the FSA to the Appeals Commission, as well as the appeal and answer.

11. The FIS Court dealt with the failures in procedure at paragraph 4.3: their conclusion was that the technical breaches of the rules resulted in no injustice and that there was no evidence that the hearing was unfairly conducted. In particular, they rejected the suggestion that the full video, including the fall of Ms Majdic, was not shown at the hearing; that the press were informed of the disqualification before the hearing had concluded; that the sanction had been finally decided before the hearing.

12. As to the procedure before the Appeals Commission, the FIS Court were disposed to accept that the Appeals' Commission's intention to rely on new rules other than those relied upon by the Jury should have been notified to the FSA and Ms Saarinen, but concluded that in any event, such defect was cured by appeal to the FIS Court, as they said in summary: *"There may have been some violations of the right to be heard in the previous procedure. But the Appellant's had two higher instances (Appeals' Commission, FIS Court) to bring in their arguments. Therefore possible violations have been cured"*.

13. As to substance, the FIS Court rejected the Jury finding that Ms Saarinen *"had direct intention to obstruct Ms Majdic",* but applied the doctrine of *dolus eventualis, i.e.*, that where someone knows that obstruction may occur and she acts in spite of it, she must be taken to accept that this

result, even if not desired by her, may occur, which qualifies in law as intention. Such finding can be made by reference to such factors as the gravity of the risk, whether or not the obstruction is in violation of a duty, and the experience of the person charged. The FIS Court considered that all the relevant criteria were satisfied and concluded that *"somebody who does not look backward or to the side before changing tracks (as Ms Saarinen did) violates elementary rules"*.

14. As to jeopardy, the FIS Court noted that Ms Saarinen hit the binding of Ms Majdic with one toe which caused the fall and could have caused her an injury.

15. As to violation of the rules of responsibility for competitors or unsportsmanlike behaviour, the FIS Court referred to the fact that, when overtaking, competitors must not obstruct each other (see rule 340).

16. As to sanctions, the FIS Court noted in company with the Appeals' Commission that:

- The events took place at a World Cup race;
- Ms Saarinen's skis crossed the skis of Ms Majdic, causing a clear obstruction and the fall of Ms Majdic;
- The obstruction destroyed the race of Ms Majdic;
- There was no emergency;
- No doubt the will of Ms Saarinen was to gain an advantage;
- Three rules had been violated by Ms Saarinen;
- They assumed in Ms Saarinen's favour that she wanted to pass Ms Kowalczyk, to gain 15 WC points, but also knew, and took into account, the possibility that she might obstruct Ms Majdic;
- Evaluating all those factors, the FIS Court considered that the sanction was not disproportionate.

17. As to the reliance on other cases, the FIS Court determined that they could not make any effective comparison as they were unaware of the facts of those cases, nor indeed could they determine that the decisions in them were correct.

18. Paragraph 5 of the FIS Court Decision states

"Summary

To sum up there may have been some failures in the procedure, but they have been cured during the procedure.

The Appeals Commission did not violate any rule when they decided to disqualify the Appellant 2 for having violated art. 392.5 ICR (intentional obstruction), art. 391.7 ICR (unsportsmanlike behaviour) and art. 392.2 ICR (jeopardy). The Court concludes that the Appellant 2 acted with dolus eventualis and that she therefore intentionally obstructed Ms Majdic.

Even if the intentional obstruction would not have been proven (and the obstruction had therefore to be qualified as grossly negligent) the disqualification is justified due to the other violations of the rules (jeopardy, violation of the rules of responsibility of competitor/unsportsmanlike behaviour)".

Analysis

19. The Panel reminds itself that the appeal is brought against a decision of the FIS Court, not against that of the Jury, or of the Appeals' Commission, something that was from time to time overlooked in the submissions of Counsels.

20. Dr Netzle submitted that the Panel was seized of essentially a field of play decision. There were two issues, both arising in the context of the particular competition, (i) was there a breach of any rule? (ii) if so, what was the appropriate sanction?

21. Whether what Ms Saarinen did constituted a breach of those rules (so properly interpreted), was, Dr Netzle submitted, axiomatic for the internal machinery of the sport. The essence of the field of play doctrine is that it is for sporting bodies via their appropriate officials to take decisions relevant to the conduct of particular events. They only lose their immunity from review by CAS in circumstances of arbitrariness and bad faith, (meaning fraud, corruption or malice), or some equivalent vice. This proposition, he asserted, is supported by a long and consistent line of authority [see CAS OG 96/006 (low blow in boxing); CAS OG 02/007 (collision in skating); CAS 2004/A/727 (spectator inference with race); CAS 2004/A/704 (judges' admitted mismarking); CAS 2008/A/1641 (running out of lane in athletics); see further, LEWIS/TAYLOR, Sports Law and Practice, 2nd ed, paras. 4.80-6, BELOFF/BELOFF, Halsbury Laws Centenary Edition, "The Field of Play", pp 147-151]. The doctrine concerns not only the evaluation of the conduct of an event but whether a protest has been properly filed (see CAS 2008/A/1641, para. 89).

22. The same reasoning, Dr Netzle further asserted, must apply to the sanction imposed. CAS jurisprudence is alert to distinguish between sanctions referable to a particular competition and sanctions arising out of a competition but with more protracted implications, *i.e.*, a disciplinary ban (see CAS OG 00/011). In this instance, the disqualification was purely competition-specific.

23. In short according to Dr Netzle, liability and sanction are two sides of the same coin. It is not for CAS to deal in a different currency.

24. Dr Netzle accepted that the FIS Court had to correctly apply the law, since it is a Swiss body and Swiss law applied. However Swiss law recognises the concept of *dolus eventualis* applicable to the obstruction offence: and neither of the other two offences that were relied upon – unsportsmanlike behaviour, or putting another competitor in jeopardy – require equivalent proof of intention actual or deemed, but merely proof of the objective facts said to constitute those offences. Hence there was no legal error which could be said to flaw the FIS Court's decision.

25. This overarching analysis would have compelling force if the appeal had been brought against the decision of the initial decision maker *i.e.* the competition jury direct to CAS, but is obviously more problematic where, as here, the decision appealed is that of a second tier appellate body. It requires the CAS Panel to view the entire process, in this instance Jury, Appeals' Commission and FIS Court, as a continuum, and to draw no distinction between the three tiers, notwithstanding that the last of those bodies adjudicated in a location and at a date far removed from the original competition and with a restricted scope of review – see Statutes Art. 52.2.2.

26. Whether the field of play doctrine, whose existence is well established, enjoys such elasticity depends on whether it is the subject matter of the decision or the mode of its resolution which determines its ambit, but CAS jurisprudence has hitherto marked out no precise guidelines (see CAS 2006/A/1176, para. 7.7). The explanation may lie in the facts that the procedures (including any appeals) for resolving disputes arising out of competition vary between different sports, and the disputes themselves occur in markedly different contexts (see CAS 2009/A/1783 where the panel overruled a disqualification of a rider in a duathlon for dangerous riding causing a collision – a set of circumstances not materially distinct from those in the present appeal and found that the wrong body took the decision complained of, and noted that in any event field of play decisions can be reviewed if *"they are made in an illegal manner or in violation of the defined process or of fundamental rules"* (para 138)).

27. In the Panel's view, the following extracts from CAS jurisprudence serve to illuminate this sometimes obscure pathway.

28. In CAS 2004/A/727 a CAS panel declined to overturn the decision of a Jury of Appeal which had refused to award a gold medal to a Brazilian marathon runner notoriously impeded in the last stages of the classic case. It said:

> *"28. The first issue to be addressed in this case, is the scope of review entrusted to the CAS in matters of this nature. Generally, the CAS has jurisdiction to try and review field of competition decisions. Where there is a relevant procedure in place to resolve such issues, however, the CAS accepts the decision reached as final except where it can be demonstrated that there has been arbitrariness or bad faith in arriving at this decision (CAS OG 96/006 […], in Digest of CAS Awards vol. I, p. 409, CAS OG 00/013 […], in Digest of CAS Awards vol. II, p. 680, CAS OG 02/007 […], in Digest of CAS Awards vol. III, p. 611, CAS OG 04/007 […]). 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, based on the idea that "the game must not be constantly interrupted by appeals to the judge" (Swiss Federal Tribunal, ATF 118 II 12/19). In some legal systems, particularly in the United States and France, the rules of the game are not shielded from the control of judges, but their power of review is limited to that which is arbitrary or illegal (CAS OG 96/006).*
>
> *(…)*

> *30. In casu, the Appellant only criticizes the security measures of the race, which allegedly were flawed and insufficient so as to allow a spectator to interfere with the regular course of the Marathon race. While this may or may not be a correct analysis, it is not for this Panel to rule on.*
>
> *For the Panel to review the decision, the Appellant must show that the Panel would be justified in overturning the decision of the Jury of Appeal. In matters of this nature, the power of review of the CAS is narrow. The Appellant has failed to show what regulations or applicable rules were violated by the Jury of Appeals in its decision not to change the results of the race. The Appellant has furthermore failed to assert specific regulations which may have been grossly misinterpreted by the Jury of Appeals in rendering its decision. The simple fact that the athlete who crossed the line first was awarded the gold medal is not a decision which can be considered to have been based on bad faith, or arbitrariness on the part of the Jury of Appeal. Moreover, there is no evidence of prejudice against the Appellant or preference for the athlete who was awarded the gold medal. There are therefore no grounds permitting the Panel to review the decision of the Jury of Appeal. The Appellant has not established that the decision of the Jury of Appeal was tainted by bad faith or arbitrariness".*

29. In CAS 2004/A/704 the panel determined only that the complaint of mis-marking should have been taken to the jury of appeal and that it would not itself interfere with an official's mere error. It said *inter alia*:

> *"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 the area all important: rough justice may be all that sort can tolerate".*

30. There the panel did not have to decide what jurisdiction it might have exercised over the jury of appeals' decision had such been taken. However in CAS 2008/A/1641 the sole arbitrator refrained from interference with a jury of appeal decision disqualifying a runner of the basis of such doctrine, suggesting that it embraces decisions about the conduct of competition by first tier appellate bodies who decide promptly and proximately on such conduct.

31. In CAS 2005/A/991 a CAS panel rejected an appeal against a decision of the FIH Judicial Commission which had upheld the suspension of a Pakistani player found guilty of dangerous conduct. It stated:

"4.2 The issue brought before the CAS goes beyond the mere application of the Rules of the Game from two perspectives. First, the sanctions imposed by the FIH Judicial Commission after the end of the Hamburg tournament affect the judicial interests of the Appellant and of the Pakistani squad. Secondly, the Appellant raises questions with regard to the Rules of Law as far as the issues of bias[1]*, mens rea and double jeopardy have been involved, quite distinct from any unsubstantiated misuse of these legal remedies.*

(…)

6.8 The CAS Panel, itself, does not see a necessity to consider previous incidents in the present case because other criteria which are applied under general principles of law for defining a sanction suffice to support the sanctions having been imposed by the FIH Judicial Commission. Taking into consideration the seriousness of the act, its aptness of fundamentally endangering the basic rule of fair play in a sport, its potential consequences for the health and physical integrity of a person, and the necessity of giving a clear sign in the interest of general prevention of other such acts in the spirit of the Pakistani team where the Appellant has the function of team captain, and of the whole sports community, the CAS Panel finds it appropriate and reasonable to impose a sanction of suspension for the next 3 matches in which Pakistan play in a FIH world event and to pay to the FIH the expenses incurred by it and by members of the FIH Judicial Commission in connection with the hearing of this matter before the FIH Judicial Commission, limited to the sum of EUR 1000 (one thousand Euros)".

32. In CAS 2006/A/1176 a CAS panel dismissed an appeal against the UEFA appeals body refusing to order a replay of a match in which a Belarussian player had, for reasons of mistaken identity, been sent off. It said:

"7.7 What is questionable is whether the consequences that ensue from Art. 62 and Art. 63 of the UEFA Statutes, which are to the detriment of the Appellant, are compatible with Swiss law. The exclusion of control by the state courts in Art. 62 of the UEFA Statutes in conjunction with the limited jurisdiction of the CAS to review the internal measures of UEFA stipulated by Art. 62 and Art. 63 of the UEFA Statutes ultimately gives rise to an "area which is not regulated by the law". For, internal measures by UEFA which have disputes of the kind mentioned in Art. 63 of the UEFA Statutes as their subject matter, are not subject to the control of either the state courts or control by CAS. According to Swiss law, the parties can agree to exclude any external control of a federation's internal measures ex ante only to a very limited extent. In principle, this cannot be objected to only insofar as the state courts do not lay claim to any cognitive power when reviewing a federation's internal measures. The latter applies to court control of federation measures which are based on the application of a so-called "rule of the game" (ATF 108 II 15, 20; 118 II 12, 15 and 19; 120 II 369 et seq.). However, it must not be overlooked that there are a number of exceptions to the principle of the non-reviewability of "decisions on the rules of the game" and that the boundaries between the scope for action, which is not regulated by the law, and the scope for action, which is limited by the law, are not very clear and are often a matter of controversy in legal literature (CAS OG 96/06 […] marg. 3; Baddeley, L'Association sportive face au droit, 1994, p. 377 et seq.; Perrin, Droit de l'association, 2004, p. 176 et seq. ; Heini/Portmann, in Tercier (Ed.) Schweizerisches Privatrecht, vol. II/5 Das Schweizerische Vereinsrecht, 3rd edition 2005, marg. no. 294 et seq.). This is so, for instance, if the federation's internal measure causes an immediate effect beyond the playing field and has an adverse effect on the party concerned either in terms

[1] The allegations of bias were dismissed.

of his rights of personality or directly in terms of his assets (ATF 118 II 12, 16 seq.; 120 II 369, 370 seq.) or if the rule of the game was applied completely arbitrarily and therefore there was no substantive relation between the application of the rule of the game and the game itself (ATF 118 II 12, 16; 108 II 15, 21).

7.8 The Panel considers that its opinion is confirmed by the consistent case law of CAS on the limits of reviewability of decisions made in games by on-field judges and umpires (CAS OG 00/013 […] marg. no. 24; CAS OG 02/007 […] marg. no. 5.2 et seq.; CAS 2004/A/704 […] marg. no. 3.13 et seq.). However, ultimately, the question of whether the exclusion of any kind of external control for certain internal measures of the federation, as stipulated in Art. 62 and Art. 63 of the UEFA Statutes, withstands Swiss law or not can be left unanswered in this award. For, even if such an exclusion were unlawful, this would not mean that CAS would have jurisdiction. Rather, in this regard the present Panel is bound by the scope of the clearly stipulated arbitration clause in Arts. 62 and 63 of the UEFA Statutes. At most, if the general exclusion of external control were incompatible with Swiss law, jurisdiction would lie with the state courts for the dispute concerned".

33. In CAS 2008/O/1483 a CAS panel allowed one and dismissed another appeal against decision of the IHF Council arising out of qualifying tournaments for the handball competition of the Beijing Olympics. The panel stated:

*"**(iv) This is not a "field of play" decision***

7.68 The Panel wishes to establish that in making the decisions regarding the cancellation and replay of the Men's Tournament and confirmation of the Women's Tournament, it is not substituting its judgment of the penalty calls for that of the referees. The Panel is not engaging in a "field of play" decision. It bases its decision on the statistical evidence from the matches, the opinion of (what the Panel believes to be) neutral and qualified experts, and the facts and circumstances surrounding the selection of the Jordanian referees.

7.69 The Panel concludes that the preponderance of the evidence submitted by the IHF, none of which has been convincingly refuted by the AHF's submissions, supports the charge that bias was present in the officiating of the Korean-Kuwait opening match. The Panel has not been persuaded on the basis of the evidence submitted that the calls of the referee's officiating at the Women's Tournament were the result of bias, intentional manipulation or some other form of bad faith.

7.70 CAS panels have consistently ruled in past awards that it will not review a field of play decision (CAS OG 02/007 […]; CAS 2004/A/727 […], CAS OG 00/013 […]; CAS OG 96/006 […]). In [CAS 2004/A/727], the panel held:

> *«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, (…) 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 Segura, where they stated that one circumstance where the CAS Panel could review a field of play decision would be if a decision were made in bad faith, e.g. as a consequence of corruption. 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 place decision»".*

34. In CAS 2010/A/2114 a full *de novo* approach was applied. That case concerned a three game suspension of [a] Bayern player […] handed down by the UEFA Control and Disciplinary Body, and confirmed by the UEFA appeals body and ultimately upheld by the CAS panel. This was for a dangerous tackle of his opponent in a game in an UEFA tournament which had resulted in the giving of a red card by the referee with in consequence an automatic suspension for one game. The CAS decision, however, turned on the special provisions of the UEFA rules as to appeals and the fact that the sanction extended beyond a single game. The Panel emphasised that the judgment of the referee who was standing closest to the action should be respected in the absence of persuasive arguments to the contrary. The Panel confirmed as well the view expressed in the referee's report, that [the player]'s tackle was directed against the ball and not against the man and should therefore be categorised not as an "assault", but rather as gross foul play. Nonetheless in affirming the three game sanction, the Panel also determined that [the player]'s action was executed with excessive roughness and recklessness endangering [the opponent]'s health and so merited the higher (than one day [recte: game] suspension) sanction.

35. From this complex jurisprudence the Panel distils the following unnuanced propositions:

1) Abstinence by CAS from ruling on field of play decisions is not a matter of jurisdiction, but of arbitral self-restraint (CAS 2004/A/727*,* para 28; CAS 2006/A/1176, para 7.8.).

2) The rationale for such self-restraint includes supporting the autonomy of officials; avoidance of the interruption to matches in progress; seeking to ensure the certainty of outcome of competition; the relative lack of perspective and/or experience of appellate bodies compared with that of match officials (CAS 2004/A/704, para 4.7).

3) Subject to 4), the doctrine at any rate applies to prevent rewriting the results of the game or of sanctions imposed in the course of competition.

4) The doctrine is disapplied upon proof that decisions otherwise falling within its ambit were vitiated by bias, malice, bad faith, arbitrariness or legal error (CAS 2004/A/727*,* CAS 2004/A/704*,* CAS 2006/A/1176).

5) Within those limits the doctrine is compatible with Swiss law (CAS 2006/A/1176).

6) If the decision of an official is subject to unrestricted appeal to an appellate body, which will be seized of it during, immediately after, or even proximate to the competition *prima facie* the same doctrine applies (CAS 2008/A/1641).

7) Where by contrast the decision under appeal is of an appellate body within the sport whose determination in respect of the field of play decision is detached in point of location and time from that decision, and has its jurisdiction defined by its own rules, then the doctrine has no application. CAS can review the appellate decision to see whether the appellate body made, within terms of its own jurisdiction, a relevant error (CAS 2008/O/1483).

8) The above principles apply *mutatis mutandis* to competition specific sanctions although not inflexibly, if interests of person or property are involved (CAS 2005/A/991).

36. It is the Panel's view that respect must be paid to the rules of the respondent body here the FIS. It allocated the roles of the three bodies thus. The Competition Juries decide whether there have been breaches against the competition rules (Statutes Article 41). The Appeals Commission decides appeals against decisions of Competition Juries (Statutes Article 42.1 (with it seems restriction)). The FIS Court decides appeals against the decision of the Appeal Commission "only" "on a point of procedure or on the application of the rules" (Statutes Article 52.2.2). The second stage of appeal is clearly envisaged to be narrower than the first stage.

37. Two grounds for appeal to the FIS Court are identified. The first ground entitles a competitor to appeal where there has been a departure from the stipulated procedure imperilling its fairness. The second ground could, as a matter of language, entitle the competitor to appeal where he (or she) simply disagrees with the decision against which the appeal is brought. The Panel, however, does not consider that the phrase "on the application of the rules" can be given so wide a meaning: it identifies, in its view, an error of law, i.e., misconstruction: otherwise it would not, as was presumably intended, limit at this level, as distinct from at the level of the Appeal Commission the breadth of a competitors complaint: the word "only" introducing the grounds of appeal must be given appropriate weight.

38. Against that background the Panel reaches the following conclusions as to approach. The Competition Jury makes what are quintessentially field of play decisions. If there were no internal mechanisms for appeal, but an appeal was direct to CAS, CAS would not interfere other than if bias or other equivalent mischief or error of law were identified. The Appeals Commission (again on the same hypothesis that an appeal from its decisions was direct to CAS) would enjoy the same qualified immunity from CAS review. Appeals to the Commission are at large: it determines appeals proximately to the competition. Its decisions could therefore also be classified as field of play decisions.

39. The FIS Court is an altogether different animal. Appeals to it are restricted in Art. 52.2.2 of the FIS Statutes to two grounds only. It has specified procedures. While it is itself concerned in a case such as the present with a field of play decision, its decision is not itself fairly characterised as a field of play decision. CAS can therefore review the FIS Court's decision *de novo* under Article R57 of the Code.

40. The consequential question is what is meant by *de novo* in this context. Where the rules of a governing body, (there the IAAF) acknowledged the jurisdiction of a CAS *ad hoc* panel but purported to restrict the grounds upon which an appeal to such panel – there in relation to a doping conviction – could be brought before it, the *ad hoc* panel's rules allowing for unrestricted review trumped those of the governing body (see CAS OG/04 003, para. 8). However this does not mean that CAS can ignore the particular incidents of the decision against which the appeal is brought. Its scope of review in this context cannot be wider than that of the FIS Court, *i.e.*, was the FIS Court correct to conclude that proper procedures were followed and that the relevant rules, properly construed, were applied. If CAS were simply to construe its *de novo* powers of review to put itself in the shoes of the Competition Jury (or

Appeals Commission) and reconsider all the evidence about Ms Saarinen's actions during the Rogla race, it would indeed be reviewing a field of play decision contrary to clear authority.

41. The Panel therefore addresses the two questions. As to procedure, any deviation from that prescribed by the rules occurred before the Competition Jury had no adverse effect. Even if, to paraphrase, a hallowed dictum of the common law, fairness would not only be done, but be seen to be done, this was in any way violated by the Jury, the Appeals Commission cured it. The FIS Court pertinently observed at paragraph 4.3.5: *"it is the nature of sports competitions that decisions have to be made quickly. In particular the jury on the site is under high time pressure. It can be expected the jury works as carefully as possible and that hearings are conducted seriously. On the other hand, the requirements regarding the right to be heard cannot be set too high. The Court cannot expect perfection from the Jury. If a party cannot bring in the relevant arguments, an appeal to the Appeals' Commission may bring relief".*

42. The very purpose of such appeal is to correct flaws both in substance and procedure at the hearing of first instance; indeed the appeals process will be futile if it were otherwise. The Panel cannot ignore CAS's view of the remedial power of its own procedures. It has been frequently said that the *de novo* hearing before CAS relegates procedural deficiencies in the hearing conducted by the body appealed against to the margins (see TAS 98/208). The Panel must logically apply to other appellate bodies with equivalent power, the principles which applies to itself (see analogously in common law Calvin v. Carr [1980] (AC 574)).

43. The Panel equally finds that the FIS Court correctly determined that there had been no error of law in the sense of application of an irrelevant rule or misconstruction of a relevant one considering the modification by the Appeals Commission of the decision of the Competition Jury. There is nothing in the regulatory structure of the FIS which disentitled the Appeals Commission to re-categorise the facts found by them by reference to different rules than those relied on by the Competition Jury; this was a permitted consequence of an open ended first instance appeal. Nor did the Appeals Commission or FIS Court misconstrue the rules found by them to be relevant to the facts found by them.

44. It is not for the Panel with its limited role described above to question decisions of fact (*e.g.* what was the nature of the obstruction caused, or judgement, what was unsportsmanlike behaviour?); but it may nonetheless question whether the sanction, within the range allowed by the rules, was properly found to be proportionate.

45. On the one hand it can be argued that *dolus eventualis* is a form of intent distinguishable from the conventional deliberate variety (*i.e.*, where the competitor's very purpose was to obstruct the competitor behind her); hence disqualification could be deemed to be disproportionate as a sanction both in itself and because it leaves no space for a severer sanction in the case of such conventional deliberate intent to obstruct. Moreover the record shows that out of 8 cases including those of similar nature in the relevant cross country ski-competition season out of 8 penalties imposed only 2 were disqualifications, 6 reprimands.

46. On the other hand are the factors alluded to by the FIS Court in its decision cited at paras. 15-17 above. The Panel observed with the benefit of the video that it does seem to be it that even if (which it has no reason at all to doubt) Ms Saarinen's object was purely to gain bonus points by overtaking Ms Kowalczyk she paid no heed to Ms Majdic, the competitor behind her and in fact not only baulked her but actually caused her to fall. It is indeed admitted by her that she did not look behind her and her coach, Mr Dalen, observed that her technique was faulty. She took, it seems to the Panel, a clear risk on a not altogether simple manoeuvre. The FIS Court considered her actions could not be classified merely as gross negligence.

47. Moreover in a case of a conventionally deliberate intent to obstruct, sanctions over and above disqualification could be visited upon the offender so allowing for differentiation in terms of sanction between various forms of intentional obstruction.

48. The Panel has no means (any more than the FIS Court did) of comparing Ms Saarinen's case with others of necessity unexplored before it. It is in any event axiomatic that reasonable people (including sporting bodies) may reasonably have different views as to the gravity of different breaches of the rules of the sports and the sanctions appropriate to them. While CAS enjoys the power to form its own view on the proportionality of any sanction, it ought not to ignore the expertise of the bodies involved in the particular sport in determining what sanctions are appropriate to what offence. It is notable that in this case three separate ski bodies reached the same conclusion as to penalty even if by different routes. The Panel considers that the FIS Court had a margin of appreciation not exceeded in this case. Moreover Swiss case law does not itself suggest that a lesser sanction would in principle be appropriate merely because the intent was of the *dolus eventualis* variety (see Swiss Supreme Court [ATF] 134 IV 28). It will not accordingly reduce the sanction.

49. Ms Saarinen can at least be consoled by this that on the finding of the FIS Court she was not guilty of a deliberate effort to frustrate in an improper manner a competitor. She was guilty only of an offence of lesser seriousness. She is an experienced, successful and well respected cross country skier. This incident has caused, the Panel trusts, only a transient blow to her reputation.

50. The Panel is confident that not only is it not for it, in principle, to interfere with a decision of the kind appealed; but even if it were within its power to do so, there is no sufficient reason shown to it why it should.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Finnish Ski Association and Aino-Kaisa Saarinen on 1 April 2010 is dismissed.

2. The decision rendered by the FIS Court on 5 March 2010 is confirmed.

3. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellants and to be retained by the CAS.

(…)

6. All other claims and prayers for relief are dismissed.