

DECISION of the FEI TRIBUNAL

7 May 2024

(Reasoned decision notified on 14 June 2024)

(Ref. no. FEI Tribunal: A24-0004

Katherine Malensek v FEI)

In the matter of

Katherine Malensek (the “Appellant”)

vs.

FÉDÉRATION EQUESTRE INTERNATIONALE (the “FEI” or the “Respondent”)

together the “Parties”

COMPOSITION OF THE FEI TRIBUNAL PANEL:

Mr César Torrente (COL), Sole Panel Member

I. INTRODUCTION

1. The Appellant submitted this appeal (the “Appeal”) to the FEI Tribunal (the “Tribunal”) against the decision of a Ground Jury to eliminate Ms Malensek and the horse Landjaegar for the use of an allegedly illegal bit (the “Appealed Decision”) following the completion of their show-jumping round on 28 April 2024 at the Defender Kentucky CCI4*S (the “Event”).

Applicable Rule Provisions:

Statutes 24th edition, effective 19 November 2019 (the “Statutes”), Art. 38.1.

General Regulations 24th edition, updates effective 4 April 2023 (the “FEI GRs”), Art. 161, Art. 162, Art. 165.

Internal Regulations of the FEI Tribunal, 3rd Edition, 2 March 2018 (the “IRs”), Art. 18, Art. 23, Art. 38, Art. 39, Art. 40.

FEI Eventing Rules, 26th Edition, updates effective 1 January 2024 (“Eventing Rules”).

II. FACTUAL BACKGROUND

2. On 28 April 2024, the Appellant participated in the Event with the horse Landjaegar (the “Horse”). The Appellant used the Myler Combination 3-ring bit (the “Bit”).
3. According to the Appellant’s recollection of the facts, after completing the course, one of the FEI stewards reviewed the Bit and communicated to the Appellant that it was not permitted according to the FEI TackApp. The Technical Delegate seemed content that the Bit was legal.
4. Ultimately, the President of the Ground Jury (“PGJ”) agreed with the steward and it was decided to eliminate the Appellant.
5. The Appellant lodged a protest against the decision made by the PGJ to eliminate her. She stated that (i) the Bit did not have any modifications, let alone the ones shown in the pictures

appearing in the FEI TackApp and that (ii) the description never stated that the Bit itself was illegal or that it could not be used as manufactured/intended.

6. The protest was finally dismissed by the PGJ apparently because the nature of the cord altered the function of the Bit even though it was manufactured this way.

III. PROCEDURAL BACKGROUND

7. On 2 May 2024, the Appellant filed a Notice of Appeal against the (the “Appealed Decision”). From a procedural standpoint, she requested that the proceedings be expedited. In particular, the Appellant explained that, in order to have a chance to qualify for the 2024 Paris Olympic Games she would have to extend the horse’s season in case the appealed decision is not set aside. In such case, the Appellant and her horse would need to compete again in an event commencing on 8 May 2024.
8. On 3 May 2024, the FEI Tribunal Chair (the “Chair”) acknowledged receipt of the Appellant’s Notice of Appeal. The Chair nominated a Sole Panel Member to handle the matter and, in view of the expedited nature of the procedure, informed the Parties that they had 24 hours to object to his nomination. The FEI was also granted a 24-hour deadline to confirm if it agreed to proceed on an expedited basis. Finally, the Chair provided a procedural calendar according to which the FEI was invited to present its comments by 6 May 2024, in case of objection to the admissibility of the appeal, the Appellant would be invited to present her view on that point by 7 May 2024, and a decision would be notified during that same day.
9. On that same day, both Parties confirmed that they had no objections to the Sole Panel Member’s nomination. The FEI also agreed to proceed on an expedited basis.
10. On 6 May 2024, the FEI filed its Answer. Amongst others, the FEI challenged the admissibility of the appeal.
11. On 7 May 2024, the Appellant filed her response to the FEI’s objection to the admissibility of the appeal.

IV. THE PARTIES' SUBMISSIONS

12. Below is a summary of the relevant facts, allegations and arguments based on the Parties' written submissions and documentary evidence presented during these proceedings. Although the Sole Panel Member has fully considered all the facts, allegations, legal arguments and evidence in this Appeal, the Sole Panel Member will only refer to the submissions and evidence it considers necessary to explain its reasoning in this decision.

i. Submission of the Appellant:

13. The Appellant submitted the following in her written submission:

a) Admissibility

- (i) The Appellant understands that the Tribunal can only review and/or overturn field-of-play decisions, such as the Appealed Decision at hand, which are taken in bad faith or arbitrarily. The Appealed Decision is to be considered an arbitrary decision.
- (ii) The decision to only eliminate the Appellant for the use of the Bit while other competitors were using it, must be considered arbitrary, even more so after only one of three stewards considered the Bit illegal.
- (iii) There is no clear rule establishing that an unmodified Myler Combination 3-ring bit is not permitted.
- (iv) The Ground Jury encouraged the Appellant to appeal their decision to the FEI and suggested that certain words be removed from the FEI rules to make them more easily applicable to the athlete's case. However, the Appellant defends that rules cannot be modified in order to fit the opinion of the members of the Ground Jury.
- (v) This situation goes against the principles of predictability, consistency and fairness as other athletes were allowed to compete with the same Bit at the Event. It is unclear why the Bit used by Appellant was examined while others were not. Moreover, the Appellant was not granted a meaningful hearing and therefore there was no due process or procedural fairness.

- (vi) The references of the FEI to the Veterinarian Regulations are only for veterinarian concerns. However, no vet was involved in the process leading to the Appealed Decision and there was no claim of abuse. According to the manufacturer's description of the Bit, it *is one of the kindest tools you can use on a horse*.
- (vii) Based on the *contra proferentem* principle, any ambiguous terms or rules must be interpreted against the interests of the drafter.
- (viii) The Appellant therefore asked the Panel to admit her appeal against the Appealed Decision.

b) On the merits

- (ix) The decision to eliminate the Appellant came from a misinterpretation of the FEI TackApp, as the Bit is not illegal and was not modified or tampered with in any way.
- (x) The Bit used is shown in a picture on the FEI TackApp in the section *Items or changes added to bits*. This picture demonstrates how this type of bit can be altered to make it illegal. However, the Appellant did not alter, tamper with or modify the Bit from its legal, purchased form.
- (xi) Moreover, the Appellant has had this Bit inspected and approved in other FEI competitions held in March and April 2024.

ii. ***Submission of the FEI***

14. The FEI submitted the following in its written submission:

a) Admissibility

- (i) The Appeal is not admissible, since the Appealed Decision is a “field of play” decision, which is immune from protest and appeal.
- (ii) The GRs are clear that an appeal against a field of play decision is not admissible, pursuant to article 162.2 of the GRs, which state that there is no appeal against decisions of the Ground Jury arising from the field of play, which are final and binding.

Furthermore, as stated in Article 161.19 of the GRs, decisions covered by article 161.2 are final and may not be appealable to the FEI Tribunal.

- (iii) While certain decisions of the Ground Jury may be appealable to the FEI Tribunal, according to article 161.19 of the GRs, the very same article notably mentions that *"Decisions covered by Article 161.2 are final and may not be appealed to the FEI Tribunal"*. According to the FEI, this appeal concerns such type of decisions.
- (iv) Article 161.2 (a) specifically states that, among others, decisions *"arising from the field of play"* are *"final and binding"*, and therefore *"there is no Protest"* against such decisions, which are listed in said article. In particular, the decision to allow or not allow the use of specific tack or equipment is a field of play decision.
- (v) If a category of decision, in this case 'field of play' decisions, is stated in the FEI Rules and Regulations to be immune from protest, it must follow that such category of decision is also immune from appeal. To hold otherwise would undermine the purpose of the rule (certainty of outcome). It would open the door to a scenario where, instead of protesting on site, persons seeking to challenge a rule/decision on-site would instead wait to file an appeal. This would undermine the authority of Officials by rendering all their field of play decisions subject to review, and potentially reversal, by judicial bodies, the exact scenario that the field of play doctrine seeks to avoid.
- (vi) Therefore, the Appellant's argumentation in this matter cannot be followed. It would run contrary to the "field of play" doctrine and the clear provisions of the FEI Rules and Regulations.
- (vii) The Field of Play doctrine is not only well established in CAS jurisprudence, but it is also enshrined in the GRs, at articles 161.2 and 162.2, which state that the decisions of the Ground Jury arising from the field of play are final and binding and not subject to appeal.
- (viii) The FEI cited the recent FEI Tribunal case A23-0005 ESP NF v. FEI decision, dated 8 January 2024, as well as the CAS award 2015/A/4208 (Horse Sport Ireland & Clan O'Connor v. FEI), the latter stipulating clearly the reasoning behind the necessity of the field of play decisions: *"There are strong sporting-based principles underlying this doctrine, including the needs for finality and to ensure the authority of the referee and match officials. Moreover, it is widely recognised that such decisions are "best left to field*

officials, who are specifically trained to officiate the particular sport and are best placed being on-site, to settle any question relating to it”, and that in most cases there is no way to know what would have happened if the decision had gone another way. Other factors that support such an approach include the arbitrators’ lack of technical expertise, the inevitable element of subjectivity, the need to avoid constant interruption of competitions, the opening of floodgates, and the difficulties of rewriting records and results after the fact.”

- (ix) It follows from the above, that the Ground Jury (“GJ”) was the equivalent of a referee, who, by deciding to eliminate the Appellant, issued a decision which could be referred to, in football or rugby, to give a penalty.
- (x) The appeal is lodged against a clear “field of play” decision, i.e. the Ground Jury’s interpretation of the FEI Rules at the FEI Event.
- (xi) It is irrelevant for the purpose of the appeal whether or not the decision taken by the GJ was correct or not or even if other ground juries at other events may have arrived at a different conclusion, since the Appealed Decision was taken within the GJ’s discretion as stated in article 515.2.1 of the Eventing Rules.
- (xii) In any event, the FEI notes that even if the Appealed Decision passed by the GJ were to be considered incorrect, pursuant to CAS jurisprudence, this sole fact does not render a “field of play” decision invalid.
- (xiii) The FEI further based its argumentations on three CAS precedents. In the first one, CAS 2015/A/3880 Steaua Bucuresti v. Gabriel Muresan, CAS noted that yellow cards cannot be disputed, even if the referee would have made serious judgment errors. In the second one, CAS 2004/A/704 Yang v. FIG, CAS considered that courts may interfere only if an official’s field of play decision is tainted by fraud, arbitrariness or corruption. Otherwise, courts should abstain from correcting the results by reliance of an admitted error. Finally, in the third one, CAS OG 02/2007 Korean Olympic Committee v. ISU, the CAS panel even refused to interfere in a “field of play” decision, even though the judges had admitted the decision was wrong, in the context of the Olympic Games. To overturn the decision, the appellant should have established that the decision of the jury was tainted by bad faith or arbitrariness.

b) On the merits

- (xiv) The FEI contends that the bit at stake is not permitted at FEI Events.
- (xv) Regardless of whether the Appellant altered or made changes or additions to the Bit, article 1044.6 of the Veterinarian Regulations (*“Additional items or changes made to the bit that affects its function are not permitted, unless specifically permitted in the FEI Tack App and FEI Tack, Equipment and Dress Database.”*) does not state that changes need to be made by the Athlete in order not to be permitted.
- (xvi) A bit is not intended to put pressure on the nasal bone or the mandible of a horse. Therefore, since the addition of a cord exerts pressure on both the nasal bone and mandible, it is explicitly forbidden regardless of whether it was added by the athlete or manufacturer.
- (xvii) The FEI TackApp contains a non-exhaustive list of indications as to what is not permitted. The fact that a manufacturer sells the Bit “as is” does not make such bit permitted at FEI Events.
- (xviii) Even if the Appellant used an illegal bit in the past, it does not make the Bit legal now. The FEI accepts that some FEI Officials may have misinterpreted the FEI Rules and FEI TackApp regarding the Bit at previous FEI Events and it will educate and inform the Eventing community about this matter.
- (xix) The FEI TackApp was implemented in order to give clarity and consistency in permitting (or not permitting) the use of specify tack and equipment but it cannot prevent that misinterpretations may still occur.
- (xx) The FEI Officials on-site shall have the final decision regarding the interpretation and implementation of the FEI’s Rules and Regulations on tack, equipment and dress at the FEI events. The Ground Jury took its responsibility on the matter, looked at the FEI Rules, FEI TackApp and decided that the Bit was not permitted, and thus decided to eliminate the Appellant.

- (xxi) The FEI therefore requested the Tribunal to consider the appeal inadmissible and, alternatively to dismiss the appeal in its entirety. In any case, it requested that each party be responsible for their own costs.

V. LEGAL DISCUSSION

15. In view of the arguments raised by both Parties on the admissibility of the appeal and the existence of a field of play decision, the Sole Panel Member will first analyse this point.
16. Only if the appeal is considered admissible, will the Sole Panel Member analyse the other arguments on the merits of the dispute.
17. Firstly, the Sole Panel Member acknowledges that neither the Tribunal nor CAS panels have settled whether the discussion surrounding the possibility of challenging field of play decisions is a matter of jurisdiction of the Tribunal or of admissibility of the appeal. In particular, several FEI panels have considered in their explanations that this is a matter of jurisdiction to then declare the appeal inadmissible.¹ CAS panels have also reached diverging solutions.
18. The Sole Panel Member finds, in line with previous CAS panels², that both positions are arguable. However, since the discussion is purely academic and the same material outcome would be reached at this stage regardless of the conclusion that the Sole Panel Member may reach on this point, this matter does not have to be solved in order to decide on the appeal.
19. Moreover, the FEI has primarily referred to the issue of admissibility of the appeal in its submission. Therefore, the Sole Panel Member will focus on the question whether the present appeal is admissible or not.
20. Pursuant to article 162.2 (a) of the FEI GRs, *An Appeal is not admissible against Decisions by the Ground Jury in cases covered by Article 161.2*. In turn, article 161.2 of the GRs states the following: *There is no Protest against (a) Decisions of the Ground Jury arising from the field of play, which are final and binding, such as, but not limited to: (i) where the Decision is based on a factual*

¹ A20-0004 Twomey v. FEI of 18 June 2020, A22-0002 UAEERF & Mohd v. FEI of 27 June 2022, A22-0003 RETB v. FEI, of 24 August 2022, A23-0005 ESP NF v. FEI of 8 January 2024.

² CAS 2019/A/6677 Markus Kattner v. FIFA.

observation of performance during a Competition or the awarding of marks for performance; (ii) whether an obstacle was knocked down; whether a Horse was disobedient; whether a Horse refused at an obstacle or knocked it down while jumping; (iii) whether an Athlete or Horse has fallen; (iv) whether a Horse circled in a combination or refused to ran out; (v) the time taken for the round; (vi) whether an obstacle was jumped within the time and/or whether, the particular track followed by an Athlete caused the Athlete to incur a penalty under the applicable Sport Rules (b) The Elimination or Disqualification of a Horse for veterinary reasons, including non-acceptance of a Horse at a Horse Inspection unless otherwise specified.

21. In the present case, the Appellant intends to challenge the decision of the Ground Jury to eliminate her from the Event for the use of an illegal bit. It is not disputed amongst the Parties that the Ground Jury's decision is a field of play decision. The Sole Panel Member agrees with the common understanding of the Parties.
22. This essentially means that article 161.2 of the GRs applies to the Appealed Decision. Even if this type of decision may not be explicitly listed in article 161.2 of the GRs, the Sole Panel Member recalls that the use of the wording "*such as, but not limited to*" indicates that it is an open list and it is therefore not exhaustive. Therefore, the general rule is that the Appealed Decision – as a field of play decision –, enjoys a "*qualified immunity*"³ from an appeal review.
23. In view of the *Field of Play doctrine* – to which the Sole Panel Member adheres –, this type of decisions may only be exceptionally reviewed in an appeal procedure if they have been the result of bad faith, fraud, arbitrariness or corruption.
24. This doctrine is based on the premise that a judicial body "*is not prepared to interfere with the application of the rules governing the play of the particular game, which is to be left to field officials, who are specifically trained to officiate the particular sport and are best placed, being on-site, to settle any question regarding it.*"⁴
25. Having stated that, the Sole Panel Member notes that it is undisputed amongst the Parties that the Ground Jury was competent – and had the discretion – to review the Bit used by the Appellant during the Event.

³ CAS OG 02/2007 Korean Olympic Committee v. International Skating Union, referenced in CAS 2015/A/4208 Horse Sport Ireland & Cian O'Connor v. FEI.

⁴ CAS 2008/A/1641 Netherlands Antilles Olympic Committee v. International Association of Athletics Federations & United States Olympic Committee.

26. Moreover, the Appellant has argued that this is a case of an arbitrary decision. However, the field of play doctrine requires that any such arbitrariness be demonstrably accompanied by *“some evidence of preference for, or prejudice against, a particular team or individual.”*⁵
27. The Panel agrees 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.”*⁶
28. Other than presenting a list of rhetorical questions, the Appellant has not argued – let alone proven – that the Ground Jury acted with bad faith, *“preference for, or prejudice against”* her or anyone else.
29. The Appellant argues that only one member of the Ground Jury considered her Bit illegal while others held a different opinion and this same Bit was inspected and approved in other recent FEI competitions. She also claims that other competitors used the same Bit in the Event and in other competitions. Nevertheless, the Sole Panel Member cannot help but notice that not one single piece of evidence has been submitted in support of any of those allegations. Based on Article 32 of the IRs (which shall apply by analogy to appeal proceedings) that stems from Article 8 of the Swiss Civil Code, the Appellant has the burden of proving the existence of an alleged fact on which she intends to rely.
30. In any case, with respect to the last argument (i.e., that other competitors used the same Bit), the Sole Panel Member recalls that there is no equality in illegality. As stated by CAS based on a ruling of the Swiss Federal Tribunal, *“[i]f, in a concrete case, a decision is taken in violation of the applicable regulations and the law respectively, it does not give the right to a person, who is in an identical situation, to be treated in the same manner and to obtain a similar illegal decision anyway (ATF 117 Ib 266 c. 3f, p. 270; 117 Ib 414 c. 8c p. 425).”*⁷
31. This means that, *arguendo*, even if the Appellant’s contention were true that other competitors used the same Bit during the Event without being disqualified for it, this would not lead to the conclusion that a breach of the regulations should go unsanctioned.

⁵ CAS OG 02/2007 Korean Olympic Committee v. International Skating Union, referenced in CAS 2015/A/4208 Horse Sport Ireland & Cian O’Connor v. FEI.

⁶ CAS OG 02/2007 Korean Olympic Committee v. International Skating Union.

⁷ CAS 2006/A/1132 Ismail Mahammedv. FEI.

32. Overall, in the absence of any allegation or evidence from the Appellant of bad faith or corruption on the part of the Ground Jury in their allegedly arbitrary decision, the challenge to the Appealed Decision must fail.
33. In other words, the Sole Panel Member considers that the field of play doctrine applies in full to the facts of this case. Consequently, the Sole Panel Member is unable to amend the Appealed Decision passed by the Ground Jury and has no other option than to declare the inadmissibility of this appeal.
34. In view of this conclusion, the Sole Panel Member does not have to rule on the other requests of the Appellant (i.e., requesting clarification and revision of the FEI tack app and clarification on the legality of an unmodified Myler Combination 3-ring bit) which, in any case, appear to fall outside of the Tribunal's jurisdiction.
35. Finally, the Appellant is ordered to pay the proceeding costs, which can be reduced to CHF 500 considering the matter, and which will be satisfied by the deposit paid by the Appellant.

VI. DECISION

36. The Tribunal decides as follows:

- (i) The Appeal is not admissible.
- (ii) All other requests are dismissed
- (iii) No deposit shall be returned to the Appellant.
- (iv) Each Party shall bear its own costs in these proceedings.

37. According to Art. 165 of the FEI GRs, this decision is effective from the date of oral or written notification to the affected Parties.

38. According to Art. 162.1 and 162.7 of the GRs, this decision may be appealed before the Court of Arbitration for Sport (CAS) within twenty-one (21) days of the present notification.

DECISION TO BE FORWARDED TO:

- a. The Parties: Yes
- b. Any other: No

FOR THE TRIBUNAL

César Torrente (COL), Sole Panel Member