

Tribunal/2022/09 FETRI and Grau vs World Triathlon Technical Committee**DECISION**

rendered by the

WORLD TRIATHLON TRIBUNAL

sitting in the following composition:

Chair of the Panel: Stephen Sampson (Great Britain)

Members of the Panel: Barry Lipp (Australia)

Angelo Rigopoulos (Italy)

in the appeal proceedings between

Mr. Genis Grau
Supported by the Spanish Triathlon Federation (FETRI)**Appellant**

against

World Triathlon Technical Committee

Respondent

I. PARTIES

1. The Appellant is Mr. Genis Grau, an athlete registered with the recognised National Federation for triathlon and its related multisport in Spain, the Spanish Triathlon Federation (“FETRI”).
2. The Respondent is the World Triathlon Technical Committee (“Tri TC”), a committee of World Triathlon appointed to, inter alia, decide on results revision cases further to the World Triathlon Competition Rules (“Tri Competition Rules”).

II. BACKGROUND FACTS AND PROCEEDINGS BEFORE THE WORLD TRIATHLON TRIBUNAL

3. The elements set out below are a summary of the relevant facts as established by the Panel on the basis of the submissions and exhibits filed by the Parties during the course of the proceedings. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties, it refers in the present decision only to those it considers necessary to explain its reasoning.
4. The Elite Men’s Competition of the 2022 World Triathlon Cup Pontevedra (“Race”) was held on 24 July 2022.
5. The Head Referee disqualified three athletes during the Race for failing to adhere to the prescribed swim course. No protests were filed against these decisions.
6. On or before 27 July 2022 new evidence came to the attention of World Triathlon concerning the adherence of three other athletes, including the Appellant, with the prescribed swim course. That new evidence was video footage apparently received from an unnamed third party (“Video Footage”).
7. Accordingly;
 - a. Further to Art 12.9(a) of the Tri Competition Rules, World Triathlon requested the revision of the Race results based on the Video Footage; and
 - b. Further to Art 12.9(b) of the Tri Competition Rules, Tri TC appointed a revisions Panel who reviewed the Video Footage and other evidence and made a proposal to the Tri TC.
8. The revisions Panel informed the Tri TC that:
 - a. *“[w]ith the [Video Footage], the [Tri TC]...it is possible to clearly identify three (3) athletes cutting the swim course and by doing so, violating article 4.1.b.) of the World Triathlon Competition Rules which states that “Athletes must follow the prescribed swim course”.*”
 - b. the Appellant was as one of those three athletes.
 - c. Its recommendation was for the three athletes to be disqualified.
9. On 12 September 2022 the Tri TC issued its Decision (“TC Decision”), which recorded as follows:

“14. After reviewing all the information at its disposal, the World Triathlon Technical Committee has stated that [the Appellant and the two other athletes] clearly violated article 4.1 b.) of the World Triathlon Competition Rules.

15. The World Triathlon Technical Committee has followed the proposal of the panel and therefore decided to modify the results of the 2022 World Triathlon Cup Pontevedra by disqualifying [the Appellant and the two other athletes.”

...

17. Therefore, and in accordance with article 13.7 of the World Triathlon Competition Rules, the athletes have a right to appeal to the World Triathlon Tribunal within thirty (30) natural days from the communication of this decision.”

10. On 30 September 2022, (by notice dated 29 September 2022) the Appellant filed his appeal (“**Appeal**”). The Appeal raised, in summary, the following arguments:

- a. Tri TC proceeded to render a decision without hearing from the Appellant or FETRI;
- b. A results revision process should respect the rights of athletes to be heard and defend themselves before decisions are reached that under which they may be sanctioned;
- c. Therefore the TC Decision must be annulled;
- d. The results of a competition must be considered valid (i.e. final) once the test concludes, and can only be reviewed in exceptional cases. The present case is not exceptional, so it is not possible to modify results days after.
- e. The athlete maintains that the buoys were indicative. It was precisely for this reason that so many athletes completed the course in the way that they did.

11. The Appeal requested:

“That the resolution of the WT Technical Committee of September 12, 2022 be annulled, maintaining the results of the competition held at Pontevedra on July 24, 2022, without applying sanction to the athlete.”

12. On 26 October 2022 by Procedural Order No.1 the Chair of the World Triathlon Tribunal appointed the present Panel to hear the Appeal.

13. On 9 January 2023 by Procedural Order No. 2 the Chair of the Panel issued directions for the filing of submission and evidence, if any, by Tri TC and responsive submissions and evidence from the Appellant, and informed the Parties that the Panel would resolve the Appeal without an oral hearing.

14. On 26 January 2023, the representative of the Tri TC stated, in effect, that it had no further submissions or evidence for the Panel to take into account.

15. On 26 January the Appellant filed further submissions, in effect restating and reiterating the arguments set out in the Appeal.

16. Neither of the Parties has raised any objection to the composition of the Panel or to the Panel resolving the Appeal without an oral hearing.

LEGAL ANALYSIS

III. JURISDICTION

17. The World Triathlon Tribunal's jurisdiction concerning this Appeal is set out by:

- a. Art 50.7 of the Tri Constitution provides, inter alia: *"A panel or a Single Judge is responsible to handle and decide on all cases brought before the Tribunal in accordance with the Constitution, Rules, Regulations and Codes."*
- b. Art 13.7 a) (i) of the Tri Competition Rules provides: *"Decisions from any Competition Jury and any World Triathlon panel (except the World Triathlon AD Hearing Panel) may be appealed to the World Triathlon Tribunal;"*

18. Accordingly, the Panel has jurisdiction over the Appeal.

IV. APPLICABLE LAW

19. Pursuant to Art 62.1 of the Constitution, *"The governing law of World Triathlon shall be Swiss law."*

20. In addition, as the Appeal concerns the Tri Competition Rules, those rules and regulations are applicable.

V. ADMISSIBILITY

21. Art 13.7 of the Tri Competition Rules provides as follows:

"Level 2 Appeal Procedure

The following procedure will be followed in the event of a Level 2 Appeal:

- (i) *Decisions from any Competition Jury and any World Triathlon panel (except the World Triathlon AD Hearing Panel) may be appealed to the World Triathlon Tribunal;*
- (ii) *Only appeal supported by National Federations will be admitted;*
- (iii) *Appeals may be submitted up to thirty natural days after the Competition Jury met or within thirty natural days from the Competition Jury of Panel decision;*
- (iv) *Appeals will be submitted in writing to the World Triathlon Secretary General and will be accompanied by a deposit of \$ 500 USD. It will only be refunded if the appeal is successful;*
- (v) *Level 2 appeal decisions may be appealed to the CAS (Level 3 of Appeal)."*

22. The Appeal was filed as required, the deposit has been paid and the Appeal is supported by FETRI. Accordingly, the Appeal is admissible.

VI. DISCUSSION

23. In the Panel's view this Appeal raises two issues: (a) the sanctity of the right to be heard and (b) jurisdiction to review Field of Play decisions.
24. Procedural fairness is requirement of the resolution of any dispute, including under the Tri Competition Rules and Swiss law. That procedural fairness includes the right to be heard.
25. The right to be heard is protected by the Swiss Federal Constitution,¹ and the jurisprudence of the Swiss Federal Tribunal. It therefore has a strong footing in Swiss law as a procedural guarantee covering all legal proceedings.
26. The purpose of the right to be heard might be considered to have two elements: (i) a means of clarifying the facts of the case and presenting a position and (ii) enabling a party to have a personal right to participate in the process which leads to the issuing of the decision.
27. Essentially, therefore the right to be heard allows a party (i) be aware of and participate in the process, (ii) give its views on any and all facts and evidence relevant to the matter; (iii) to present relevant evidence and submissions; and (iv) to participate in any hearings.
28. That the right to be heard is a fundamental principle is long recognised by the jurisprudence of the Court of Arbitration for Sport. For example:

"78. Indeed, the right to be heard is a fundamental right and one of the most important elements of the right to a due process that must be respected in the course of the proceedings in front of any judicial body. A party to any such proceedings has the right of defending itself and shall have the chance to state its case and to provide its position regarding the subject matter in question, as well as to provide evidences that it may deem relevant for the case".²

29. As members may imagine, the right to be heard is recognised and respected throughout the rules and regulations of World Triathlon. For example, the Tri Competition Rules concerning protests set out a detailed procedure at Art [12.8] concerning the adjudication of such protests:

- a) *Protests will be filed with the Head Referee, signed by the protester, within the time limits specified above;*
- b) *The Head Referee will announce on the notice board in the finish area that a protest has been filed;*
- c) *The protester and the accused and/or their national coach or representative must be present. If the protester does not attend, the*

¹ CONSTITUTION FÉDÉRALE [CST] [SWISS FEDERAL CONSTITUTION] Apr. 18, 1999, art. 29(2) (Switz.): "Each party to a case has the right to be heard." (Informal translation).

² CAS 2012/A/2740

- protest hearing may be postponed or cancelled. The Competition Jury will determine if absence from the hearing is valid;*
- d) *Failure of any party to attend the hearing may justify the Competition Jury in making a decision without them;*
 - e) *A representative for either the protester or the accused may be designated to appear if approved by the Chair of the Competition Jury;*
 - f) *The hearing will not be open to the public;*
 - g) *The Competition Jury Chair will explain the process and everyone's rights;*
 - h) *The Competition Jury Chair will read the protest;*
 - i) *The protester and the accused will be given adequate time to give their accounts of the incident;*
 - j) *Witnesses (up to two each) may speak for up to three (3) minutes each;*
 - k) *The Competition Jury will hear the evidence and render a decision, by simple majority;*
 - l) *The decision will be posted immediately and delivered in writing to the parties upon request;*
 - m) *The Competition Jury will produce minutes of the meeting, including the Competition Jury's decision, which must be approved by all members of the Competition Jury, by the end of the meeting. The minutes will be submitted to the World Triathlon.*

30. The Panel notes the provisions, inter alia, announcing the protest, the chair explains the process, the protest is read out, the protester and the accused are given "*adequate time to give their accounts of the incident*", and witnesses may be called.

31. But there is one notable exception to the right to be heard not being recognised: Art 12.9 the results revision process. Here, without wishing to criticise the Tri TC, the Panel finds that the Tri Competition Rules were silent as to the obligation, which should have existed, to notify the athletes whose results are in question about the fact that there has been a request that their results be revised, to carry out a procedure that involves hearing from those athletes and to protect their right to be heard.

32. It is not in question that the Appellant was not heard before the TC Decision was issued. That is a specific ground of the Appeal.

33. As a general principle and subject to some exceptions, a procedural defect in the proceedings below may be remedied by a de novo hearing of the facts and matters that led to the decision under appeal. This full power of review means that procedural flaws, if any, in a first instance decision can often be cured by the hearing before the appellate body. In the context of appeals to the CAS, in CAS 2008/A/1574, that Panel dealt with the meaning of a CAS Panel's de novo powers and ruled that a de novo hearing is: "*a completely fresh hearing of the dispute between the parties, any allegation of denial of natural justice or any defect or procedural error even in violation of the principle of due process which may have occurred at first instance whether within the sporting body or by the Ordinary Division CAS panel, will be cured by the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations*"³.

³ CAS 2008/A/1574, at 42. See also CAS 2012/A/2702.

34. Further, CAS jurisprudence is clear that a breach of the right to be heard in proceedings below may be cured by a de novo hearing before the appellate body:

“Amongst the procedural violations in a first instance decision that can be cured by a de novo CAS proceeding is the ‘right to be heard’, and this has been consistently established in CAS jurisprudence. The Swiss Federal Tribunal (“SFT”) has also confirmed the legality of the curing effect of the CAS de novo review. Accordingly, infringements on the parties’ right to be heard can generally be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal in the first instance and in front of which the right to be heard had been properly exercised”.⁴

35. The Panel considers that it would therefore in principle be able to cure the defect that infects the TC Decision, and notes that it has received two written submissions from (or on behalf of) the Appellant.
36. The second issue that the Panel needs to consider is whether the Appeal concerns a Field of Play decision?
37. In this matter, the decision in issue is self evidently a Field of Play matter. It concerns the adherence, or not, of an athlete with the course requirements further to the Tri Competition Rules.⁵
38. The third issue therefore is does the Panel have jurisdiction to determine this Field of Play decision?
39. The principle of respecting field of play decisions is one of the defining characteristics of the *lex sportiva*, as a sport-specific rule that guides much of sports competition at a fundamental level. The key objective of this principle is to immunise the field of play from the reach of the law, to create in other words a field of autonomy which which even appellate sports tribunals should not trespass.⁶
40. In CAS 2015/A/4208, the Panel held that:

“3. Applying this principle is important and disturbing it risks an undermining of the fundamental fabric of the law of sport, opening the door to a more general review by adjudicators of matters that have long been considered as relating to the field of play. Accordingly, decisions taken by match officials enjoy a “qualified immunity” and for CAS to review a field of play decision, there has to be more than that the decision is wrong or one that no sensible person could have reached; put differently, field of play decisions are not open to review on the merits. Rather, CAS may interfere only if the person requesting the review establishes that a field of play decision is tainted by fraud, bad faith, bias,

⁴ CAS 2016/A/4387, at 148.

⁵ The panel notes that the new edition, i.e. the 2023 edition of the Tri Competition Rules clarify that results revision is a Field of Play issue.

⁶ Lewis & Taylor: Sports Law, 4th Ed, Bloomsbury 2021, at D2.136

arbitrariness or corruption; furthermore, whether the accusation is one of fraud, bad faith, arbitrariness or corruption, the person requesting the review must demonstrate evidence of preference for, or prejudice against, a particular team or individual.

4. The field of play doctrine only permits review of field of play decisions in so far as the rules of the game themselves provide. Put differently if the applicable rules do not provide for any review after the event or match has finished, then the CAS is directed to respect such silence. Furthermore, in cases where a decision rendered by the match officials during the competition is reviewed by an appeals body immediately after, or even proximate to the competition, the respective decision rendered by the appeals body is also only open to review by CAS under the limitations of the field of play doctrine.”

41. These principles have been subject to two recent decisions from the World Triathlon Tribunal: Tribunal 2022/05 and Tribunal 2022/07. Those decisions note the terms of Art 13.1 b) of the Tri Competition Rules which clearly stated that:

“Decisions from...any World Triathlon panel may be appealed to the World Triathlon Tribunal, except:

(i)...

(ii) Field of Play decisions.”

42. Given that apparently clear (and understandable) prohibition, how does the Panel construe Art 12.9 e.) of the Tri Competition Rules – which appears to suggest that the decision of the Technical Committee is subject to a right to appeal to this tribunal? ⁷

43. CAS jurisprudence provides us with some guidance. CAS appreciates that the rules of a sports governing body may appear to provide for some *ex post facto* review of a field of play decision:

“51. Moreover, as noted above, the established field of play doctrine permits review of “field of play” decisions “in so far as the rules of the game themselves provide”...

52. But even if the rules do provide for the possibility of review of the decision “immediately after, or even proximate to the competition” after the match, the CAS has been clear that “prima facie the same doctrine applies” (CAS 2010/A/2090, at paras 35(6) and 38). In CAS 2010/A/2090 the CAS determined that: “The Competition Jury makes what are quintessentially field of play decisions. If there were no internal mechanism 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

⁷ The Panel notes that the latest iteration of the Tri Competition Rules (which are not being applied in these proceedings) specifically provides “g.) World Triathlon Technical Committee results revision process decisions are field of play decisions h.) World Triathlon Technical Committee results revision process decisions may be appealed to the World Triathlon Tribunal.” The Panel does not consider that this iteration of the rules is inconsistent with its decision.

Appeals Commission (again on the same hypothesis that an appeal from its decision 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 be classified as field of play decisions". That has to be right, or else the postmatch review provided for in the rules would lead to a complete end run around the 'field of play' doctrine, frustrating all of the public interest and other objectives that underlie it. It would have the most undesirable result that sports bodies would be forced to write out of their rule books any mechanism for post-match review of the original match official's decision, to ensure that the "qualified immunity" his or her decision enjoys was maintained."

44. This Panel considers that the sanctity of the Field of Play doctrine is not jettisoned by the existence of Art 12.9 e.). It therefore considers that its scope of review must be limited to matters such as – and this is not intended to be exhaustive – whether the proceedings before the Tri TC infringed a party's rights, or whether its decision is tainted by one of the elements that would permit the underlying decision to be reopened (and as to which see Tribunal 2022/07 at #36 *"...decisions of referees are not reviewable unless there is evidence that the referee rendered (i) a decision in bad faith, (ii) an arbitrary decision or (iii) a decision, made not in appreciation of the state of affairs on the field at the time but in application of a wrong rule, or made by failing to apply the correct rule to the factual circumstances."*) There is nothing the grounds of Appeal that suggests that the Appellant considers the TC Decision was tainted by one of those elements permitting it to be reopened.
45. The panel therefore considers that, while it does have jurisdiction to review and rule on the procedure followed by the Technical Committee that led to the TC Decision, it does not have jurisdiction to review the merits of the TC Decision.
46. Given the above, the Appeal is upheld in part. The TC Decision was reached in a manner which denied the Appellant his right to be heard which denial may have had some effect on the outcome.

VII. COSTS

47. As the Appeal is upheld in part only and neither party has claimed any cost, the panel decides not to award any costs.

VIII. APPEAL FEE

48. The appeal fee may be refunded if the Appeal is successful. Given the Appeal has been successful in part only, the fee is not refunded.

ON THESE GROUNDS


The Panel rules that:

- 1 The Appeal is admissible.

- 2 The Appeal is partially upheld .
- 3 The TC Decision - insofar as the Appellant is concerned only - is annulled.
- 4 The Technical Committee is directed to rehear the results revision case, applying the procedural rules set out at Art 12.9 d) of the current Tri Competition Rules, or some other process that it shall determine that recognises the Appellant's right to be heard of the Appellant.
- 5 All and any other relief is dismissed.

Lausanne, Switzerland, 17 April 2023


WORLD TRIATHLON TRIBUNAL


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Member of the Panel

Appeal to the Court of Arbitration for Sport

According to Article 52 of the Constitution, final decisions made by World Triathlon under the Constitution may be appealed exclusively to the CAS which will resolve the dispute definitively in accordance with the CAS Code of Sports-related Arbitration.

Any appeal must be filed with the CAS within twenty-one (21) days of the party's reception of the written, reasoned decision of World Triathlon in question.

Pending resolution of the appeal by the CAS, the decision being appealed shall remain in full force and effect unless the CAS orders otherwise.










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Rapporto di audit finale

2023-04-18

Creato il:	2023-04-17
Da:	Paola Turconi (paola.turconi@triathlon.org)
Stato:	Firmato
ID transazione:	CBJCHBCAABAAACZhaHequnIAq3ShGDHSr7mcr1JpZJ3

Cronologia di "2022_09 FETRI and Grau vs TRI Technical Committee - Decision"


-  Documento creato da Paola Turconi (paola.turconi@triathlon.org)
2023-04-17 - 15.27.48 GMT
-  Documento inviato per e-mail a sjsampsonlegal@outlook.com per la firma
2023-04-17 - 15.29.34 GMT
-  E-mail visualizzata da sjsampsonlegal@outlook.com
2023-04-17 - 15.48.41 GMT
-  Il firmatario sjsampsonlegal@outlook.com ha immesso il nome Stephen Sampson al momento della firma
2023-04-17 - 15.49.17 GMT
-  Documento firmato elettronicamente da Stephen Sampson (sjsampsonlegal@outlook.com)
Data firma: 2023-04-17 - 15.49.19 GMT - Origine ora: server
-  Documento inviato per e-mail a angelo.rigopoulos@tribunal.triathlon.org per la firma
2023-04-17 - 15.49.22 GMT
-  E-mail visualizzata da angelo.rigopoulos@tribunal.triathlon.org
2023-04-17 - 15.51.00 GMT
-  Il firmatario angelo.rigopoulos@tribunal.triathlon.org ha immesso il nome Angelo Rigopoulos al momento della firma
2023-04-17 - 15.59.33 GMT
-  Documento firmato elettronicamente da Angelo Rigopoulos (angelo.rigopoulos@tribunal.triathlon.org)
Data firma: 2023-04-17 - 15.59.35 GMT - Origine ora: server

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2023-04-17 - 15.59.37 GMT

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 Il firmatario barry.lipp@tribunal.triathlon.org ha immesso il nome Barry Lipp al momento della firma

2023-04-18 - 6.19.31 GMT

 Documento firmato elettronicamente da Barry Lipp (barry.lipp@tribunal.triathlon.org)

Data firma: 2023-04-18 - 6.19.33 GMT - Origine ora: server

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