Arbitration CAS 2007/A/1415 B. v/ Fédération Equestre Internationale (FEI), award of 24 April 2008

Panel: Mr Conny Jörneklint (Sweden), President; Mr Raymond Hack (South Africa); Mr Jean-Pierre Morand (Switzerland)

Equestrian
Validity of the notification to undergo an anti-doping test
Refusal to submit to doping control
No compelling justifications and mitigating circumstances
Determination of the sanction

1. **No exact time limit is prescribed in the International Standard for Testing (IST). Even if the notification takes place when the Athlete had finished his ride, dismounted from his horse and proceeded to the bar it cannot be said that the notification is too late. The 15 minutes elapsed from the end of the ride to the notification cannot be considered excessive. Even if the Athlete had left the place of the Competition he could have been subject to an Out-of-Competition Test.**

2. **The intentional refusal to submit to doping control with the purpose to hide that the Athlete had drunk alcohol, which he was not sure was prohibited in connection with a competition, and also to cover the fact that he had taken another medication, which he was not sure of, constitutes anti-doping rule violation.**

3. **The possibility for the athlete of establishing No Fault or Negligence does not apply to violations under Art. 2.3 (refusal to submit to doping control). According to Art 10.5.4 and 10.2 the sanction therefore has to be two years ineligibility.**

B. ("B." or "the Appellant") is a rider, who is a member of the South African National Equestrian Federation (SANEF) which is itself a member of the Fédération Equestre Internationale.

The Fédération Equestre Internationale (FEI; the "Respondent") is a non-governmental association of national federations recognized as the international federation governing horse sport as defined in its Statutes under all forms worldwide. Its registered office is in Lausanne, Switzerland.

B. participated in the CSI-W Cape Town Event ("the Event"), which took place between 23 and 26 November 2006. This event was the national qualification for the World Cup.

As a requirement for his participation in the Event the Appellant had filled in and signed an Entry Form on 31 October 2006. The following statement is contained in the sentence immediately above the signature of the Appellant:

> *"I, the undersigned, herewith accept that I bind myself and all the entrants on the form to the rules of the Organisers as stipulated in the schedule".*

The Schedule to the Entry Form contained detailed information on the Event and specified that it was a FEI WORLD Cup Qualifier, authorised and supervised by the FEI. It was set out that:

> *"This event is organised in accordance with:*
>
> - *FEI Statutes, 21st edition, effective 21st April 2004,*
> - *FEI General Regulations, 21st edition, effective 1st January 2005,*
> - *FEI Veterinary Regulations (…)*
> - *FEI Rules for Jumping Events (…)*
> - *FEI Special Regulations for Pony Riders (…)*
> - *All subsequent published revisions, the provisions of which will take precedence.*
> - *An arbitration procedure is provided for in the FEI Statutes and General Regulations referred to above. In accordance with this procedure, any appeal against a decision rendered by the FEI or its official bodies is to be settled exclusively by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland".*

On 24 November 2006, B. participated in Competition No 2 of the Event referred to as "JICM Riders Grand Prix Ar.273.3.3 Speed 400mpm". After having completed his riding in the competition – in which he was not placed, which means that he had completed this competition – he dismounted from his horse and went to the Event bar for some refreshments and to watch the competition's jump off. At the bar he was offered a beer, which he accepted and consumed. After having consumed the beer he bought a Savannah, which is a local brand of cider, a beverage with alcohol. On leaving the bar area after having consumed half the Savannah he was notified by Mr Yussuf Hank, Lead Doping Control Officer ("the DCO") that he had been selected for an anti-doping test.

The Appellant was handed over by the DCO to Mr Vusi Cekiso ("Mr Cekiso"), assistant DCO, at the Doping Control Station. Mr Cekiso signed him into the attendance register and showed him a Letter of Authority. According to the Doping Officials the Appellant was also informed that he had an hour to report to the Doping Control Station. The Letter of Authority contained the following paragraph in bold characters, which reads as follows:

> **"WARNING: The refusal or failure by an athlete to submit to doping control when requested to do so by a doping control officer/chaperone may result in a sanction being imposed under its national or international federation rules".**

The Appellant signed the Doping Control Form – National Federation Copy. Next to the Athlete's Signature is the following sentence set out in bold letters:

"I HEREBY ACKNOWLEDGE THAT I HAVE RECEIVED AND READ THIS NOTICE, AND I CONSENT TO PROVIDE SAMPLE(S) AS REQUESTED (I UNDERSTAND THAT FAILURE OR REFUSAL TO PROVIDE A SAMPLE MAY CONSTITUTE AN ANTI-DOPING RULE VIOLATION".

The Athlete explained to Mr Cekiso that he had been drinking alcohol and also that he had taken some medication, of which he could not give the exact name. According to Mr Cekiso's witness statement, the Athlete was given a pamphlet on "Drug-Free Sport" published by the South African Institute for Drug-free Sport (SAIDS). The pamphlet contained a list of prohibited substances. Alcohol is mentioned under a separate section "Classes of Prohibited Substances in specific sports" with the information *"banned in competition"* and the warning *"check with your Federation whether any of these apply to your sport"*.

The Appellant submits that he asked to Mr Cekiso whether alcohol is considered as a banned substance in his sport and that he did not received any adequate answer. The Respondent submits that the Appellant did not asked any questions in this respect and that Mr Cekiso never mentioned anything related to whether or not alcohol was on the prohibited list for equestrians.

As he could not remember the name of the medication he had taken, the Appellant asked Mr Cekiso to chaperone him to his car to fetch his cell phone in order to call his doctor and ask him. The Appellant could not get in touch with his doctor as the doctor's phone was on voicemail.

When the Appellant and Mr Cekiso returned to the Doping Control Station, Mr Cekiso asked the Appellant if he was ready to provide his urine sample. The Appellant then phoned to his lawyer and the Appellant then reported to Mr Cekiso that his lawyer advised him not to provide the test.

The Appellant has referred to an affidavit by his lawyer, Mr David Spohr. According to this affidavit Mr Spohr was driving when he received a phone call from the Appellant on Friday afternoon rush hour traffic. Mr Spohr explained that he could therefore not advise the Appellant properly in the given time frame but he told the Appellant that if the latter felt that the procedure was wrong he should not consent to the drug test, but that it was the Appellant's call and that Mr Spohr was uncertain about what the legislation said. Mr Spohr also told the Appellant that he had a right against self incrimination and if he felt the procedures used were irregular he should refuse to undergo the tests.

It is common cause that the Appellant after this phone call refused to provide the urine sample.

According to the Athlete Log Form recorded by Mr Cekiso, the Athlete arrived at the Doping Control Station at 16:37. According to the same Log Form, Mr Cekiso and the Athlete left for the Athlete's car at 16:40 to take his cell phone. At 16:49 Mr Cekiso noted in the Log Form at the Doping Control Station that *"after having a long conversation explaining the procedure with help of my colleague Evedea (Heyns) the athlete decided not to take the test based on his attorney's advice"*. The last note in the Log Form is at 17:01 when the Athlete left the Doping Control Station.

According to a written statement by Mr Cekiso, the Appellant never posed any questions related to the pamphlet of Drug-Free Sport. Mr Cekiso also states that the Appellant never enquired about the medicine Voltaren apart from telling him that he had taken some stuff he could not recall. Mr Cekiso expresses that he explicitly explained to the Appellant the consequences should he refuse to provide a urine sample and that failure to provide the sample may result in sanctions being imposed against him by his federation. His statement was echoed by his colleague Evedea Heyns. Mr Cekiso also states that he redirected the Athlete to the Doping Control Form, which he had received and signed, as well as the Letter of Authority in which the consequence of refusing to submit to doping control was clearly stated. According to Mr Cekiso, the Appellant told that he trusted his lawyer's advice not to take the test as he had known this lawyer for years and had never been given a bad legal advice.

Mr Cekiso completed the Doping Control Form and noted that the Athlete refused to provide a sample and he also filled in the DCO Report Form in which he stated that the Appellant's test was not completed as it resulted in a *"refusal"*. In the DCO Report Form it is also noted that the Athlete had been shown the Letter of Authority.

By a letter of 29 November 2006 the SAIDS informed the SANEF of the Appellant's refusal to submit the test at the Event and instructed them to follow the recommended procedure in terms of its International Controlling Body's procedures relating the use of prohibited substances.

As the Event was international, the matter was referred by SANEF to the FEI for adjudication by the FEI Tribunal.

On 21 December 2006, the Appellant addressed a statement to his national federation and to the FEI in which he made his own account of what had happened at the Event on 24 November 2006. In this Statement the Appellant explains in essence that:

- He spent many years of his life riding show jumping horses as a professional rider both in the USA and in Europe.
- After a bad fall he broke two bones in his back 20 years ago.
- He had to stop riding for seven years. He subsequently returned to the sport in South Africa and with help of physiotherapy and some pain relieving drugs used time to time, he has been able to compete at some of the major horse shows in South Africa. He is competing as an amateur.
- The Appellant was drug tested after winning the South African Championships in 2005.
- On warming up his horse before the competition on 24 November 2006, he heard talks among the riders that the "drug squad" was at the show and that riders would be tested. So he was well aware that he could be tested during or after his competition.
- From his previous experience of being tested he was notified while he was still on his horse and he was immediately chaperoned to the drug testing area.
- When he had finished his ride in the competition for the day he dismounted from his horse and as nobody at this point had notified him he was to be tested, he proceeded to the Event

bar where he had a beer together with a group of people sitting in the bar watching the jump-off. After he had finished the beer he bought a Savannah. As his nanny and his two children were waiting in the car, he had to leave early. This is the reason why he left the table after having consumed half the Savannah. He proceeded to the office on his way out of the show grounds to find out about the next days competitions and to decide if he was going to ride.

- On leaving the bar area he crossed the entrance to the arena and he literally bumped into a man he knows, Mr Mike Greeff, who was the SANEF representative at the Event, and a gentleman he did not recognize.
- Mr Greeff told him that he had been selected for a drug test. The Appellant informed the unidentified man that he had been drinking alcohol to which the man replied that this was not a problem and then asked if the Appellant was happy that the containers were sealed before he drank from them. He replied that he did not know. The man told him to accompany him to the testing station.
- The man handed him over to Mr Cekiso who asked him for some details which he gave. The Appellant was then asked to sign the Doping Control Form which he did.
- He then asked Mr Cekiso a number of questions related to the use of alcohol and he also told him that he used a medication for pain in his back. He specifically asked whether he could be tested positive for using alcohol earlier in the day. Mr Cekiso was very vague and did not seem to have any clear answers but told him that he could be tested for both and that a list of all illegal substances was in the pamphlet which he passed to him. He noted that the pamphlet indicated that alcohol is a banned substance and he said that he needed some advice. Mr Cekiso then told him that he had 30 minutes to provide the test.
- The Appellant explained that he did not use medication on an everyday basis but only when his back is causing him pain and that he had used a Voltaren tablet earlier in the day. He requested that Mr Cekiso accompany him to his car to get his cell phone in order to call his doctor to get the exact name and dosage of the painkiller. He could not get hold of his doctor.
- Mr Cekiso kept telling him that he had to provide the sample no matter what and that he could sort everything out later. He felt that he was in a huge dilemma and decided to call his lawyer as he still was not clear whether he would be incriminating himself by having had alcohol and by not declaring exactly what medication he had used.
- The first gentleman he spoke to started to question him about whether his drink were sealed or not. He could not verify this issue as he received the first drink in a glass. He therefore thought that he had to get some advice.
- His attorney suggested that under the circumstances he should probably not take the test as he could not get the correct information to him in balance of the time he had left to provide for the test. In the attorney's view there appeared to be a number of irregularities and the Appellant should in no way incriminate himself.
- He had not read the FEI Doping Rules until after this incident. As not being a professional rider he never really thought it would affect him.

By a "Notification fax" dated 31 January 2006, the FEI notified Mr Jimmy Dewar, Secretary General of SANEF, for the attention of B., that a case of refusal to comply with respect to the tests conducted at the Event had been reported by the SAIDS and investigated by the FEI. As a result the Appellant was informed that a violation of the anti-doping rule 2.3 of the FEI Anti-Doping Rules for Human Athletes ("the ADRHA") had possibly been committed and what the consequence could be. The Appellant was also informed of his procedural rights in this context.

On 23 February 2007, the Counsel for the Appellant sent to the FEI written submissions together with five exhibits, affidavits and statements by the Appellant, Mr Dewar, Mr Dominey Alexander, a colleague rider of the Appellant, Ms C. De Greef and the Appellant's doctor, Dr. Spohr.

This case under the reference 2006/02 was submitted to the FEI Tribunal for consideration. A hearing was requested by the Appellant and was held by telephone conference on 4 April 2007. In the perspective of the hearing, an additional written statement was submitted by Mr Mike Greeff. According to Mr Greeff's own recollection of events that took place on 24 November 2006, it is confirmed that the SAIDS DCO *"mentioned that Michael has refused the test, apparently he had said that he was on medication but did not know what. He had tried unsuccessfully to contact his Doctor and then phoned his lawyer, who had advised him to refuse the test"*.

On 25 September 2007, the FEI Tribunal issued a decision stating as follows in relevant parts:

"i. ***Disqualification*** *– As a result of the foregoing, the Tribunal has decided to disqualify the Athlete from the Event and that all medals, point and prize money won at the Event must be forfeited, in accordance with ADRHA Article 9.*

ii. ***Sanctions –*** *1) The Athlete is suspended for a period of two (2) years to commence immediately and without further notice at the expiration of the period in which an appeal may be filed (30 days from the date of notification of the written decision) or earlier if the appeal is waived in writing by or behalf of the Athlete. 2) The Athlete shall contribute 1,500 CHF towards the legal costs of the judicial procedure".*

By a letter dated 29 October 2007 from the FEI, the Appellant was informed that the suspension of two years would be enforced from 27 October 2007 until 26 October 2009.

On 24 October 2007, the Appellant filed his Statement of Appeal.

In the Appeal Brief dated 12 November 2007 the Appellant submitted a procedural motion that the hearing should take place in South Africa. This submission was dismissed but in order to avoid the costs incurred by the travel to Switzerland, the Chairman of the Panel instead exceptionally granted the Appellant's request to be heard by video-conference.

On 10 December 2007, the Respondent filed an answer.

A hearing was held on 28 February 2008 at the CAS premises in Lausanne. All the members of the Panel were present. The parties confirmed that they had no objections to the composition of the Panel.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is undisputed by the parties, derives from Art. 13 of the ADRHA and Art. R47 of the Code of Sports-related Arbitration ("the Code"). It is further confirmed by the Order of Procedure issued on 8 February 2008 by the Chairman of the Panel and duly signed by both parties.

2. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel did not therefore examine only the formal aspects of the appealed decision but held a trial de novo, evaluating all facts and legal issues involved in the dispute.

Applicable law

3. Art. R58 of the Code provides the following:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

4. It is common ground between the parties that the applicable regulations in this case are the ADRHA.

5. The Appellant has claimed that the ADRHA shall apply primarily and that South African law shall apply subsidiarily. The Appellant has argued as follows. As a matter of principle, as the seat of the FEI is in Switzerland, in the absence of choice of another law by the parties, Swiss law will be applicable to the merits of the dispute. This solution is appropriate because it submits international cases to the same law applicable to the merits. In the present case, however, there is no need for such uniform policy. As the Event was a purely domestic one, it is submitted that the rules of law which are more appropriate and which should be of application to this matter is South African law.

6. The Respondent has submitted that Swiss law shall be applied subsidiarily. The respondent has argued that pursuant to the FEI Statutes applicable to this case, the CAS, as an independent court of arbitration, shall judge all appeals properly submitted to it against decisions of the FEI Tribunal, as provided in the Statutes and General Regulations. The parties concerned acknowledge and agree that the seat of the CAS is in Lausanne, Switzerland, and that proceedings before the CAS *"are governed by Swiss law"*. As a clear choice-of-law clause is comprised in the FEI Statutes and agreed between the parties, the Panel shall decide the

matter according to Swiss law without consideration for any other system of law (see CAS 2006/A/1043, para. 5.1). In any event, should the parties have not agreed on the law applicable, the FEI is based in Lausanne, Switzerland, and Swiss law should therefore apply to the merits of the dispute pursuant to Art.R58 of the Code. The Appellant's contention that the present case should be decided according to South African law is without foundation and must be disregarded.

7. The Panel considers that in the present matter, there is no mutual agreement between the parties on the application of any particular law and the FEI which has issued the challenged decision is domiciled in Switzerland. Therefore, according to Art. R58 of the Code, the ADRHA shall apply primarily and Swiss Law subsidiarily.

Admissibility

8. The appeal was filed within the deadline provided by Art. 13.5 of the ADRHA. It complied with all other requirements of Art. R48 of the Code.

9. It follows that the appeal is admissible, which is not disputed.

Review of the parties' submissions

10. Before taking its decision on the merits of the case, the Panel reviewed the submission made by the Appellant in relation with the admissibility of the evidence produced by the Respondent. The results of such review can be summarized as follows:

11. At the hearing. the Appellant has submitted that the witness statements by Mr Fahmy Galant and Mr Vusi Cekiso, evidence adduced by the Respondent shall be disregarded according to Art. 35.4 of the Statutes which states:

"Notwithstanding anything to the contrary in the CAS Code of Sports-related Arbitration, no evidence discoverable by due diligence during proceedings before the FEI Tribunal may be brought before the CAS on Appeal. If any such evidence is produced after a Decision is issued by the FEI Tribunal, it must first be produced to the FEI Secretary General before all legal remedies are exhausted within the meaning of the CAS Code of Sports-related Arbitration. Any such additional evidence produced post-Decision may be the subject of additional proceedings and penalties".

12. In the course of the oral hearing, the Appellant requested that the current evidence referred to by the Respondent should be disregarded. This motion has been submitted neither in the Statement of Appeal nor in the Appeal Brief.

13. It is a basic principle of procedure, applicable in state courts as well as in arbitration, that objections related to the procedure and evidentiary issues must be raised *in limine litis*. This means that the motion from the Appellant has been submitted too late.

14. Both parties have set out during the hearing that they wish to have a trial de novo, which in the Panel's understanding means that all relevant facts, regardless if they had been mentioned before the FEI Tribunal or not have to be considered.

15. According to Art. R57 of the Code, the Panel used its power to review the facts and the law and held a trial de novo as required by the Appellant himself in his request for relief and at the hearing.

16. The Respondent itself acknowledged that the above mentioned provision would not limit the power of the CAS Panel as set forth in Art. R57.

17. Finally, both Parties had the opportunity and indeed used this opportunity to make all possible submissions and to produce any relevant evidence.

18. Accordingly, the Panel evaluated all facts, including new facts, which had not been mentioned by the Parties before the FEI Tribunal.

The merits

19. The main issues to be resolved by the Panel are:
    a) Was the Appellant notified of the testing in due form?
    b) Did a compelling justification for his refusal to take the anti-doping test exist?
    c) Does the Appellant bear any fault or negligence?
    d) Is the Appellant's alleged fault or negligence significant?
    e) Are there any mitigating circumstances?
    f) What is the starting point of ineligibility?

A) Was the Appellant notified of the testing in due form?

20. The Appellant claims that there was no authorized notification in this case. The Appellant argues that Art. 2.3 of the ADRHA is violated only if the sample collection is failed *"after notification as authorized in applicable anti-doping rules"*. What does *"authorized in applicable anti-doping rules"* mean? It is generally acknowledged that this requirement means that Art. 2.3 concerns the sample collection requested *"after valid, authorized and proper notification for testing"* (see ATP Tour Anti-Doping Tribunal 14 July 2005 Decision in the case of Alejandro Vargas-Aboy, para. 21). The ADRHA does not specify how and when notification is *"valid, authorized and proper"*. In the present case, failing a clear definition of *"authorized notice"* which is one of the constitutive elements of the offence, no sanction can be imposed if validity of notification is challenged. As an aside, one could have find guidance in Art. 5.3.5. of the IST, according to which the Anti-Doping Officer *"shall establish the location of the selected Athlete and plan the approach and timing of notification, taking into consideration the specific circumstances of the sport/Competition and the*

situation in question". That said, the ADRHA does not incorporate the IST. In any event it is doubtful that a wording like *"taking into consideration the specific circumstances of the sport/Competition and the situation in question"* complies with the requirement of legality and predictability. Be that as it may, even considering that the IST were applicable in the present case, it is submitted that the way in which the Appellant was notified was improper *"taking into consideration the specific circumstances of the sport/Competition and the situation in question"*. The facts surrounding the Appellants notification that he was to be tested after he had dismounted and had already proceeded to the bar for a refreshment and had already consumed alcohol are inappropriate to say the least. Moreover the inability of the testing officers to properly advise the Appellant in regard to whether alcohol and the anti-inflammatory medication were prohibited substances as envisaged by the ADRHA was prejudicial to him in making a decision to refuse to take the test. It is common cause that the Appellant was asked to submit a test some time after the Event had been completed. In other words, he was not notified immediately after the Event. On the contrary the notification only came at a time when he had already consumed alcohol.

21. The Respondent claims that the notification is valid and that it has been in substantial conformity with the IST. The respondent refers to Art. 5.2 and 5.3.5 in the IST. The Respondent argues further that in equestrian events, the circumstances may justify that there is a certain period of time between the time the rider has exited the arena and the moment when he is notified by the DCO. Since riders must take care of their horses, DCOs should endeavour to notify the athletes at an opportune moment, which may differ from an event to another, depending on the organisation. Thus the Appellant is wrong when he argues that not being notified immediately after the event led to an improper notification. In acknowledging that the ADRHA does not specify how and when notification is appropriate, the Appellant must admit that these rules do not impose strict duties and timing commitments to the DCOs. The Appellant knew that DCOs would test riders at the Event and that he could be tested even after the competition. The facts surrounding the Appellant's notification, i.e. that the Appellant was notified after he had dismounted from his horse and had already proceeded to the bar, should be considered appropriate in view of the notification standards applicable in equestrian sports. There are no compelling time limits with which the DCOs ought to have complied and Mr Cekiso, the Assisting DCO in charge of testing the Appellant had no reason to abort the test procedure for the sole reason that the Appellant had drunk alcohol in the bra. Drinking alcohol immediately after a competition cannot become a valid excuse to challenge the validity of a testing notification. Even if alcohol was a Prohibited Substance (which it is not the case under FEI rules), as the Appellant knew he could be tested after the competition, it was his duty no to put himself in a situation which would then lead him to refuse the drug test. Any other approach would rise to abuses: any athlete could seek to conceal the use of a doping substance prohibited in competition in consuming alcohol upon completion of the competition and arguing that a test notification is no longer valid in view of the time elapsed and the fact that the substance would have been consumed after competition.

22. According to Art. 5.3 of the ADRHA testing conducted by the FEI and its National Federations shall be in substantial conformity with the IST in force at the time of Testing.

The version of IST which was in force at the time of Testing was the version 3.0 from June 2003.

Art. 5.3.5 of IST states:

"The ADO, DCO or Chaperone, as applicable, shall establish the location of the selected Athlete and plan the approach and timing of notification, taking into consideration the specific circumstances of the sport/Competition and the situation in question".

Art. 5.4.1 of IST states:

"When initial contact is made, the ADO, DCO, or Chaperone, as applicable, shall ensure that the Athlete (….) is informed

a. That the Athlete is required to undergo a Sample collection;

b. Of the authority under which the Sample collection is to be conducted;

c. Of the type of Sample collection and any conditions that need to be adhered to prior to the Sample collection;

d. Of the Athlete's rights, including the right to:
- *i. Have a representative and, if required, an interpreter;*
- *ii. Ask for additional information about the Sample collection process;*
- *iii. Request a delay in reporting to the Doping Control Station for valid reasons; and*
- *iv. Request modifications as provided for in Annex B – Modifications for Athletes with disabilities.*

e. Of the Athlete's responsibilities, including the requirement to:
- *i. Remain within sight of the DCO/Chaperone at all times from the first moment of in-person notification by the DCO/Chaperone from the first moment of in-person notification by the DCO/Chaperone until the completion of the Sample collection procedure;*
- *ii. Produce identification in accordance with 5.3.5; and*
- *iii. Comply with Sample collection procedures and the possible consequences of failure to comply; and*
- *iv. Report to the Doping Control Station, unless delayed for valid reasons, as soon as possible and within 60 minutes of notification for a No Advance Notice Sample collection (…)*

f. Of the location of the Doping Control Station".

Art. 5.4.3 states:

"The Chaperone/DCO shall then have the Athlete sign an appropriate form to acknowledge and accept the notification. (…)".

23. First the Panel notes that the Athlete has signed the Doping Control Form certifying *"I hereby acknowledge that I have received and read this notice, and I consent to provide sample(S) as requested (I understand that failure or refusal to provide a sample may constitute an anti-doping Rule violation)".* At this time of the process the Athlete obviously accepted the notification. But this fact is not enough for the Panel to accept the notification as valid.

24. As stated in the IST the ADO, DCO or Chaperone, as applicable, shall establish the location of the selected Athlete and plan the approach and timing of notification, taking into

consideration the specific circumstances of the sport/Competition and the situation in question. No exact time limit is prescribed.

25. Even if the notification took place when the Athlete had finished his ride, dismounted from his horse and proceeded to the bar it cannot be said that the notification was too late. The Athlete has stated that it took about 15 minutes from end of his ride to the notification. Even if the Athlete had left the place of the Competition he could have been subject to an Out-of-Competition Test.

26. The Panel cannot find that there are any departures what so ever from the IST regarding the notification.

27. For those reasons, the Panel considers as groundless the complaints of the Appellant that the notification should be considered as not valid.

B) Does a compelling justification for the Athletes refusal to take the anti-doping test exist?

28. The Appellant submits that the Athlete had compelling justifications to refuse to submit a Doping Sample.

29. The Appellant argues as follows: As already mentioned, it is common cause that the Athlete was asked to submit to a test some time after the event in question had been completed and when he had already consumed a certain amount of alcohol. In other words, he was not notified immediately after the event that he would be required to submit to a test. On the contrary, the notification only came at a time when alcohol had already been consumed. The Appellant was accordingly faced with an impossible dilemma. Submission to the test would inevitably have revealed the presence of alcohol. Although he received contradictory advice as to whether alcohol constituted a prohibited substance and that there was therefore no certainty in this regard, he was entitled to assume it was a prohibited substance, a fact confirmed by the leaflet shown to him. On so refusing, the Athlete acted upon legal advice which, in the circumstances was reasonable. – The ADRHA requires that SANEF and the FEI put in place a procedure whereby international athletes have to personally sign the Appendix 2 of the ADRHA, which is an acknowledgement and an agreement by a member that he, inter alia, reviewed the ADRHA. The Athlete has never signed Appendix 2 nor was he made aware of its existence, as required, prior to the incident. The Secretary General of SANEF is in fact unaware of any of its members having signed Appendix 2. Moreover, fellow athletes have likewise confirmed that they have also not signed Appendix 2.

30. The Respondent submits that the Athlete misinterprets Art. 2.3 of the ADRHA because a refusal, in and of its own, with or without justification, constitutes an antidoping violation.

31. Art. 2.3 of the ADRHA – and moreover the same Rule in the WADA Code – states the following:

"ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The following constitute anti-doping rule violations:

(…)

2.3 Refusing, or failing without compelling justification, to submit to Sample Collection after notification as authorized in these Anti-Doping Rules or otherwise evading Sample collection".

32. The Panel agrees with the Respondent that a strict and literal reading of the wording of the rule today and notably the existence of a comma after "refusing" does imply that compelling justification could not be taken into consideration when the Athlete has refused to submit to a sample collection.

33. According to the Panel's view this regulation however is not quite appropriate. One can easily imagine some situations when it can be said that there has been compelling justifications even when the refusal is intentional. For instance the situation when the Athlete has been properly notified and he/she is informed by a phone call that his/her children have been very seriously injured in an accident and have been carried to hospital. In such a case, if the Athlete then refuses to stay and submit to Sample collection he/she must be said to have compelling justifications.

34. This is the reason why this Rule will be amended in the next version of the WADA Code. According to the 2007 Code Amendments this rule will provide:

"Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection".

35. With this in mind the Panel will investigate if the Athlete in this case had any compelling justifications for his refusal.

36. The Panel accepts the facts that when the Athlete was notified, he had drunk alcohol and could not get an appropriate answer as to whether alcohol is a forbidden substance in riding during competition. Furthermore he had taken a painkilling medication which he could not remember the name of and he could not get in contact with his doctor to have the name. These are the reasons why he refused to provide the Doping Sample.

37. The aim of the Athlete was to avoid that the test would establish that he had taken alcohol and a medication that might be forbidden substances. This is exactly what the Rule in Art. 2.3 intends to prevent. If the Athlete considers the alternatives of refusing the test or of revealing at the occasion of a test that he has taken some contingently forbidden substances, the sanction shall be the same in both cases. Towards this background the Athlete in this case cannot be deemed to have had any compelling justifications. On the contrary he has acted in a way which the relevant Rule aims to forbid.

38. The conclusion is that the FEI has established that the Athlete committed an anti-doping rule violation.

C) Does the Appellant bear any fault or negligence?

39. The Appellant has argued: It is a paramount principle of the WADA Code that a sanction cannot be imposed if the athlete can prove that he bears no fault or negligence. The fact that both Art. 10 of the WADA Code and of the ADRHA do not contemplate the elimination of the sanction in case of absence of fault is clearly an involuntary omission by the drafters. Indeed, the new version of the WADA Code rectifies this omission in explicit terms. In the present case it is submitted that the FEI bears the burden of establishing fault or negligence on the part of the athlete. Unlike Art. 2.1, Art. 2.3 does not provide that *"it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping violation"*. The FEI therefore bears the burden to establish, according to the high satisfaction standard, that the Athlete bears fault or negligence. The FEI Tribunal found that the Athlete is presumed to know the FEI Statutes, Regulations and Rules and that in addition to this the Athlete in question signed an entry form to the Event accepting to be bound by the rules as stipulated in the schedule. The Athlete has never signed the Appendix 2 and accordingly it is submitted that his refusal was entirely justifiable and that there was therefore no culpable contravention of the rules. Should the Panel consider that the FEI establish to the comfortable satisfaction of the Panel that the Athlete bears fault or negligence it is further submitted that the level of the Athlete's fault should be taken into consideration when imposing the sanction. The FEI Tribunal ignored Art. 10.5.2, according to which the sanction can be reduced if the athlete *"establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence"*. The definition of *"No Significant Fault or Negligence"* provided for in the ADRHA is relevant for the present case only insofar it shall be determined in view of *"the totality of the circumstances"* and *"in relationship of the anti-doping rule violation"*. It is submitted that the Athletes fault is not significant. In any event, a reduction of the sanction is possible even if the Panel should hold that the Athlete bears significant fault or negligence. In a recent landmark decision, the CAS considered that even in that case it had discretion to determine the sanction in view of all circumstances of the case (TAS 2007/A/1252, para. 90 ff).

40. Art. 10.4.1 of the ADRHA provides: *"For violations of Article 2.3 (refusing or failing to submit to Sample collection), (…) the Ineligibility periods set forth in Art 10.2 shall apply"*.

Art. 10.2 provides that for the first violation two years' Ineligibility shall apply. Art. 10.2 further states that *"the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Art 10.5"*.

According to Art. 10.5.1 the possibility for the Athlete of establishing No Fault or Negligence does not apply to violations under Art. 2.3.

Art. 10.5.2 provides that *"this Art 10.5.2 applies only to anti-doping rule violations involving (…), failing to submit to Sample Collection under Art 2.3 (…)"*.

41. In the 2007 WADA Code Amendments, the reduction according to No Fault or Negligence or No Significant Fault or Negligence can be applied also in cases where a refusal has taken place.

42. In this case we have an intentional refusal with the purpose to hide that the Athlete had drunk alcohol, which he was not sure was prohibited in connection with a competition, and also to cover the fact that he had taken another medication, which he was not sure of.

43. Even if according to the New WADA Code, the Panel should consider the level of Fault or Negligence, there would be no mitigating circumstances in this case.

44. According to Art. 10.5.4 and 10.2 the sanction therefore has to be two years ineligibility.

D) What is the starting point of ineligibility?

45. The Appellant has submitted that the suspension, if any, shall commence on an earlier date than the one decided by the FEI Tribunal.

The Respondent has argued that the FEI Tribunal applied Art. 173 (4) of the FEI General Regulations, which provides that decisions taken by the FEI Tribunal may be effective from the day of written notifications to the persons and bodies concerned or on a specific date if the FEI Tribunal so decides. It is standard practice for the FEI Tribunal to enforce its decisions after the parties have had the opportunity to file an appeal within 30 days from notification of the decision.

46. According to Art. 10.8 of the ADRHA

"The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. (…) Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the FEI or Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample Collection".

47. In this case, the FEI has decided that the period of Ineligibility shall commence on 27 October 2007. The period is thus not decided according to Art. 10.8 of the ADRHA. The Panel finds that in order to have unification between different sports it is necessary to follow the ADRHA in these matters.

48. Thus the Panel finds that Art. 10.8 of the ADRHA shall apply. In this case the hearing of the FEI Tribunal was held on 4 April 2007 and the decision was rendered on 25 September 2007.

49. The Panel finds that the time between the hearing and the decision was fairly long. This is not attributable to the Athlete. The Panel therefore deems that it is required by fairness that the date of the commencement of the Ineligibility period shall be set earlier than the FEI Tribunal did. The Panel decides this date to be 1 June 2007.

E) Disqualification of results

50. Art. 9 of the ADRHA provides that *"A violation of these Anti-Doping Rules in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes".*

51. Art. 10.7 states: *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes".*

52. Based on Art. 9 of the ADRHA the Panel hereby confirms the decision of the FEI Tribunal with respect to the Appellant's disqualification of the Event. The FEI Tribunal ruled that only the result obtained in the Event should be disqualified, and not the other results achieved. As the Respondent did not request that further results be disqualified and did therefore not provide any further evidence as to other results that could fall within the scope of Art. 10.7, the Panel, in accordance with the prohibition to decide *ultra petita*, did not further inquire on this part of the sanctions taken against the Appellant.

53. This means that the decision of the FEI Tribunal shall be upheld except according to the date of the commencement of the period of Ineligibility.

The Court of Arbitration for Sport rules:

1. The Appeal filed by B. is only partially admitted.

2. The decision issued by the FEI Tribunal is upheld except regarding the commencement date of the period of ineligibility which is fixed on 1 June 2007 instead of 27 October 2007. The period of Ineligibility thus will end on the 30 May 2009.

3. B. is disqualified from the Event CSI-W Cape Town, which took place between 23 and 26 November 2006, and his results obtained at this Event are annulled.

4. All other motions or prayers for relief are dismissed.

5. (…).