

CAS 2009/A/1768 Hansen v. Fédération Equestre Internationale (FEI)

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon. Michael J. Beloff QC MA, barrister in London, England

Arbitrators: Dr Kaj Hobér, attorney-at-law in Stockholm, Sweden

Prof. Dr. Michael Geistlinger of Salzburg, Austria

in the arbitration between

TONY ANDRE HANSEN, Norway

represented by Mr Morten Steenstrup, Advokatfirmaet Steenstrup Stordrange, Oslo, Norway

-Appellant-

and

FEDERATION EQUESTRE INTERNATIONALE, Lausanne, Switzerland

represented by Mr Xavier Favre-Bulle, Lenz & Staehelin, Geneva, Switzerland

- Respondent-

1. **INTRODUCTION**

- 1.1 An Olympic medal is the most precious coin in a sportsman's treasury. In the course of a single day Mr Tony Andre Hansen (the "Appellant"), an equestrian, enjoyed the elation of being a member of a Norwegian team which had won the bronze medal in the Team Jumping at the games of the XXIX Olympiad (the "Beijing Olympics") and suffered the distress at being the cause of disqualification of the team and his own removal from the individual competition and additional suspension on account of a medication control offence resulting from the discovery of Capsaicin in the urine of his horse Camiro ("Camiro") in a test carried out in the laboratory of the Hong Kong jockey club ("HKJC").
- 1.2 This explains why the validity of that disqualification and additional sanction has been strenuously and expensively contested for more than a year initially before the Tribunal of the Federation Equestre Internationale ("FEI" or the "Respondent"), and finally before the Court of Arbitration for Sport ("CAS"). Although the arguments and evidence at both levels has ranged far and wide there is, on analysis, a single-but crucial-issue in the dispute i.e. whether Capsaicin had been in the body of Camiro before being detected in its urine or whether it had found its way into the urine sample during or after the process of collection of the sample.

2. **THE PARTIES**

- 2.1 The Appellant is an experienced rider, ranked high among the world's élite in the sport of show jumping with (hitherto) an impeccable record in relation to compliance with an anti-doping régime.
- 2.2 The Respondent is the international governing body for equestrian sports, whose headquarters are located in Lausanne, Switzerland.

3. **THE APPEAL**

- 3.1 The appeal is brought by the Appellant, the person responsible ("PR") against a decision of the FEI Tribunal dated 22nd December 2008 (Positive Medication case No.2008/23) ("the Decision").
- 3.2 The decision was that (i) the horse and the PR were disqualified from the Beijing Games; (ii) all medals points and prize money won at the Games were forfeit; (iii) the results of the Norwegian jumping team were recalculated not taking into account the results achieved by the PR and horse combination; (iv) additional sanctions were imposed on the PR, i.e.

"As a consequence of the foregoing, the FEI Tribunal decides to impose on the PR the following sanctions, in accordance with GR Art. 174 and EADMCR Art. 10:

1) The PR shall be suspended for a period of Four and One-Half (4.5) months (namely, 135 days) which period has commenced on the date of the application of the provisional suspension, 21 August 2008;

2) The PR is fined CHF 3,000.-;

3) The PR shall contribute CHF 8,000.- towards the legal costs of the judicial procedure." (para 91)

3.3 The Appellant requests that:

“The decision subject to appeal shall be amended as follows:

(1) The decision of the FEI Tribunal dated 22 December 2008 is annulled.

(2) The Appellant shall be fully reimbursed all costs and damages resulting from or related to the positive medication case nr. 2008/23.

(3) The Respondent shall bear the costs of the arbitration and the legal costs of the Appellant.”

3.4 The Respondent resists those requests and invites the CAS to uphold the decision.

4. **JURISDICTION**

4.1 The Appellant relies on Article 170 par. 1.3 of the General Rules of the FEI (22nd edition), Article 165 par. 1.3 of the General Rules (23rd edition) and Article 12.2 of the FEI Equine Anti-Doping and Medication Control Rules, as conferring jurisdiction on the CAS. In its Answer, the Respondent specifically and correctly states that the jurisdiction of the CAS is undisputed by the parties. The jurisdiction of the CAS is further confirmed by the signature of the Procedural Order by the parties.

5. **LAW APPLICABLE TO THE MERITS**

5.1 In accordance with Article R58 of the Code of Sports-related Arbitration (the “Code”), 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.

- 5.2 The substantive law which governs this dispute is therefore that contained in the legal instruments set out at para 10 below and Swiss Law, referred to in Article 35.3 of FEI statutes as well as the *lex ludica* which is applicable by the CAS as an international sports tribunal CAS 98/200 – *AEK Athens and Slavia Prague v. UEFA*.

6. **WRITTEN PROCEEDINGS**

On 19 January 2009 the Appellant filed his statement of appeal.

On 2 February 2009 the Appellant filed his appeal brief.

On 26 February 2009 the Respondent filed its answer.

On 9 March 2009 the Appellant filed an unsolicited four-page reply to the Respondent's answer.

On 10 March 2009 the Respondent raised an issue with the admissibility of the Appellant's letter of 9 March 2009*.

On 15 May 2009 the Appellant filed a five-page submission attaching new evidence regarding a test report from the Hong Kong Jockey Club Racing Laboratory.

On 26 May 2009 the Respondent raised an issue with the admissibility of the Appellant's submission* (but not of the new evidence) and reserved the right to respond to the new submission.

At the hearing the Panel admitted the contested material,* without prejudice to its weight, in the interests of fairness.

7. **ORAL HEARING**

The Panel held a hearing on 26th October 2009 at the Court of Arbitration for Sport, Chateau de Béthusy, Avenue de Beaumont 2, 1012, Lausanne, Switzerland.

8. **EVIDENCE**

8.1 The following witnesses gave evidence for each party:

For the Appellant

Mr Tony André Hansen (in person)

Ms Anita Kleppe, groom (by telephone)

Professor Steven A. Barker, Professor of Veterinary Medicine at the Louisiana State University, Baton Rouge, Louisiana and Professor in Department of Comparative Biomedical Sciences and Director of the Analytical Systems Laboratory, Equine Medication Surveillance Laboratory and the Laboratory for Drug Residue Studies. Prof Barker has also served as the State Chemist to the Louisiana State Racing Commission since 1987 (in person)

Mr Jonas Tornell, team veterinarian (by telephone)

Dr Thomas Tobin, veterinary surgeon in Lexington, Kentucky, USA (written statement)

Dr Peter F. Cronau, consultant veterinarian in equine practice, former team veterinarian to national equine teams, former member of the FEI Veterinary Committee (written statement)

Dr Laurent Bigler, chemist with the University of Zurich, Switzerland, laboratory of mass spectrometry (written statement)

Dr Rüdiger Brems, equine veterinary surgeon in Munich, Germany (written statement in German)

Dr Elisabeth Bosshard, Federal Office for Agriculture and Swiss registration authority for plant protection products, Berne, Switzerland (email)

Dr Joe D Pagan, President, Kentucky Equine Research, Inc. (email)

Dr Warwick Vale, FEI Testing Veterinarian, Beijing Olympic Games (written statement)

Dr Jarmy Miklos, FEI Testing Veterinarian, Beijing Olympic Games (written statement)

Ms Carolyn James, FEI Steward, Beijing Olympic Games (written statement)

Mr Sylve Soderstrand, Chef d'Equipe (written statement)

Mr Edvin Hoofs, equine veterinarian, Holland (written statement)

Mr Gerry Mullins, Tony Hansen's coach during Beijing Olympic Games (written statement)

Mr Kai Roger Hansen, handyman to the Norwegian equine team (written statement)

For the Respondent

Dr Paul Farrington, veterinary consultant, Berkshire, United Kingdom (in person)

Dr Terence Wan, Head of Racing Laboratory and Chief Racing Chemist, The Hong Kong Jockey Club (in person)

Dr John Vine, Laboratory Director of Racing Analytical Services Ltd., Victoria, Australia (by telephone)

Ms Maxine Leigh, FEI Steward, MCP Testing Steward Beijing Olympic Games (by telephone)

Prof Marc Gogny, Head of the Department of Pharmacology and Toxicology National Veterinary School, Nantes, France (written statement)

Dr Richard Corde, Doctor in veterinary medicine, Boissy Saint Leger, France (written statement)

Dr Olivier Niggli, qualified Swiss lawyer and WADA's Director of Legal Affairs (written statement)

Dr Warwick Vale, FEI Testing Veterinarian, Beijing Olympic Games (written statement)

- 8.2 Those expert witnesses who participated *viva voce* in the oral hearing were able to comment on each others' evidence as well as being examined by Counsel and the Panel. This proved a useful adaptation of the conventional procedure.

9. **BACKGROUND FACTS**

- 9.1 Camiro participated at the Games of the XXIX Olympiad, Beijing 2008, from 8 to 21 August 2008 in Hong Kong (the “Event”), in the discipline of Jumping. Camiro was ridden by Mr Tony Andre Hansen (the “PR”).
- 9.2 On 18 August 2008 Camiro was selected for sampling, following the Team Jumping Final.
- 9.3 Analysis of the urine sample no. FEI-0069350 taken from Camiro, performed by the approved FEI laboratory, the Hong Kong Jockey Club (“HKJC”) Racing Laboratory, in Hong Kong, under supervision of Jenny K Y Wong, Chemist, and Dr Terence S M Wan, Chief Racing Chemist and Head of the HKJC Racing Laboratory, revealed the presence of Capsaicin (Test Report dated 21 August 2008).
- 9.4 No request had been made for the use of Capsaicin on Camiro, and no medication form had been supplied for this substance.
- 9.5 On 21 August 2008 the presence of the Prohibited Substance, the possible rule violation and the consequences involved were duly notified to the PR.
- 9.6 The notification of 21 August 2008 included a notice that the PR was provisionally suspended and granted the opportunity to be heard at a preliminary hearing before the FEI Tribunal.
- 9.7 The PR confirmed that he wished the preliminary hearing to be held.
- 9.8 On 21 August 2008 the preliminary hearing took place before Prof. Dr. Jens Adolphsen. The preliminary decision was rendered and communicated to the PR on the same day. The PR was informed that the preliminary panel had decided to maintain the provisional suspension until the

final decision of the case by the FEI Tribunal, subject to review depending on the explanations and evidence that might be submitted by the PR.

- 9.9 In its preliminary decision, the preliminary panel stated that the presence of Capsaicin was evidenced to its satisfaction.
- 9.10 The PR provided no explanation at the preliminary hearing for the presence of the Prohibited Substance and gave in the view of the preliminary panel no reasons why the provisional suspension should be lifted.
- 9.11 In light of the above, and considering the FEI policy to impose provisional suspension in doping, and in medication A cases at major events such as the Olympic Games, the preliminary panel refused to lift the provisional suspension.
- 9.12 In the notification of 21 August (Annex IV “B-Sample analysis”), the PR also received notice that the B-Sample analysis would be carried out at the HKJC. The PR was informed of his right to attend or be represented at the identification and opening of the B-sample.
- 9.13 The PR acknowledged that the B-sample analysis would be performed as described in the notice and indicated that he would be represented at the identification and opening of the B-sample by Dr Jonas Tornell, Team Veterinarian.
- 9.14 On 23 August 2008 the B-sample analysis was carried out at HKJC under the supervision of Dr Emmie N M Ho, Racing Chemist, and Mr David K K Leung, Racing Chemist, while the witness, Dr Jonas Tornell, Team Veterinarian for the Swedish Equestrian Federation, representing the PR, was present.

- 9.15 In his witness statement, Dr Tornell certified that the urine B-Sample container “*shows no signs of tampering and that the identifying numbers appearing on the sample to be tested by the Racing Laboratory of the Hong Kong Jockey Club corresponds to that appearing on the collection documentation accompany the sample*” and that he had also witnessed the opening of the sample.
- 9.16 The B-Sample analysis confirmed the presence of Capsaicin (Test Report dated 25 August 2008).
- 9.17 On 27 August 2008 the results of the B-Sample analysis were notified to the PR through his NF.
- 9.18 On 26 September 2008 a Final Hearing was held at the FEI Headquarters in Lausanne.
- 9.19 At the hearing the FEI Tribunal heard preliminary and other arguments of the parties and examined certain evidence. The FEI Tribunal also heard the witnesses for the parties: the PR himself and his groom, on behalf of the PR, and Dr Farrington, on behalf of the FEI. However, both the PR and the FEI argued that they needed additional time to exchange witness documents and to examine the various expert witnesses. The parties agreed that an additional hearing be held for the purpose of providing additional evidence and, in particular, examining and cross examining the expert witness.
- 9.20 On 8 November 2008 the additional hearing was held at the FEI Headquarters in Lausanne. At the additional hearing the FEI Tribunal heard further arguments and witnesses and examined further evidence: A large part of that additional hearing consisted of hearing the expert witnesses of the parties who were enabled to hear each other and to provide comments on each other’s expert testimony. The expert witnesses were Dr Tobin (present) and Prof Barker (by

teleconference), on behalf of the PR, and Dr Wan (by teleconference) and Dr Vine (by teleconference), on behalf of the FEI.

10. **THE LEGAL INSTRUMENTS**

10.1 The relevant legal instruments were:

- The 2003 WADA Code
- FEI Statutes 22nd edition, effective 15 April 2007, Arts. 1.4, 34 and 37.
- FEI General Regulations, 22nd edition, effective 1 June 2007, Arts. 142, 146.1 and 174.
- Internal Regulations of the FEI Tribunal, effective 15 April 2007.
- FEI Equine Anti-Doping and Medication Control Rules, effective 1 June 2006, updated with modifications approved by the General Assembly, effective 1 June 2007 and with modifications approved by the Bureau, effective 10 April 2008.
- FEI Veterinary Regulations, 10th edition, effective 1 June 2006, Art. 1013 and seq. and Annex III (the Equine Prohibited List).
- FEI Code of Conduct for the Welfare of the Horse.
- IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008, Article 15.
- FEI Regulations for Equestrian Events at the Olympic Games (22nd edition), effective for the 2008 Beijing Olympic Games (Hong Kong), Arts 614, 615 and Annex G.

10.2 The WADA Code provides, so far as material, as follows:

“ARTICLE 1 DEFINITION OF DOPING

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code.

...

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, 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 under Article 2.1.

2.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

2.1.3 As an exception to the general rule of Article 2.1, the Prohibited List may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

2.2 Use or Attempted Use of a Prohibited Substance or a Prohibited Method.

2.2.1 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

ARTICLE 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS

An anti-doping rule violation 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.

ARTICLE 10 SANCTIONS ON INDIVIDUALS

10.1 Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Articles 2.1 (presence of Prohibited Substance or its Metabolites or Markers), 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and 2.6 (Possession of Prohibited Substances and Methods) shall be:

First violation: Two (2) years' Ineligibility.

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However, 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 Article 10.5.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

10.5.1 No Fault or Negligence

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.

10.5.2 No Significant Fault or Negligence

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers). If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

ARTICLE 16 DOPING CONTROL FOR ANIMALS COMPETING IN SPORT

16.1 In any sport that includes animals in competition, the International Federation for that sport shall establish and implement anti-doping rules for the animals included in that sport. The

anti-doping rules shall include a list of Prohibited Substances, appropriate Testing procedures and a list of approved laboratories for Sample analysis.

16.2 With respect to determining anti-doping rule violations, results management, fair hearings, Consequences, and appeals for animals involved in sport, the International Federation for that sport shall establish and implement rules that are generally consistent with Articles 1, 2, 3, 9, 10, 11, 13 and 17 of the Code.”

10.3 The FEI statutes provides, so far as material, as follows:

“Article 1. Objectives

The objectives of the FEI are:

1.1 To be the sole authority for all International Events in ... Jumping, ...;

1.2 To establish Statutes, General Regulations and Sport Rules for the conduct of International Events in the FEI Equestrian Disciplines, and to co-ordinate and supervise their technical organization;

1.3 To enable individual Athletes and teams from different nations to compete in International Events under fair and even conditions;

1.4 To preserve and protect the welfare of the horse and the natural environment by establishing appropriate codes of conduct;

1.5 To promote the highest standards of organization, judging, stewarding, course designing, veterinary and medication control and anti-doping controls of human athletes and horses at International Events;

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Article 2. Principles

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2.6 The National Federations agree to comply with, and be bound by, the Statutes, General Regulations, Sport Rules and any Decision issued by the authorized bodies of the FEI in relation to the conduct of international equestrian Events, all of which shall also bind Organizing Committees, Officials, horse Owners, Persons Responsible, Athletes, team officials and other individuals and bodies involved in FEI Events. National Federations are granted an exclusive license to use, modify, print and distribute as appropriate the documents referred to in this Article, which are FEI property, for the purpose of regulating horse sport within their national territory.

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Article 3. Organization

3.1 The FEI is constituted as follows:

...

(vi) FEI Tribunal.

...

Article 35. Arbitration, Court of Arbitration for Sport (CAS)

35.1 The Court of Arbitration for Sport (CAS) shall judge all Appeals properly submitted to it against Decisions of the FEI Tribunal, as provided in the Statutes and General Regulations.

35.2 Any dispute between National Federations or between any National Federation and the FEI, which falls outside the jurisdiction of the FEI Tribunal shall be settled definitively by the CAS in accordance with the CAS Code of Sports-related Arbitration.

35.3 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.

...”

10.4 The Veterinary Regulations provides, so far as material, as follows:

“CHAPTER V ANTI - DOPING AND MEDICATION CONTROL

FOREWORD

The FEI Equine Anti-Doping and Medication Control Rules apply to these Regulations. The provisions of these Regulations relating to Anti-Doping and Medication Control are subject to the principles and definitions therein, including the Equine Prohibited List which is incorporated herein as Annex III.

Article 1013 RESPONSIBILITY AND NOTICE TO PERSONS RESPONSIBLE

3. The Person Responsible is responsible for the supervision of his/her horse at all times.

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CHAPTER VI SAMPLING PROCEDURE AND ANALYSIS GUIDELINES FOR DOPING AND MEDICATION CONTROL

Article 1014 INTRODUCTION

The FEI Equine Anti-Doping and Medication Control Rules apply to sampling under these Regulations. The sampling procedure and instructions for collecting samples, as contained in

the sampling kit, have been carefully drawn up so that all concerned appreciate their roles and understand the procedures involved. All aspects must be strictly followed.

Article 1018 PROTOCOL FOR SAMPLING

1. Once a horse has been selected for sampling, a member of the Veterinary Commission/Delegate or deputy, or the MCP Testing Veterinarian or deputy, must first inform the Person Responsible. The Person Responsible may appoint a representative to witness the testing procedure; the Person Responsible or his/her representative is responsible for the supervision of the horse. From the moment of notification, an authorised assistant or technician must accompany the horse at all times until the sample has been collected.

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3. All sampling must be supervised by a member of the Veterinary Commission/Delegate or the MCP Testing Veterinarian. The Organising Committee must ensure that one or more technicians (including but not limited to stewards), familiar with the procedure of urine and blood collection, are available to assist with the medication control procedures.

*4. The veterinarian supervising the sampling and the Person Responsible (or his/her representative) must sign the Medication Control Form/Card (as applicable). The Testing Veterinarian is responsible for ensuring that no contamination of the sample occurs. **In signing the Medication Control Form the Person Responsible (or his/her representative) either accepts the validity of the material used for the sampling and has no objection to the sampling system, or rejects it and must state the reason, in writing, for non-acceptance.***

(our emphasis)

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Article 1019 URINE AND BLOOD COLLECTION

The presence of a Prohibited Substance in a horse may be demonstrated in samples taken from its tissues, body fluids (mainly blood) or excreta (mainly urine). Urine and blood samples will normally be collected from all horses selected for sampling. Urine is a superior body fluid for forensic testing and efforts should always be made to collect this fluid from every selected horse. Instructions for collecting samples are contained in the Central Laboratory's sampling kits and in the testing manual (see FEI website).

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Article 1022 GUIDELINES FOR ANALYSIS UNDER THE EQUINE ANTI-DOPING AND MEDICATION CONTROL RULES

1. Analysis of the sample is performed:

- On urine if urine has been collected. Urine from one of the two bottles, referred to as Sample A, is analysed. The remaining bottle of urine, referred to as Sample B, is stored frozen and unopened to be used in the event that a confirmatory analysis is required

- On blood, collected in the absence of urine, or in combination with a urine sample. Blood from the syringes contained in the sampling kit, referred to as Sample A, is analysed. The remaining syringe(s), referred to as Sample B, is/are stored refrigerated and unopened to be used in the event that a confirmatory analysis is required.

2. The analysis of Sample A must be completed as soon as practical following receipt by the laboratory.

3. If the result of the analysis of Sample A is negative, Sample B must be destroyed by the laboratory.

4. If the result of analysis of Sample A is positive and a confirmatory analysis of Sample B is required, this must be requested in writing by the Person Responsible or his National Federation, within 10 working days of the date of the FEI's notification of the results of the Sample A analysis.

Article 1024 DESENSITISED AND HYPERSENSITISED LIMBS

1. Horses are not eligible to compete at any time when any limb or part of a limb has been temporarily or permanently desensitised or hypersensitised by any means.”

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ANNEX III

EQUINE PROHIBITED LIST

SUBSTANCES AND METHODS PROHIBITED IN-COMPETITION

PROHIBITED SUBSTANCES (DOPING)

Agents, cocktails or mixtures of substances that may affect the performance of a horse; masking agents; substances with no generally accepted medical use in competition horses; substances which are usually products prescribed for use in humans or other species; agents used to hypersensitise or desensitise the limbs or body parts, including but not limited to:

- *hypersensitizing or sensitizing agents (organic or inorganic or other substances likely to have been applied to body parts or to tack to influence performance);*
- *oxygen carriers;*

and other substances with a similar chemical structure or similar biological effect(s).

PROHIBITED SUBSTANCES (MEDICATION CLASS A)

Agents which could influence performance by relieving pain, sedating, stimulating or producing/modifying other physiological or behavioural effects, including¹:

and other substances with a similar chemical structure or similar biological effect(s).

PROHIBITED SUBSTANCES (MEDICATION CLASS B)

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THRESHOLD SUBSTANCES

Horses may compete with the presence of certain substances in their tissues, body fluids or excreta for which threshold levels/ratios are listed below, provided the concentration of the substance is not greater than the threshold level/ratio indicated. Thresholds only apply to:

- substances endogenous to the horse;*
- substances arising from plants traditionally grazed or harvested as equine feed; or*
- substances in equine feed arising from contamination during normal cultivation, processing or treatment, storage or transportation.*

The following constitutes an exclusive list of substances for which a threshold has been established. For each substance, a concentration level beneath that indicated is not an EADMC²

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ANNEX IV

INSTRUCTION FOR COLLECTING SAMPLES

Equipment

Equipment used for collecting samples must be able to stand up to rigorous scrutiny and potential legal cross examination, particularly in relation to the sealing and labelling of samples in tamper proof containers. Sampling kits intended to be used by National Federations must receive the approval of the FEI in advance.

Medication Control Programme Sampling

Under the FEI's Medication Control Programme (MCP), Testing Veterinarians will use the official sampling kits assembled by the FEI Central laboratory, currently the Laboratoire des Courses Hippiques (LCH), France (address below). Precise instructions as to the correct use of the sampling kits and corresponding paperwork can be found in the Testing Manual, FEI website (http://www.horsesport.org/FEI/fei_04_04.html)

¹ A list is then set out which does not include Capsaicin

² Capsaicin is not listed

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ANNEX VIII

HERBAL OR NATURAL MEDICINAL PRODUCTS

1. Riders, trainers, grooms and veterinarians are cautioned against the use of herbal medications, tonics, oral pastes and products of any kind, the ingredients and quantitative analysis of which are not known in detail. Many of these products can contain one or more prohibited substances.

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6. As the analytical techniques in the testing laboratory become more refined, the fact that these products have not been detected by testing in the past does not hold any guarantee for their safe use in competition

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10.5 The FEI also have a Manual for Testing Veterinarians which describes the contents of the sampling kit. This should contain, *inter alia*, 2 pairs of gloves (packed in a sealed plastic bag).

10.6 The FEI Equine Anti-Doping and Medication Control Rules ('EADMC') provide (so far as material) as follows:

"INTRODUCTION

Preface

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Equine anti-doping rules, like Competition rules, are sport rules governing the conditions under which sport is performed. They seek to prevent any attempt to alter a horse's performance or to mask an underlying health problem by the administration or application of prohibited substances to the horse's body. Equine medication control rules seek to prevent medication violations that may affect performance or mask an underlying health problem whilst in some instances providing appropriate treatment to safeguard the health and welfare of the competition horse. Athletes accept these rules as a condition of participation. EADMC Rules are not intended to be subject to or limited by the requirements and legal standards applicable to

criminal proceedings or employment matters. The policies and minimum standards set forth in these EADMC Rules represent the consensus of a broad spectrum of stakeholders with an interest in fair sport and horse welfare and should be respected by all courts and adjudicating bodies.

Fundamental Rationale for the FEI's EADMC RULES

Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport"; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values:

- Ethics, fair play and honesty*
- Health*
- Excellence in performance*
- Character and education*
- Fun and joy*
- Teamwork*
- Dedication and commitment*
- Respect for rules and laws*
- Respect for self and other participants*
- Courage*
- Community and solidarity*

Doping is fundamentally contrary to the spirit of sport.

Scope

The present EADMC Rules are effective as of 1 June 2006. They must be read in conjunction with the Statutes, the General Regulations and the Veterinary Regulations.

These EADMC Rules shall apply to the FEI, and each Participant in the activities of the FEI by virtue of the Participant's membership, accreditation, or participation in the FEI, or its activities or Events.

To be eligible for participation in FEI events, an athlete must be registered with the FEI and/or be a registered member of a FEI National Federation.

Each National Federation shall guarantee that all registered international athletes under its jurisdiction accept the Statutes, Regulations and Rules of the FEI, including these EADMC Rules which take into account the principles of the World Anti-Doping Code.

Each National Federation agrees to ensure that all Testing at FEI Events complies with these EADMC Rules.

These EADMC Rules shall apply to all Doping Controls and Medication Controls at FEI Events.

ARTICLE 1 DEFINITION OF ANTI-DOPING AND MEDICATION CONTROL VIOLATIONS

An anti-doping violation is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.6 of these Rules.

A medication control violation is defined as the occurrence of one or more of the medication control rule violations set forth in Article 2.1 through Article 2.6 of these Rules.

ARTICLE 2 ANTI-DOPING AND MEDICATION CONTROL RULE VIOLATIONS

The Equine Prohibited List includes three classes of Prohibited Substances:

- Doping;*
- Medication Class A; and*
- Medication Class B.*

Where Doping Prohibited Substances or Prohibited Methods are involved, the following constitute anti-doping rule violations; where Medication Class A or Medication Class B Prohibited Substances are involved, the following constitute medication control rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Horse's bodily Sample (our emphasis)

2.1.1 It is each Person Responsible's personal duty to ensure that no Prohibited Substance is present in his or her Horse's body during an Event. Persons Responsible are responsible for any Prohibited Substance found to be present in their Horse's bodily Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Person Responsible's part be demonstrated in order to establish an anti-doping or medication control violation under Article 2.1.

2.1.2 Excepting those substances for which a quantitative threshold is specifically identified in the Equine Prohibited List, the detected presence of any quantity of a Prohibited Substance in a Horse's Sample shall constitute a rule violation.

2.1.3 As an exception to the general rule of Article 2.1, the Equine Prohibited List may establish special criteria, including but not limited to specific thresholds or extenuating circumstances, for the evaluation of Prohibited Substances that can be produced endogenously and/or be

ingested from the environment or as a result of contamination. If such special criteria or circumstances apply, the detected presence of a Prohibited Substance in a Horse's Sample shall not automatically constitute a rule violation. Where thresholds have been established for the presence of a given Prohibited Substance, detection of a concentration above the applicable threshold shall constitute a rule violation.

...

ARTICLE 3 PROOF OF DOPING OR MEDICATION CONTROL VIOLATION

3.1 Burdens and Standards of Proof

The FEI shall have the burden of establishing that an anti-doping rule violation or medication control rule violation has occurred. The standard of proof shall be whether the FEI has established a rule violation to the comfortable satisfaction of the Hearing Body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Person Responsible alleged to have committed an anti-doping or medication control rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

3.2.1 FEI-listed laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the FEI Standard for Laboratories. The Person Responsible may rebut this presumption by establishing that a departure from the FEI Standard for Laboratories occurred.

If the Person Responsible rebuts the preceding presumption by showing that a departure from the FEI Standard for Laboratories occurred, then the FEI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.2 Departures from the Testing procedures in the FEI Veterinary Regulations which did not cause an Adverse Analytical Finding or other anti-doping or medication control rule violation shall not invalidate such results. If the Person Responsible establishes that departures from the Testing procedures in the FEI Veterinary Regulations occurred during Testing then the FEI or its National Federation shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the rule violation.

ARTICLE 4 THE EQUINE PROHIBITED LIST

4.1 Incorporation of the Equine Prohibited List

These Rules incorporate the Equine Prohibited List which is published and revised by the FEI from time to time.

The FEI's determination of the Prohibited Substances and Prohibited Methods that will be included on the Equine Prohibited List shall be final and shall not be subject to challenge by a Person Responsible.

4.4 Therapeutic Use

4.4.1 Horses with a documented medical condition requiring the use of a Prohibited Substance or a Prohibited Method during or prior to an Event must obtain permission for ongoing participation through a Equine Therapeutic Use Exemption (ETUE) in accordance with the FEI Veterinary Regulations through the use of a Medication Form as therein specified.

ARTICLE 5 TESTING

5.1 Authority to Test

All Horses participating at FEI Events shall be subject to Testing by the FEI or its assignees or agents.

5.2 Responsibility for FEI Testing

The FEI Veterinary Department shall be responsible for overseeing all Testing conducted by the FEI. Testing may be conducted by members of the FEI Veterinary Commission at a given Event or by other qualified persons so authorized in writing by the FEI Secretary General or designee.

5.3 Testing Standards

Testing conducted by or on behalf of the FEI shall be in substantial conformity with the Testing procedures in the FEI Veterinary Regulations in force at the time of Testing. A departure from these procedures shall only invalidate a given test if it undermines the validity of the Adverse Analytical Finding.

ARTICLE 6 ANALYSIS OF SAMPLES

Samples collected under these Rules are the property of the FEI. They shall be analyzed in accordance with the following principles:

6.1 Use of Approved Laboratories

The FEI shall send Samples for analysis only to laboratories subject to the FEI Standard for Laboratories. The choice of laboratory used for the Sample analysis shall be determined exclusively by the FEI.

6.2 Substances Subject to Detection

Samples shall be analyzed to detect Prohibited Substances and Prohibited Methods identified on the Equine Prohibited List. The FEI may also seek to detect other substances for research and monitoring purposes.

.....

6.4 Standards for Sample Analysis and Reporting

Laboratories shall analyze Samples and report results in conformity with the FEI Standard for Laboratories.

ARTICLE 7 RESULTS MANAGEMENT

7.1 Results Management for Tests Initiated by the FEI shall proceed as set forth below:

7.1.1 The results from all analyses must be sent exclusively to the FEI, in a report signed by an authorised representative of the laboratory. All communication must be conducted in such a way that the results of the analyses are confidential.

7.1.2 Upon receipt of an A Sample Adverse Analytical Finding, the FEI Investigating Body shall conduct a review to determine whether: (a) an applicable ETUE has been granted, or (b) there is any apparent departure from the Testing procedures of the FEI Veterinary Regulations or the FEI Standard for Laboratories that undermines the validity of the Adverse Analytical Finding.

7.1.3 If the initial review under Article 7.1.2 does not reveal an Applicable ETUE or departure from the Testing procedures in the FEI Veterinary Regulations or from the FEI Standard for Laboratories that undermines the validity of the Adverse Analytical Finding, the FEI shall promptly notify the Person Responsible of:

(a) the Adverse Analytical Finding;

(b) the rule violated;

(c) the Person Responsible's right to promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived;

(d) the right of the Person Responsible and/or the Person Responsible's representative to be present at the identification and opening of the B Sample if an analysis of the B Sample is requested;

(e) the right of the Person Responsible to request copies of the A and B Sample laboratory reports; and

(f) if applicable, the Person Responsible's option to waive certain rights by accepting an administrative penalty.

7.1.4 The FEI will arrange, within 14 days of receipt of the Person Responsible's request, for the B Sample to be tested at the earliest possible date provided by the testing laboratory. A Person Responsible may accept the A Sample analytical results by waiving the right to a B Sample analysis. The FEI may nonetheless elect to proceed with the B Sample analysis.

7.1.5 The Person Responsible and/or a representative shall be allowed to be present at the identification and opening of the B Sample. A representative of the Person Responsible's National Federation as well as a representative of the FEI shall also be allowed to be present.

.....

7.1.7 If a Prohibited Substance or the Use of a Prohibited Method is identified, the FEI shall be informed of the results confidentially and shall inform the Person Responsible via his or her National Federation, and his or her National Federation.

7.1.8 The FEI Investigating Body may conduct any follow-up investigation as may be required. Upon completion of such follow-up investigation, if any, the FEI shall promptly notify the Person Responsible regarding the results of the follow-up investigation and whether or not the FEI asserts that a rule was violated.

.....

7.2 Provisional Suspensions

The FEI may provisionally suspend a Person Responsible and/or his or her horse prior to the opportunity for a full hearing based on (i) an Adverse Analytical Finding from the A Sample or A and B Samples; (ii) the review described in Article 7.1.2; and (iii) the notification described in Article 7.1.3. If a Provisional Suspension is imposed at the discretion of the FEI, either the hearing in accordance with Article 8 shall be advanced to a date which avoids substantial prejudice to the Person Responsible, or the Person Responsible shall be given an opportunity for a Provisional Hearing either before imposition of the Provisional Suspension or on a timely basis after imposition of the Provisional Suspension.

ARTICLE 8 RIGHT TO A FAIR HEARING

8.1 Hearings arising out of FEI Testing or Tests at International Events

8.1.1 The FEI Hearing Body shall decide all cases of violation of these rules, unless the Person Responsible has waived his or her right to a hearing and agreed to an administrative process.

8.1.7 Decisions of the FEI Hearing Body may be appealed to the Court of Arbitration for Sport as provided in Article 12.

8.2 Principles for a Fair Hearing

All decisions and hearings pursuant to Article 8.1 shall respect the following principles:

The principles are then set out.

ARTICLE 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL

RESULTS

A violation of these Rules in connection with a test in a given Event automatically leads to Disqualification of all results of the Person Responsible and Horse combination obtained in that Event with all resulting consequences, including forfeiture of any related medals, points and prizes.

ARTICLE 10 SANCTIONS ON INDIVIDUALS

10.2 Imposition of Ineligibility and Fine for Medication Class A

Prohibited Substances

Except for Doping Prohibited Substances or Medication Class B Prohibited Substances, the period of Ineligibility imposed for a violation of Article 2.1 (presence of a Prohibited Substance), or Article 2.2 (Use of a Prohibited Substance or a Prohibited Method) shall be:

First violation: Up to one (1) year's Ineligibility.

...

A Fine of up to CHF 15,000.-- may also be imposed for any medication control rule violation.

However, the Person Responsible shall have the opportunity in each case, before a period of Ineligibility or Fine is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.

...

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 If the Person Responsible establishes in an individual case involving a rule violation under Article 2.1 (presence of a Prohibited Substance) or Use of a Prohibited Substance or a Prohibited Method under Article 2.2 that he or she bears No Fault and No Negligence for the violation, the otherwise applicable period of Ineligibility and other sanctions shall be eliminated. When a Prohibited Substance is detected in a Horse's Sample in violation of Article 2.1 (presence of a Prohibited Substance), the Person Responsible must also establish how the Prohibited Substance entered the Horse's system in order to have the period of Ineligibility and other sanctions eliminated. ...

10.5.2 This Article 10.5.2 applies only to rule violations involving Article 2.1 (presence of a Prohibited Substance), Use of a Prohibited Substance or a Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3, Tampering under Article 2.4, Trafficking under Article 2.5 or administration of a Prohibited Substance or a Prohibited Method under Article 2.6. If a Person Responsible establishes in an individual case involving such violations that he or she bears No Significant Fault and No Significant Negligence, then the period of Ineligibility and other sanctions may be reduced. When a Prohibited Substance is detected in a Horse's Sample in violation of Article 2.1 (presence of a Prohibited Substance), the Person Responsible must also establish how the Prohibited Substance entered his or her Horse's system in order to have the period of Ineligibility and other sanctions reduced.

...

APPENDIX 1 - DEFINITIONS

Adverse Analytical Finding. A report from a laboratory or other approved Testing entity that identifies in a Sample the presence of one or more Prohibited Substances (including elevated quantities of endogenous substances) or evidence of the Use of a Prohibited Method.

Competition. A Competition as defined in the FEI General Regulations.

Disqualification. A consequence of an anti-doping or medication control rule violation whereby the Person Responsible's results in a particular Competition or Event are invalidated, with all resulting consequences including forfeiture of any medals, points and prizes.

Doping Control. The process including test distribution planning, Sample collection and handling, laboratory analysis, results management, hearings and appeals aimed at preventing any attempt to alter a Horse's performance (or to mask an underlying health problem) by the administration or application of Prohibited Substances in or on the Horse's body.

Equine Prohibited List. The list identifying the Prohibited Substances and Prohibited Methods as published from time to time under the direction of the Secretary General.

Equine Therapeutic Use Exemption (ETUE). The authorization to compete when a Prohibited Substance or a Prohibited Method has been administered or used for legitimate therapeutic purposes in a Horse, as provided for in the FEI Veterinary Regulations through the use of an applicable Medication Form as therein specified.

Event. An Event as defined in the FEI General Regulations.

FEI. The Fédération Equestre Internationale acting through its applicable representative as determined in its Statutes, General Regulations, other regulations or rules, or by its Secretary General from time to time.

FEI Standard for Laboratories. A standard setting out the criteria to apply in respect of analyses, custodial procedures and reports thereon adopted by the FEI from time to time as certified by the Secretary General in support of these Rules. Compliance with this standard (as opposed to another alternative standard, practice or procedure) in force at the time of Sample analysis shall be sufficient to conclude that the procedures addressed by this standard were performed properly.

Fine. A consequence of an anti-doping or medication control rule violation whereby the Person Responsible receives a financial penalty.

Hearing Body. The FEI Judicial Committee or a panel of members thereof, or other such body as provided for in the FEI Statutes.

Horse. A horse, pony or other member of the genus *Equus* competing in an FEI discipline.

In-Competition. An In-Competition test is a test where a Person Responsible is selected for testing in connection with a specific Competition on the day the Person Responsible is competing.

Ineligibility. A consequence of an anti-doping or medication control rule violation whereby the Person Responsible, Horse or Person is barred for a specified period of time from participating in any Competition or Event or other activity or funding as provided in Article 10.8.

International Event. An Event where the FEI, International Olympic Committee, or International Paralympic Committee is the ruling body for the Event or appoints the technical officials for the Event.

.....

Medication Class A. A class of Prohibited Substances as defined in the Equine Prohibited List.

.....

Medication Control. The process including test distribution planning, Sample collection and handling, laboratory analysis, results management, hearings and appeals aimed at preventing medication control rule violations that may affect performance or mask an underlying health problem whilst providing appropriate treatment to safeguard the health and welfare of the Horse.

Metabolite. Any substance produced by a biotransformation process.

.....

National Federation. A national entity which is a member of or is recognized by the FEI as the entity governing FEI sport in that nation.

No Fault or No Negligence. The Person Responsible's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used on the Horse, or the Horse's system otherwise contained a Prohibited Substance or a Prohibited Method. No Significant Fault or No Significant Negligence. The Person Responsible's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping or medication control rule violation.

Participant. Any Person Responsible or Horse.

Person. A natural Person or an organization or other entity.

Person Responsible. A Person Responsible for a Horse as defined in the FEI General Regulations in force from time to time.

Prohibited Method. Any method so described on the Equine Prohibited List including its Metabolites and Markers.

Prohibited Substance. Any substance so described on the Equine Prohibited List including its Metabolites and Markers. Prohibited Substances include Doping, Medication Class A, and Medication Class B substances.

Provisional Hearing. For purposes of Article 7.2, an expedited abbreviated hearing occurring prior to a hearing under Article 8 (Right to a Fair Hearing) that provides the Person Responsible with notice and an opportunity to be heard in either written or oral form.

Provisional Suspension. A consequence of an anti-doping and/or medication control rule violation whereby the Person Responsible is barred temporarily from participating in any Competition prior to the final decision at a hearing conducted under Article 8 (Right to a Fair Hearing).

.....

Rules. The FEI Equine Anti-Doping and Medication Control Rules.

Sample. Any biological or other material collected for the purposes of Doping Control or Medication Control.

.....

Testing. The parts of the Doping Control or Medication Control process involving test distribution planning, Sample collection, Sample handling, and Sample transport to the laboratory.

Use. The application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or a Prohibited Method.”

- 10.7 The FEI Regulations of Equestrian Events at the Olympic Games provided, so far as material, as follows:

“Article 600 - INTRODUCTION

This booklet sets out the special rules and qualification procedures for the equestrian events at the Olympic Games. It must be read in conjunction with the Olympic Charter applicable at the time of the Olympic Games, FEI Statutes, FEI General Regulations, FEI Rules for the Olympic disciplines (Eventing, Dressage, Jumping) and FEI Veterinary Regulations, all of which remain in force except where otherwise specified.

An arbitration procedure is provided for in the FEI Statutes and FEI General Regulations. In accordance with this procedure, the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland has the exclusive jurisdiction to be the final forum to resolve all disputes concerning these events, subject to the terms of the Accelerated Medication Control Procedure in Annex G.

The FEI is responsible for the technical supervision of the preparations of facilities and for the technical control of the competitions”.

...

“Article 615 - CONTROL OF PROHIBITED SUBSTANCES OF HORSES

Control for Prohibited Substances will be carried out as set out in the FEI Equine Anti-Doping and Medication Control Rules, and the FEI Veterinary Regulations:

1. Selection of Horses for Testing (see also Veterinary Regulations 1016)

1.2. Three possible methods for selection of horses can be distinguished: obligatory testing (i.e. medal winners.

1.4. For obligatory testing in the Olympic Games, sufficient horses must normally be sampled to ensure that the following samples are available for analysis:

.....

1.4.2. in Final Jumping ... Competitions for Teams, one horse from among all the horses in each of the first three placed teams.”

...

2. Accelerated Testing and Hearing Procedure; see Annex G.

“ANNEX G - Accelerated Medication Control Procedure during & after the 2008 Olympic Games

(see also Equine Anti-Doping and Medication Control Rules and Veterinary Regulations)

The following shall apply to equine medication control at the Olympic Games:

1. Treatment of Samples

1.1 All samples taken during any one day must be kept in a securely locked refrigerator during such day and must be dispatched to the laboratory as soon as possible after the conclusion of the competition, using the most rapid and reliable available method of transportation.

1.2 The MCP Testing Veterinarian is responsible for ensuring the dispatch of samples to the official laboratory of the Olympic Games.

2. Procedure for Analysis

2.1 The analysis of Sample A (“A-analysis”) must be completed as soon as possible, within 7 days of receipt by the laboratory.

2.2 If the A-analysis is negative, Sample B may be destroyed by the laboratory.

2.3 If the A- analysis is positive a confirmatory analysis, to be carried out on Sample B (“B-analysis”), is mandatory, and the result of the A- analysis must be communicated to the Person Responsible (“PR”), the NF, the NOC and the relevant Olympic Games body immediately in writing. The PR must be notified of his/her applicable rights concerning presence or representation at the opening and identification of the sample for analysis. The B- analysis must be completed as soon as possible, within 7 days of receipt by the laboratory of the sample or the written instruction to begin testing, whichever occurs latest.

2.5 The B- analysis must be commenced within 2 days of the date of the report of the A-analysis by the same laboratory that carried out the A-analysis. The B-analysis must not be carried out by the same analyst who performed the A-analysis.

2.7 If the PR contests the validity of the test results, the Medication Control Administrator, FEI General Counsel and the IOC Medical and Scientific Director must be informed immediately by confidential letter. All copies of the original and subsequent analytical documents must be submitted to the FEI General Counsel.

3. Reporting the Results of Analysis

The results of the A- analysis and the B-analysis must each be reported immediately to the MCA and the FEI General Counsel accordingly.

When reporting the presence of a Prohibited Substance, the analytical report must include all relevant documentation from instrumental analysis.

4. Hearing

4.1 A hearing must be called by the relevant FEI Tribunal within 24 hours, to be held within 7 days of the date of the report of the B- analysis. The PR and his NF must receive full details of the case together with copies of all written evidence, and must be informed how, when and where the case will be investigated.

10.8 Article 15 of the IOC Anti-Doping Rules applicable to the Beijing Games provided:

“ARTICLE 15 DOPING CONTROL FOR HORSES – EQUINE ANTI-DOPING AND MEDICATION CONTROL RULES

15.1 In determining anti-doping rule violations, results management, fair hearings, Consequences, and appeals for Horses, the Fédération Equestre Internationale (FEI) shall establish and implement rules (i) that are generally consistent with Articles 1, 2, 3, 9, 10, 11, 13

and 17 of the Code and (ii) which include a list of prohibited substances, appropriate Testing procedures and a list of approved laboratories for Sample analysis.

15.2 Notwithstanding the application by the IOC of the present Rules to all Athletes and Persons, the FEI shall implement and apply the rules established in relation to Horses, in particular its “Equine Anti-Doping and Medication Control Rules” (hereinafter the “FEI Equine Anti-Doping Rules”). The FEI shall forthwith provide to the IOC its decision in applying the FEI Equine Anti-Doping Rules. The right of any Person to be heard in relation to (i) a procedure of the FEI applying the FEI Equine Anti-Doping Rules and (ii) any potential further consequences or sanctions from the IOC deriving from a decision of the FEI applying the Equine Anti-Doping Rules, shall be exercised in front of the competent body of the FEI.”

11. **PROCEDURAL MATTERS**

11.1 A variety of complaints were made on the Appellant’s behalf about the absence of “*a fair and transparent hearing*” before the FEI Tribunal. We need not dwell on these complaints. Under Article R57 of the Code, the Panel considers both fact and law *de novo*. Accordingly any procedural defects which occurred in the internal proceedings of a federation are cured by arbitration proceedings before CAS (*F v FINA CAS 96/156* p.61, *M v Swiss Cycling CAS 2001/A/345* at para 8).

12. **PROHIBITED SUBSTANCES**

12.1 It was only faintly argued that Capsaicin was not a prohibited substance at all. It is true that it was not listed as such at the material time, although we heard and accept evidence that this omission is likely to be corrected for the future, but such express mention is not a *sine qua non* of a substance achieving prohibited status; were it otherwise there would always be a risk, to the obvious detriment of sport, that science could outstrip the law by discovery or invention of

potentially performance-enhancing drugs hitherto not captured in the catalogue of the banned substances. We accept the evidence of Dr Farrington (Supplemented by that of Dr Corde and Dr Grogny) that Capsaicin falls within the definitions of prohibited substance Medication Class A in Annex III and as a pain relieving substance and is not excepted merely because it is, or is derived from, a natural product. Since none of the parties requested the Panel to go beyond a discussion of capsaicin as a medication A substance the Panel did not examine whether in parallel to a medication A substance also a doping substance was given and whether in such situation of a double nature of a substance the case needed to be handled as an anti-doping rule violation and not merely as a violation of a medication A rule, see *Christian Ahlmann v FEI* CAS 2008/A/1710 paras 87ff.

- 12.2 The FEI Tribunal determined that its presence in the urine was evidence of a medication control offence, but not a doping offence on the basis that EADMC 3.1 should be construed as compelling the location of a substance in one or other of the two categories. [Decision para 48] That aspect of their determination has not been the subject of any appeal; we have therefore not heard argument on the matter and do not need to – indeed cannot properly - rule upon it. Suffice it to say that we are not to be taken as endorsing the conclusion that a substance may not fall into both categories, depending of course on its properties and effect, nor indeed that in order to qualify as a doping substance an agent would have to have been likely applied by the person charged “*so as to influence performance*” as distinct from being of a category likely generally to have been so applied (compare Decision para 44 which equally did not require consideration by us in the present appeal).
- 12.3 Dr Wan and Dr Vine informed us that the HKJC laboratory had a special capacity to detect Capsaicin - although Professor Barker would dispute that such capacity was unique. Dr Tobin

suggested that in consequence in advance of the Beijing games it would not have been appreciated generally in the equine world that use of such substance was forbidden. Even assuming this to be correct, it seems to us that the only conclusion would be that previously participants in jumping events may have had advantages over their competitors which had not been detected. It cannot mean that the substance, if otherwise satisfying the criteria for prohibition, should as a result be deemed not to do so; if it has the appropriate properties, it is prohibited, whether hitherto detectable or not. Nor can we accept that as Dr Tobin also suggested "*horsemen should be allowed to adopt their practices to what are effectively new and unantiquated rules*". At most a participant might seek to plead in mitigation his ignorance of the effects of Capsaicin because of the state of knowledge (or rather lack of it) at the time it was administered to his horse. But the Appellant disclaims that Capsaicin was administered in any form to Camiro, and the Coach of the Norwegian team was apparently aware that Equi-Block should not be used.

12.4 It is equally immaterial as to disqualification that Capsaicin may have found its way into Camiro's body as a result of Camiro's biting wood in a stable impregnated with it, or breathing in airborne particles or eating feed contaminated with it (all without knowledge of the Appellant). The source of the Capsaicin, if it could be established, might go to the balance of the sanction i.e. period of suspension, where questions of intent, care and the like come into focus. It cannot affect the disqualification which depends upon the presence of the substance in the urine (as long as such presence was not the result of the way in which the sample was collected or subsequently dealt with) ("the proviso").

12.5 The evidence before us demonstrated that 64 horses were tested at the Beijing Olympics and 20 at the subsequent Paralympics. 5 tested positive with Capsaicin or related substances (all in

jumping). In three of Capsaicin cases the PRs affirmed that they had used Equi-Block which contains Capsaicin. Only in the present and one other case was the source of the substance not identified. The FEI Tribunal concluded that contamination of only 2 among 84 jumping horses “*is most unlikely*” (Decision para 61). We would more simply say, the proviso apart, it is irrelevant.

13. Finally it is immaterial that in the particular circumstances it cannot be shown that the substance did affect Camiro whether by hypersensitisation or pain relief. It is another aspect of the strict liability rule that the sports’ governing body will not have to establish such matters; and it will not avail the sportsman (save again as to additional sanction) to show that it had no such effect. The disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels. See in particular *CAS 2005/A/829 Ludger Beerbaum v/FEI* para 12.19: “*to construe the proviso as allowing the FEIJC (or the CAS) to allow an appeal against disqualification on the grounds that it was proven that there was neither intent to gain competitive advantage nor success in so doing would be contrary to those principles.*” See also *Baxter v IOC CAS 2002/A/376* para 3.29: “*The disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels.*”

14. **PRESENCE**

- 14.1 The presence of Capsaicin in Camiro's urine was shown by the tests on the 'A' and 'B' samples carried out on 22nd and 23rd August 2008 in the HKJC laboratory, one of the four FEI accredited laboratories worldwide. It had to submit to and satisfy strict criteria procedures in order to gain such status: see CAS 2008/A/1569 *Kürten v FEI*, para 7.9.
- 14.2 The cogent supporting analytical material was shown to us.
- 14.3 Dr Tornell, the PR's team's veterinarian, was present at the identification and opening of the B sample and confirmed its identity and integrity.
- 14.4 Professor Barker concluded "*from the data I reviewed there was a positive identification in both samples*". (Evidence before FEI Tribunal 26th September 2008 Transcript p.82).
- 14.5 Accordingly, presence of a prohibited substance in the sample was established to our comfortable satisfaction.

15. **STRICT LIABILITY**

- 15.1 The advantage of a uniform code such as provided by WADA is that the interpretation of rules, where in issue, can be authoritatively determined by a court or tribunal with appropriate jurisdiction. However the WADA code itself allowed latitude in drafting to governing bodies of sports involving animals— see Article 16. The legitimate use of this facility by the FEI has encouraged the Appellant to advance an argument, to the effect that it was incumbent upon the FEI in order to inculcate a PR to prove that the substance found in the urine was a substance that

came from the horse. The argument fastens on the first sentence of Article 2.1.1: and is to the effect that the second sentence must be construed in the light of the first.

15.2 We bear in mind, of course, the twin principles that the rules must be constructed *contra proferentem* i.e. the FEI, see e.g. *CAS 2001/A/317 A. v FILA* para 18, and that any ambiguity in disciplinary rules must be resolved in favour of the individual who may be made liable under them see e.g. *CAS 98/222 B. v ITU* para 31. We are also conscious of the classic statement in *CAS 94/129 USA Shooting v. UIT* at para 34: “Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the *de facto* practice over the course of many years of a small group of insiders”. However, with respect to Mr Steenstrup, there is no thicket in the FEI rules, and the pathway through them is clear.

15.3 14.3 It is common ground before the Panel that no offence is committed if a prohibited substance enters the sample as a result of its handling in the process of collection or transport to or treatment in the laboratory thereafter. The very purpose of protocols on collection and proof of chain of custody is to eliminate any possibility of sample contamination.

15.4 The first sentence of Article 2.1.1 is, however, concerned with the imposition of responsibility on the PR, and gives rise to an obligation independent of the second sentence. The second sentence is in what we may describe as common form, and harks back to Article 2.1 which is unambiguous, and to which Mr Steenstrup’s argument gives no weight. Presence indicates offence. The FEI provisions must be “*generally consistent*” with WADA Article 2 and 16.

They are: and the comment on WADA Article 2³ is itself a powerful pointer against Mr Steenstrup's submission.

15.5 The presumption is that what is in the sample (be it from horses – as here – or athletes as in other sports) must have been in the body, as will, of course, be the position in all but exceptional cases. The presumption may be rebuttable; but the burden of rebuttal lies on the person charged. We note that the balance of Article 2 (2.1.2 and 2.1.3) with its repeated emphasis of the importance of presence (save in carefully drawn exceptions) is consistent with our construction; and the heading of Article 2, itself distinguishing between substances in their free form or metabolites (or conjugates) points away from the need to test for more than presence of the substance in free form.

15.6 Finally we remind ourselves that the need for a strict liability rule in the interests of fair competition has been constantly reiterated in CAS jurisprudence. (See e.g. *CAS 94/129 USA Shooting v UIT* paras 14-16, *CAS 95/41 C v FINA* para 137). Its compatibility with Swiss law has been recognised by the Swiss Federal Supreme Court in *Kurt Schafflutzal and Panel Zokig v FSC* 5C 248/2006 (Reported ATF 134 III 193). Nor does the European Convention of Human Rights, Article 6 para 2 stipulate that strict liability cannot be consistent with the right to a fair trial (*Salabiaku v France* Application no.10519/83 paras 28-29, *Janovic v Sweden* Application No.346/9/92 para 101).

³ which explains the rationale of the strict liability rule

16. **SAMPLE CONTAMINATION**

16.1 Can the Appellant show that the Capsaicin did not come from the body of Camiro? The Respondent starts with the advantage of the presumption of regularity both in the testing process and in the custody/analysis, see EAMDC 3.2.2 and 3.2.3. We can discount the relevance of the former presumption since there was not an iota of evidence to suggest any irregularity at any time after the sample collection itself. The volley of questions emanating from the Appellant's experts, Professor Barker and Dr Tobin, if designed to elicit some irregularity, manifestly failed to do so, and the fact that not every request, some of which in our judgment verged on the oppressive, was answered in our view is immaterial. FEI were more responsive than the law required: and no adverse inference can be drawn from the fact that they did not satisfy every demand made on the Appellant's behalf.

16.2 As to the sample collection the only evidence relied upon was that of Ms Kleppe, the Norwegian team's groom, who claimed that – in what would certainly be a departure from good practice – Mrs Leigh collected the urine sample without wearing gloves, and, for good measure, that the steward Mr Vale vested with the function of supervising the collection, was lax in performance of his duties.

16.3 There are four points to be made at the outset about Ms Kleppe's evidence.

Firstly, she made no complaints about departure from practice at the time. Her candid admission to this effect, explained by her as a consequence of her distraction by joy at Norway's success was confirmed by Mr Tornell.

Secondly, she signed on the doping control form that the sample had been collected and sealed without endorsing any reservation as to the way in which the process had been carried out, and without comment on Mr Vale's signature just above hers to the effect that he had supervised a successful collection. The Veterinary regulations stipulate that objections should be made on the form Article 1018-4; although Ms Kleppe denied knowledge of this. For our part we respectfully invite the FEI to adapt the form to reflect that used in other sports of which the Panel has knowledge, to provide that the representative of the rider in signing the form expressly confirms that he has no objection to the way of the collection was carried out. A slight amendment to the form would ensure that subsequent objections were less frequently made and, if made, less likely to be believed.

Thirdly, in consequence the first time that Ms Kleppe raised the matter now relied on was in a statement of 17th September 2008.

Fourthly, revealingly, the initial way she put it in that document was "*I can't remember her having gloves on ...*" which is not the same as an outright denial.

16.4 As against this firstly, no other person present on that occasion corroborated Ms Kleppe's version; all indeed expressly denied it: Mr Warrick Vale, Dr Miklos Jarny (both veterinarians), Ms Carolyn James, and Mrs Maxine Leigh. We are conscious of the fact that persons might not willingly admit to a breach of proper procedure, and might close ranks around a colleague, but we could not conclude this to be so without cogent proof, which was entirely lacking.

16.5 Secondly, while the majority of statements to which we have referred were in writing, and we did not have the opportunity to hear the authors or see how they reacted to the cross-examination, Mrs Leigh did give evidence to us by telephone from New Zealand (at an unsocial

hour) and was adamant that she had taken all appropriate care with use of gloves and otherwise to avoid contamination of the sample during collection. She impressed us with the clarity of her evidence – and we noted that, in so far as we permitted Counsel for the FEI to invite her to retrace steps already covered in her written statement, she was consistent in her testimony, and did not yield any ground in cross-examination.

16.6 Thirdly, we have to bear in mind Mrs Leigh's considerable experience, not least at Olympic games; the training she and others involved in this vital stage of doping control had received; the absence of any good reason why on this occasion she would have deviated from proper practice of a function she performed on up to twenty occasions during the Beijing Games (Ms Kleppe could only suggest that the collection process was running behind schedule); her natural appreciation of the importance of the collection process; her intrinsic professional pride and her lack of motivation to distort or misrepresent the true position.

16.7 Two further matters were the subject of discussion. First, Ms James had taken an unofficial video of the collection process for Camiro (which we considered). It was incomplete in its coverage; and, since it was unofficial and not required by any rule, it cannot be the subject of criticism on that score. It simply did not cast any light on the issue of whether gloves were worn or not by Mrs Leigh in collecting the sample from Camiro.

16.8 Secondly, Ms Kleppe had a recollection that Mrs Leigh's hands looked 'old'. It may well be that she saw Mrs Leigh's hands. But as Mrs Leigh explained that she would not have shaken hands with Ms Kleppe before performing her tasks as she would have regarded it as inappropriate to do so when wearing surgical gloves. After the process of collection it was our understanding of her evidence that she did take off her gloves and did shake hands

(unfortunately the transcript of this passage of her evidence at this point is incomplete). If so, there is no real discrepancy between the testimony of the two main witnesses on this aspect of the case. An alternative possibility is that Ms Kleppe confused Mrs Leigh with Ms James, the video-maker, who was certainly ungloved. But whatever may be the explanation for Ms Kleppe's recollection, we are entirely confident that Mrs Leigh wore gloves at all times material to her duties vis à vis Camiro.

16.9 For the avoidance of doubt we do not suggest that Ms Kleppe was giving deliberately untruthful evidence: but only that we cannot prefer her evidence to that of Mrs Leigh and the others who corroborated her testimony.

16.10 Nor, we add, is the Appellant able to rely on the voluntary test on 5th August 2008 at a Post-Arrival Elective Testing (PAET) of the horse since the screening provided did not include the detection of Capsaicin, Nor would the boot/bandage controls administered necessarily detect any hypersensitisation. Accordingly we do not consider that the Appellant has rebutted the presumption on the balance of probabilities, or, indeed at all.

17. **A NEW HYPOTHESIS**

17.1 On the 19th November 2009, having been provided with the CD of the hearing, Mr Steenstrup (while accepting that "*it was actually very difficult to hear what Mrs Leigh was telling on the telephone*") drew attention to a passage in the transcribed evidence of Mrs Leigh where she stated, by reference to her encounter with Ms Kleppe "*I was inside and getting ready with my gloves on and my plastic bag, sealed plastic bag waiting for her to come in.*"

17.2 On this basis Mr Steenstrup advances the following argument:

“The groom maintains that the steward did not put on gloves at the start of the sampling collection as stated in her statement. However, having gloves on already before the sampling collection is as bad and totally unacceptable. Based on Mrs Leigh’s statement during the hearing, we must rely on, if the groom’s statement is not taken into account, that she was wearing gloves already before she met the PR’s representative. According to the FEI Medication Control Program – Manual for testing veterinarians – the gloves are part of the sampling kit. The sampling kit must be opened in the presence of the PR or its representative, because otherwise they would not be able to control if the sample taker used old gloves that have already been used in other (e.g. capsaicin) cases. This has to be, based on the steward’s own statement, a serious procedural error which has to lead to that according to the FEI Equine Anti-Doping and Medication Control Rules section 3.2.2, the FEI shall have the burden to establish that such departures did not cause the adverse analytical finding or the factual basis for the rule violation.

In our opinion, based on that the steward was handling 20 of the sampling collection cases during the Olympics, and that there were more of them at the same time as the testing of Camiro, the risk for contamination is very high. This procedural error that in fact is admitted by the steward, if the groom is not heard that the steward did not have gloves on at all during the urine sampling collection, is extremely serious. In both instances such a serious procedural error must lead to that it will not be possible for the FEI to prove that such departure did not cause the adverse analytical finding.”

17.3 This new argument elides two separate matters: the propriety of the sampling procedure; and the ability of the PR’s representative to witness it. We can find nothing in the Manual (or Article 1018 para 1 of the Veterinary Regulations) to suggest that the PR has to witness the putting on of the gloves.

17.4 The Manual simply states (so far as material)

“2 Sampling protocol

The utmost care must be taken to avoid any contamination of samples during and after collection. Testing Veterinarians should adhere to the following procedure:

- *Open the kit box and arrange all times on a clean bench.*
- *Put disposable gloves on both hands (gloves should only be removed when the bottles have been closed).*

- 17.5 In our view what the PR must witness is not the putting on of the gloves, but the taking of the urine samples and the handling of the bottles, both before and after, in connection with it.
- 17.6 In any event the factual basis for this argument involves the Appellant in discarding the evidence of his own witness, Ms Kleppe. We would also need to ignore the lack of objection to the sampling procedure on the relevant form at the time; and to modify or abandon the view already formed of Mrs Leigh as a conscientious and experienced taker of samples (see paragraph 15.7 above). In short we reject the submission that Mrs Leigh wore other than pristine gloves for the taking of the sample from Camiro.
- 17.7 We have dealt with the fresh argument *de bone esse*. We are in any event concerned about the propriety of admitting it (especially since it was available at the time of the hearing being based on evidence given during it) after the proceedings have closed. We do not rule out that in exceptional circumstances such further argument could be admitted: but the present circumstances on no way qualify as exceptional, even if such exception exists. But in the event we do not need (as we otherwise would) to invite the FEI to state their position as to both procedure and substance.

18. **CONJUGATION TEST**

- 18.1 As we understood the evidence of all experts, if Capsaicin enters the urine from the environment and does not go through the horse, it exists in the urine as Capsaicin (“free form”). If it goes through the horse, it exists in the urine as a sugar linked to Capsaicin (“conjugate or metabolite”).

- 18.2 The experts agreed that the advantage of a conjugation test without enzyme or hydrolysis – a feature of the conventional test on ‘A’ and ‘B’ samples – is that, were it positive, it would establish that the prohibited substance in the urine sample was also in the horse “*an applicable quantity of contingents form of Capsaicin is not commercially or readily available and it is obviously not naturally occurring*”, as Dr Wan pointed out in his Statement of 24 September 2008, although it was not common ground that if such a test was not positive, it would establish the opposite. (The enzymes split any conjugates which might be contained in the sample so as to make it uncertain that only the free form was in the sample: a sample not treated with enzyme hydrolysis will contain it in its original form whether conjugate or free). We can see the attractions of administering such a test if only to foreclose possible defences to a charge of doping or medication control offences: but, we repeat, we can find no basis in the relevant instruments or general law for such a test being compulsory although it is permissible under EADMC art 7.1.8.
- 18.3 In this case, however, Dr Wan did carry out tests on the ‘A’ sample on 31st August 2008 and they proved positive. As Dr Wan put it on 20 November 2008: “*It can be concluded that ‘A’ Urine Sample 0069350 did not contain any detectable amount of free capsaicin, or else it would have been detected as in the positive control urine sample containing free capsaicin. It can also be deduced that the capsaicin identified, and reported previously in ‘A’ Urine Sample 0069350 after enzyme hydrolysis, had been present essentially in the conjugated (or metabolised) form.*” (See also tests of 5th September 2008 to like result. In other words the unlikely possibility of contamination of urine sample 0063950 with free Capsaicin can be ruled out).
- 18.4 Professor Barker made a number of points. First, while he accepted that the fact that such test was carried out later than the official test on ‘A’ and ‘B’ samples would not in itself cast doubt

upon its results - efflux of this time might indeed make it less rather than more likely that such test would prove positive - he said that the Panel lacked any direct evidence as to chain of custody, conditions under which the 'A' sample had been kept and other safeguards against contamination in the interim. The short answer is that the burden of proof of any irregularity lies on the Appellant, and no such proof was tendered. Secondly, he said that the test should be disregarded because it was on the 'A' sample alone: and not the 'B' sample. Dr Wan explained that since

- (i) the official tests were both positive;
- (ii) there was no reason to doubt that the substances detected in the urine came from the horse;
- (iii) the traces of the substance in the blood suggested it had been in the body of the horse;
- (iv) the conjugation test on the 'A' sample was consistent with, indeed confirmed, the conclusions drawn from other material,

there was no need to probe further.

We accept this explanation as cogent.

Thirdly, Professor Barker said that not only should the 'B' sample have been retested, but that the Appellant would have had a right to be present by himself or his representative at such test. This point can only be sustained if his second point was good. We do not cast any doubt in the importance of an athlete's right to representation at an official 'B' sample analysis. (See *CAS 2008/A/1607 Varis v/IBU* at para 123.) Those rights however do not attach to voluntary unofficial tests.

19. **BLOOD TEST**

19.1 A blood test, as well as a urine test, was carried out on Camiro. It revealed traces of Capsaicin but not in amounts sufficient, according to the HKJC laboratory, to justify a positive finding. Any trace of a substance in the blood is further confirmation that it originated in the horse's body for obvious physiological reasons. Professor Barker said that since it was of an insufficient amount to qualify as proof of a doping offence, it should be discounted for all purposes. We do not agree. He himself accepted that it would not be illogical for a scientist, if asked whether on the basis of such blood test result he considered that Camiro contained Capsaicin to give an affirmative answer, while at the same time saying he would not inculcate the PR on the basis of the evidence of the blood test alone. To ignore it completely seems to us to be an invitation to deny reality.

20. **UAE**

20.1 Dr Wan carried out a test after and unconnected with the Beijing Games arising out of an event in the UAE. We quote the full report provided to us at the request of the Appellant and with the concurrence of the HKJC laboratory.

“Dear Mr M,

Sample X from the ... Equestrian & Racing Federation

The accompanying page is a copy of the test report for Sample X from a batch of samples (with seal no. Y) delivered to us on 29 January 2009. The original report will be sent by registered post.

The urine ‘A’ Sample X was found to contain capsaicin and dihydrocapsaicin (both are naturally-occurring capsaicinoids). However, our further analysis showed that both substances were present in the free (rather than conjugated) form in the sample,

suggesting that neither had gone through the body of the relevant horse. Furthermore, based on the levels detected in urine, the corresponding blood sample should also have detectable amount of capsaicin and dihydrocapsaicin, but neither was detected in Blood 'A' Sample X. The above findings strongly suggested that the presence of the free form of capsaicinoids in urine had been caused by contamination either during or after urine collection, and consequently Urine Sample X was reported negative. While there are many possible sources of contamination (including the back side of the relevant horse, the sample container, the hand of the collection personnel, etc.), laboratory contamination has been ruled out because all the negative controls analysed together with the urine sample on more than one occasions were negative.

Yours sincerely,

[signature]

Terence S. M. Wan, PhD EurChem CSci CChem FRSC FAORC FFSSoc

Head of Racing Laboratory (Chief Racing Chemist)

...”

- 20.2 At first blush this might seem to indicate a *volte* face on Dr Wan's part, an acceptance of the need for a test which had been denied in the Beijing Games, not least because as Dr Wan testified, the legal provisions were in no way materially different.
- 20.3 However, Dr Wan also explained salient difference between the two situations. In the urine sample tested above, the amount of Capsaicin was considerable: of the order of 10,000 micrograms to millilitres (as contrasted with 53 micrograms to millilitres in the case of Camiro). By contrast there was no trace at all of Capsaicin in the horse's blood. This strongly suggested to Dr Wan that the urine sample had been contaminated in the collection. Wholly responsibly, in our view, he then carried out a conjugation test which, indeed, verified his hypothesis. Hence his report acquitted the PR in the case above.

21. **THE GREY ZONE**

- 21.1 Mr Steenstrup urged us to be creative in recognizing that in respect of Capsaicin there is a grey zone which should disable us from finding that the presence of Capsaicin indicated a medication control offence given its small quantity as revealed in the laboratory tests 53 micrograms per millilitre.
- 21.2 There are several objections to this argument.
- 21.3 First, CAS is an adjudicative, not legislative body. It is not for CAS to write the rules of the FEI. As long as those rules are not incompatible with some relevant aspect of *ordre publique*, be it competition law, the law of human rights, or Swiss statute, we have to apply them as they stand. For us the only *lex lata*, not the *lex ferenda* has relevance.
- 21.4 Even approaching the matter on the basis that the European Convention on Human Rights is incorporated into Swiss law or that there is a *lex judica* which qua international sports tribunal CAS must in any event apply (see *CAS 98/200 – AEK Athens and Slavia Prague v. UEFA*, at para 156), we find no aspect of any such law renders *ultra vires* a law which applies strict liability in the public interest of clean sport, or one which allows the presence of “*any quantity*” of a prohibited substance to trigger liability. (See further para 14.6 above)
- 21.5 It is moreover the case that EAMDC 2.1.2 and 2.1.3 recognise that provision may be made in the Equine prohibited list quantitative thresholds in cases where the substances can be produced endogenously or ingested from the environment or as a result of contamination. No such provision has been made for Capsaicin; and there is no indication in the evidence before us that any is contemplated.

- 21.6 The case primarily relied on by the Appellant, *TAS 98/222 O. Bernhard v/ITU*, was concerned with a specific substance nandrolone – and the CAS Panel was able to speak of a ‘grey zone’ (paras 13, 14, 35) only because of a coincidence of the fact that the rule under scrutiny specifically required proof of “ingestion” (paras 30-31); coupled with a developing science indicating that nandrolone could be produced endogenously (para 10).
- 21.7 Those criteria for recognition of such a grey zone are absent in the case of Capsaicin. Professor Barker’s first statement of 28th January 2009 accepts “*There is no evidence that Capsaicin is an endogenous substance in the horse*”.
- 21.8 Finally, the small amount of Capsaicin, it was agreed by all experts, could be a function of the time that it entered the horse’s body. A large amount administered – or otherwise entering the horse’s body – a significant period before detection, could diminish to a small amount by the time of detection as a result of natural forces.
- 21.9 Nor does the Appellant gain any purchase for his submission from the fact that Swedish trot and gallop sports have adopted thresholds for 16 prohibited substances if for no other reason than that Capsaicin is not one of them.
- 21.10 Accordingly, we must reject this alternative argument, advanced to us, we must acknowledge, more in hope than expectation.

22. SANCTION

- 22.1 As a medication offence the period of ineligibility can be up to one year for a first offence (see EADMC Article 10.2).

22.2 The FEI Tribunal said:

”In considering the sanctions to be given to the PR in this case, the Tribunal takes into account the following (i) the fact that the PR is an experienced sportsman and that the behaviour of anyone at the top of the sport and particularly at the Olympic Games must be faultless since the eyes of the world focus on performances at such events; (ii) the nature of the substance involved which is not only a potent pain relieving substance, but also an agent that can be used for hypersensitisation purposes; (iii) the fact that the source of the presence of the substance has not been established by the PR; (iv) the fact that the actions taken by the PR to control all possibilities of contamination and actions taken following the positive finding to reveal its source were not at the same level as established by other PRs at the same or similar events; and (v) in regard to costs, the fact that the PR contributed to the prolongation of this case and, in particular, efforts to refuse acceptance of evidence argued by the PR’s team during the second hearing to be of vital importance.”

22.3 Unlike the position in the three other cases in which Capsaicin was found in samples of horses whose riders were competing in the Beijing Games (*CAS 2008/A/1655 D. Lynch v/Fédération Equestre Internationale*; *CAS 2008/A/1700 Deutsche Reiterliche Vereinigung e.V. v/FEI & Christian Ahlmann*; *CAS 2008/A/1710 Christian Ahlmann v/FEI*; *CAS 2008/A/1654 B. Alves v/Fédération Equestre Internationale*) where it was concluded that the substance came from the administration of Equi-Block, no explanation at all (as distinct from speculation) for the source of the Capsaicin in Camiro was provided. This has implications for sentence.

22.4 In order to engage a lesser sanction on grounds of lack of fault the PR must establish the source of contamination in order that his degree of fault or negligence can be assessed. It is not sufficient for this purpose to provide mere hypothesis. (See *L v FISA CAS 2004/A/602*).

22.5 Paragraph 90 of the FEI Tribunal’s decision states:

“On the other hand and in mitigation, the Tribunal also considers: (i) the impeccable record and reputation of the PR; (ii) the hardship already caused to the PR including the loss of an Olympic medal; and (iii) the substance has not been previously detected in the context of FEI events and is often used by riders also for legitimate therapeutic reasons.”

22.6 The relevance of those factors to mitigation to a sanction imposed under the EADMC Article 10 is debatable. However, we do not need to resolve this issue. Suffice it to say on that we see no basis for reducing the period of suspension as assessed by the FEI Tribunal.

23. (...)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Tony André Hansen on 19 January 2009 is dismissed.
2. The decision of the FEI Tribunal dated 22 December 2008 is upheld.
3. (...)

Lausanne, 4 December 2009

THE COURT OF ARBITRATION FOR SPORT

The Hon. Michael J. Beloff QC MA
President of the Panel

Dr Kaj Hobér
Arbitrator

Prof. Dr. Michael Geistlinger
Arbitrator