

Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2018/A/6004 Pablo Barrios v. Fédération Equestre Internationale**

## **ARBITRAL AWARD**

**delivered by the**

### **COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

President: Prof. Dr. Martin Schimke, Attorney-at-Law in Dusseldorf, Germany  
Arbitrators: Mr. Michele A.R. Bernasconi, Attorney-at-Law in Zurich, Switzerland  
Ms. Barbara A. Reeves, Attorney-at-Law in Los Angeles, United States of America  
*Ad hoc* Clerk: Ms. Marianne Saroli, Attorney-at-Law in Montreal, Canada

**in the arbitration between**

**Pablo Barrios**, Florida, United States of America

Represented by Dr. Monika Gattiker, Attorney-at-Law in Zurich, Switzerland

**Appellant**

**and**

**Fédération Equestre Internationale**, Lausanne, Switzerland

Represented by Ms. Anna Thorstenson, FEI Legal Counsel, Lausanne, Switzerland

**Respondent**

## **I. PARTIES**

1. Mr. Pablo Barrios (the “Appellant”) is a registered equestrian athlete with the Fédération Equestre Internationale (the “FEI”) from Venezuela. He is the rider of the horse “Le Vio” (the “Horse”).
2. The FEI (or, the “Respondent”) is the international governing body for the equestrian sport disciplines of dressage, jumping, eventing, driving, endurance, vaulting, reining and para-equestrian. The FEI is a Swiss law association established in accordance with Articles 60 *et seq.* of the Swiss Civil Code, headquartered in Lausanne, Switzerland.

## **II. FACTUAL BACKGROUND**

3. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

### **A. Background Facts**

4. The Horse participated in the Central America and Caribbean Games (the “Event” or the “CAC games”) in Bogota, Colombia in the discipline of Jumping from 26 to 29 July 2018. The Event is a multi-sport regional championship event held every four years and is an important equestrian event in relation to qualification for the Pan American Games taking place in 2019, themselves a qualifying event for the 2020 Tokyo Olympic Games.
5. The Horse was ridden during the Event by the Appellant, who is considered the Person Responsible (“PR”) in accordance with Article 118.3 of the applicable FEI General Regulations (“FEI GR”).
6. The results obtained by the Appellant, the Horse, and the Appellant's team at the Event were as follows:
  - a) “Athlete Performance”
    - i. 26 July 2018 – 3<sup>rd</sup> Place (Competition No. 1)
    - ii. 27 July 2018 – 2<sup>nd</sup> Place/2<sup>nd</sup> Place (Competition No. 2, Round A and Round B)
    - iii. 29 July 2018 – 1<sup>st</sup> Place/1<sup>st</sup> Place (Competition No. 3, Round A and Round B)
  - b) “Individual Classification – Final Individual Classification”
    - a. 29 July 2018 – 1<sup>st</sup> Place

- c) “Team Results – Final Team Classification”
  - a. 27 July 2018 – 4<sup>th</sup> Place (Team Venezuela)
- d) “Final Team Classification”
  - a. 27 July 2018 – 2<sup>nd</sup> Place (Individual Standings after Competition No. 1, 2A, and 2B)
- 7. The Horse was tested twice during the Event. Analysis of urine and blood samples taken from the Horse on 26 July 2018 returned positive tests for caffeine and theophylline in the urine sample. Analysis of the blood sample taken from the Horse on 29 July 2018 returned positive tests for caffeine and theophylline in the blood sample (the “Prohibited Substances”).
- 8. Caffeine is a stimulant that stimulates the central nervous system. Theophylline is a bronchodilator used in the treatment of respiratory disease. Caffeine and theophylline can be direct metabolites of each other. Both substances are Specified Substances and are classified as Controlled Medication Substances under the FEI Equine Prohibited Substances List and are, therefore, prohibited in-competition.
- 9. The Appellant and the Horse competed on 26, 27 and 29 July 2018. As indicated above, the Appellant won the individual title and finished fourth with the team of Venezuela.
- 10. On 11 September 2018, the FEI sent a Notice of Charge to the Appellant, informing him of the presence of the Prohibited Substances in the samples collected at the aforementioned doping controls. The Appellant was not provisionally suspended at that time given that Prohibited Substances found in the Horse’s samples were designated as Specified Substances.
- 11. On an unspecified date, the Appellant requested the analysis of the Horse’s B-Samples.
- 12. On 23 October 2018, the FEI notified the Appellant that the results of the B-Samples confirmed the presence of the Prohibited Substances in both samples (i.e. the 26 and 29 July 2018 samples).
- 13. On 30 October 2018, the FEI requested the automatic disqualification of the Appellant’s individual results from the Event.

**B. Proceedings before the FEI Tribunal**

- 14. On 9 November 2018, the FEI Tribunal issued a Partial Decision (the “Appealed Decision”). The FEI Tribunal declared that “*the Prohibited Substances detected are Caffeine and Theophylline, (...), both substances are designated as “Specified Substances”, and are classified as Controlled Medication Substances under the FEI Equine Prohibited Substances List (the “FEI List”). Therefore, the positive finding for Caffeine and Theophylline in the Horse’s sample – without a valid Veterinary Form - gives rise to an Controlled Medication Rule Violation under the ECM Rules.*”

15. The FEI Tribunal held that a violation of the FEI Equine Anti-Doping and Controlled Medication Regulations (the “ECM Rules”) was established; that pursuant to Article 9.1 ECM Rules, a violation of the ECM Rules in connection with a positive test in a given competition automatically leads to the disqualification of the results of the PR and the Horse combination obtained in that competition with all resulting consequences.
16. Accordingly, the FEI Tribunal decided “*to disqualify the results at this point in the proceedings, in order to allow for the medals to be re-distributed accordingly*”. The FEI Tribunal held that “*since the Horse tested positive after the Competition on 26 July 2018, the results of the [Appellant] and Horse combination of that Competition shall be disqualified. In addition, the Tribunal finds that the results of 29 July 2018 should be disqualified, as the Horse tested positive on that day also*”. Thus, the FEI Tribunal disqualified the Appellant and Horse combination from the Competitions of 26 July 2018 and 29 July 2018 (the “Individual Results”), based on Article 9 ECM Rules.
17. Finally, the FEI Tribunal subtracted the results of the Appellant and Horse combination from the Team Competition of 26 July 2018 from the Team Result (the “Results of 26 July”). The FEI Tribunal clarified that any other sanction shall be determined in a final decision following a hearing.
18. The relevant point of the Appealed Decision read as follows:

*“10. The Decision*

*10.1 The Tribunal is satisfied that the laboratory reports relating to the A Sample and the B-Sample reflect that the analytical tests were performed in an acceptable manner and that the findings of both laboratories are accurate. The Tribunal is satisfied that the test results evidence the presence of Caffeine and Theophylline in both samples, i.e., the one taken on 26 July 2018 and the one taken on 29 July 2018. The PR did not contest the accuracy of the test results or the positive findings. Caffeine and Theophylline are classified as Controlled Medication Substances under the Equine Prohibited Substances List, and the presence of those substances without a valid Veterinary Form – which is not the case in the case at hand – is prohibited under Article 2.1 of the ECM Rules.*

*10.2 As a result the Tribunal finds that an ECM Rule violation, i.e., the presence of the Prohibited Substances in the Horse’s system, has been established.*

*10.3 The Tribunal finds that the conditions of Article 9.2 of the ECM Rules, i.e., that the PR and Owner has been informed of an AAF and the B Sample confirms the A-Sample analysis, are fulfilled. Accordingly, the pre-requisite for the Automatic Disqualification of the Individual Results, i.e., a violation of the ECM Rules, has also been established.*

*10.4 From the foregoing, together with the Hearing Panel’s authority to resolve issues not specifically provided for in the IRs, in a manner that achieves fair, consistent, and expeditious resolution of the matter, the Tribunal finds that it shall apply Article 9.2 of the ECM Rules, and thus Article 9.1 of the ECM Rules at this point in the proceedings.*

*10.5 Taking into consideration the importance of maintaining a level playing field and the substantial prejudice to the other competitors if the results are not corrected at this point in time, the Tribunal indeed finds that it is both fair and consistent with previous findings by the Tribunal to disqualify the results at this point in the proceedings, in order to allow for the medals to be re-distributed accordingly. Furthermore, the Tribunal takes note that the Event determines which teams qualify to the Pan Am Games, which in the Tribunal's view is another reason to decide on the disqualification of results – at least partially - already at this point in the proceedings.*

*10.6 It follows from Article 9.1 of the ECM Rules that a violation of these ECM Rules in connection with a Test in a given Competition automatically leads to the Disqualification of the results of the PR and Horse combination obtained in that Competition with all resulting Consequences, including forfeiture of any related medals, points and prizes.*

*10.7 Pursuant to Article 9.1 of the CAC JRs, the Games comprises three Competitions, each taking place on a different day. Furthermore, pursuant to Article 12.6 of the CAC JRs, concerning the Third Competition, i.e., the one of 29 July 2018 in the case at hand, the Individual placing for this Competition is determined by adding together for each Athlete the Penalties incurred in Round A and Round B. The Tribunal thus understands that a Competition at the CAC JRs involves an entire day of competitions, and thus results, even if the results might be more than one because more tests or Rounds have taken place, such as for Competition No 2 (Round A and Round B) on 27 July 2018, and Competition No 3 (Round A and Round B) on 29 July 2018.*

*10.8 Furthermore, for Regional Games, such as the Event in the case at hand, pursuant to Article 10.1.1 of the ECM Rules, an ECM Rule violation occurring during or in connection with an Event shall lead to Disqualification of all of the PR's individual results obtained in that Event, with any and all Horses with which the PR competed, with all Consequences (and the resulting consequences to teams as provided in Article 11), including forfeiture of all medals, points and prizes, except as provided in Article 10.1.4. However, exceptional circumstances may be considered under Article 10.1.3 of the ECM Rules, where the PR can demonstrate that results were not likely to have been affected by the ECM Rule violation.*

*10.9 To start with the Tribunal takes note that the Horse has been tested twice during the Event, once on 26 July 2018, after the competition, and once on 29 July 2018, according to the PR after Round A of the Third Competition. Analysis of both samples confirmed the presence of Caffeine and Theophylline. The PR does not contest the testing results as such. However, he seems to question the quantity of the Controlled Medication Substances in the samples.*

*10.10 Further, the PR does not contest that the results of 26 July 2018 be disqualified. The PR however argues that the Horse was tested after Round A in Third Competition, and that the PR might be able to demonstrate as the proceedings continue that the results of Round B in the Third Competition were*

*not likely to have been affected by the ECM Rule violation. Similarly, the Horse had not been tested on 27 July 2018, and thus the PR might also here be able to demonstrate that the results of 27 July 2018 were not likely to have been affected by the ECM Rule violation.*

*10.11 The Tribunal finds that since the Horse tested positive after the Competition on 26 July 2018, the results of the PR and Horse combination of that Competition shall be disqualified.*

*10.12 In addition, the Tribunal finds that the results of 29 July 2018 should be disqualified, as the Horse tested positive on that day also. Pursuant to Article 9.1 of the ECM Rules and Articles 9.1 and 12.6 of the CAC JRs, the (entire) Competition has to be disqualified, i.e., all results of 29 July 2018.*

*10.13 The Tribunal is therefore disqualifying the PR and Horse combination from the Competitions of 26 July 2018 and 29 July 2018, and all medals, points and prize money won in those Competitions must be forfeited, in accordance with Article 9 of the ECM Rules.*

*10.14 In addition, the Tribunal finds that, pursuant to Article 11.1.2 of the ECM Rules, the results of the PR and Horse combination from the Team Competition on 26 July 2018 shall be subtracted from the team result, and consequences to the VEN team, such as elimination from the CAC Games Team Competition, following from the disqualification of the PR and Horse combination included in this Decision, have to be calculated in accordance with the CAC JRs.*

*10.15 Lastly, the Tribunal finds that any other sanctions as defined in Articles 10 and 11 of the ECM Rules shall only be determined in a Final Decision following a hearing, as requested by the PR and to be held at a time to be determined later. The foregoing also includes disqualification with regards to results of 27 July 2018.*

*10.16 For the avoidance of any doubt, since the Tribunal is only disqualifying the results of the Competitions/days where the Horse has been tested positive, and since the PR has not contested the positive results, the Tribunal finds that a hearing regarding these results is not necessary. As requested, the PR shall however be granted the right for a hearing to determine other sanctions, if any, and the possibility for the PR to show that the other results have not been affected by the ECM Rule violation, as alleged by the PR.*

*10.17 Any other requests shall be dismissed at this point in time in the proceedings; hence dealt with and decided when issuing a Final Decision.”*

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

19. On 15 November 2018, the Appellant filed his statement of appeal with the Court of Arbitration for Sport (“CAS”) against the Respondent with respect to the Appealed Decision in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”). In his statement of appeal, the Appellant nominated

Mr. Michele A.R. Bernasconi as arbitrator. Included therewith was a request to stay the Appealed Decision in accordance with Article R37 of the Code.

20. On 30 November 2018, the Respondent filed its response to the Appellant's request to stay and at the same time, nominated Ms. Barbara A. Reeves as arbitrator.
21. On 10 December 2018, the Appellant filed his appeal brief in accordance with Article R51 of the Code.
22. On 21 December 2018, the President of the Appeals Arbitration Division rendered a decision dismissing the Appellant's request to stay.
23. On 8 January 2019, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the appointment of the Panel as follows:  
  
President: Prof. Dr. Martin Schimke, Attorney-at-Law in Dusseldorf, Germany  
Arbitrators: Mr. Michele A.R. Bernasconi, Attorney-at-Law in Zurich, Switzerland  
Ms. Barbara A. Reeves, Attorney-at-Law in Los Angeles, United States of America
24. On 11 January 2019, the Respondent filed its answer in accordance with Article R55 of the Code.
25. On 15 January 2019, the Parties were advised that Ms. Marianne Saroli, attorney-at-law in Montreal, Canada was appointed *ad hoc* clerk in this procedure.
26. On 23 January 2019, the Parties signed and returned the Order of Procedure.
27. On 29 January 2019, a hearing was held at the CAS Court Office in Lausanne, Switzerland. The Panel was assisted by Ms. Delphine Deschenaux-Rochat, CAS Counsel, and Ms. Marianne Saroli, and joined by the following:

For the Appellant:

- The Appellant, Pablo Barrios (by Skype)
- Dr. Monika Gattiker, attorney-at-law (in person)
- Mr. Thomas Tobin, veterinarian, pharmacologist and board certified toxicologist specializing in equine drugs and medications (by phone)
- Dr. Carlos Larrazabal, head veterinarian of the Venezuelan Veterinarian Delegation, veterinarian for Honduras Eventing horses, veterinarian for Costa Rica Jumper horse, veterinarian for Venezuela dressage horse and Vice-President of the national federation of Venezuela – FVDE (by phone)
- Mrs. Patricia Velutini, President of the national federation of Venezuela, FVDE (by phone)
- Mr. Cesar Hirsch, FEI overall chief steward of the Event (by phone)

For the Respondent:

Ms. Aine Power, deputy legal director (in person)

Ms. Anna Thorstenson, legal counsel (in person)

Ms. Ana Kricej, junior legal counsel (in person)

28. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution of the Panel. At the conclusion of the hearing, the Parties expressly confirmed that their right to be heard was fully respected.
29. On 15 April 2019, the CAS Court Office notified the operative part of the award to the Parties.

**IV. SUBMISSIONS OF THE PARTIES**

**A. The Position of the Appellant**

30. In his statement of appeal, the Appellant sought the following relief:
  1. *That the FEI Tribunal's decision of 9 November 2018 be annulled.*
  2. *That neither the individual nor the team results obtained at the Central American and Caribbean Games 2018 be annulled.*
  3. *That the execution of the FEI Tribunal's decision of 9 November 2018 be stayed.*
  4. *That Respondent shall bear the costs of the arbitration and the legal costs of Appellant.*
31. The Appellant's submissions, in essence, may be summarized as follows:
  - a) **Concentrations found in the samples unlikely to be associated with a pharmacological effect on the horse**
    - A significant pharmacological effect to a horse's behavior requires a minimum concentration of 2,000 ng/ml caffeine in plasma or 5,000 ng/ml in urine. Here, the contested caffeine concentrations allegedly found in the samples of 26 and 29 July 2018 were below these concentrations. They were below 500 ng/ml in the urine sample of 26 July and 200-300 ng/ml in the blood sample taken on 29 July 2018.
    - Moreover, a pharmacologically effective dose of theophylline peaks at about 80,000 ng/ml in urine, a 160 fold greater than the 500ng/ml reported in the Horse's urine. The urinary concentrations of theophylline are unlikely to be associated with a pharmacological effect on the Horse at the time of the Event.
    - The concentrations of caffeine and theophylline allegedly found in both samples are consistent with a feed contamination caused by the concentrated feed eaten by the Horse in the first 48 hours after arriving in Colombia, following with the hay and alfalfa eaten over the course of the entire Event.



**b) The Respondent and the Colombian national federation's knowledge of caffeine contaminations**

- The Respondent knows of this contamination issue with feed from Colombia as it experienced this problem during the Bolivarian Games of 2017. The Respondent was even notified by the national federations of Venezuela, Chile, Peru, Ecuador, Panama and Spain that several processes had to be put in place to facilitate the issue during the upcoming Event.
- Indeed, the Colombian national federation instructed its riders, through an information sheet dated 28 February 2018, to “*keep samples of each meal and/or supplements used in each competition for at least six months in case it is necessary for research*”. For the Appellant, this is a clear indication that the Colombian national federation was aware of the problem and of the risk of positive caffeine and theophylline findings. Yet, this information sheet was never sent to any other national federation involved in the Event and consequently, its riders were not warned about this issue.
- By choosing this venue for the Event, the Respondent exposed the Appellant and all competitors to a risk of caffeine and theophylline contaminations, without even sending a warning to this effect.

**c) “Proof frustration” with respect to the concentrations allegedly found in the Horse’s A and B Sample**

- Pursuant to Article 3.2.1 of the ECM Rules, the FEI-approved Laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the FEI Standard for Laboratories. This presumption may be rebutted if the Appellant establishes on the balance of probabilities that a departure from the FEI Standard for Laboratories could reasonably have caused the Adverse Analytical Finding.
- Following the Notice of Charge dated 11 September 2018, the Appellant requested the estimate of concentrations in the A and B samples as well as the limits of detection, but the Respondent informed him that the substance concentration in the B samples could not be disclosed by the laboratory.
- The Appellant formulated a second request to the Respondent, since Mr. Tobin required the concentration of the substances in the spiked sample to compare it with the tested samples. However, the Respondent replied that it had no obligation to provide further information in this respect.
- The concentrations asserted by the Respondent are unsubstantiated as there is no indication that the figures came from the laboratory. And considering that the laboratory information was withheld by the Respondent, the Appellant calls into question the integrity of its B sample testing.
- The Respondent’s conduct should be considered as “proof frustration” and as an abuse of law.

**d) The FEI Tribunal's failure to exercise discretion with respect to the wording of Articles 9.1, 9.2, 11.1.2 and 11.2 of the ECM Rules**

- The provisions in Articles 9.1, 9.2, 11.1.2 and 11.2 of the ECM Rules should be interpreted in a manner that confers discretion to the FEI when deciding whether to disqualify the Team Results a positive finding.
- Article 9 of the ECM Rules does not state anything about the team results, except referring to Article 11. On the one hand, Article 11.1.1 grants an automatic disqualification of the team results if a member of a team has committed a violation of an ECM Rules during an event for Olympic Games, Paralympic Games and FEI World Equestrian Games. On the other hand, Article 11.1.2 may grant a disqualification of the team results if a member of a team has committed a violation of ECM Rules during an event not mentioned in Article 11.1.1. In the present case, the event is a regional event not specified in Article 11.1.1 and therefore falls within the bounds of Article 11.1.2.
- While Article 11.1.2 of the ECM Rules uses “*may be disqualified*” to confer discretion to the FEI Tribunal, Article 11.2 points out the consideration of exceptional circumstances for all events with regard to the team's consequences. The wording of Article 11.1.2 is very clear: “*the results of the Person Responsible may be Disqualified in all Competitions*”, but they do not have to be disqualified.
- The Appellant further refers to the principle of proportionality set forth in Article 5 para 2 of the Federal Constitution of the Swiss Confederation, a fundamental legal principle that requires the exercise of discretion to determine the correct sanction.
- The Appellant stresses that he has not committed any fault or negligence as no harm was caused and no benefit to the Horse achieved, as the alleged concentrations are below any concentration that would affect his Horse's performance.
- The Appellant's Results of 26 July should not be subtracted from the Team Result in consideration of the relevant factors in a balancing exercise pursuant to Article 11.1.2 of the ECM Rules, especially since Article 11.2 states that exceptional circumstances may be considered for all events.
- The Appellant believes he benefits from exceptional circumstances with regard to the subtraction of his Results of 26 July from the Team Result, as follows:
  - Regulatory cut-offs for caffeine and theophylline above the concentrations allegedly found in the Horse sample was discussed by the Colombian national federation;
  - The Colombian national federation instructed its own competitors to keep a sample of each portion of feed given to a horse at an event to have it available for testing and to be able to prove a contamination;

- The Colombian national federation in cooperation with the Colombian FEI Officials, provided a sealer and plastic bags with which to store feed samples at the Event, but this was not brought to the attention of the other national federations;
- The Organizing Committee of the Event (the “OC”) offered feed to every competitor while it was known to be potentially contaminated with caffeine and subject to eventual positive tests;
- The Respondent was familiar with the issue of horse feed contamination from caffeine in Colombia, having dealt with it in another FEI procedure.

**e) The Feed**

- The Appellant argues that exceptional circumstances apply due to the nature of the violation, namely the alleged contamination of the feed and that the asserted fact that the positive finding did not affect or bring any benefit to the Horse.
- The Appellant elaborates that when the Horse arrived in Colombia on Saturday 22 July 2018, the feed and equipment were held at the customs. As a result, and in the interim (until 23 July 2018), feed was provided by the OC and given to the Horse.
- The feed and equipment were eventually cleared on the evening of 23 July 2018 and from that point forward, the Appellant fed his Horse with his own concentrated feed.
- The violation for caffeine and theophylline originated from the Horse’s ingestion of the OC’s feed.
- Commercial feed products in Colombia using alfalfa and hay are proven to contain caffeine and terbromine, and often result in positive findings during doping controls. Moreover, reputable manufacturing brands in that region are limited and feed producers often replace one lacking ingredient with another ingredient, without disclosing it to the consumer or mentioning it on the product label.

**f) Violation of the Appellant's personality rights, right to economic freedom, as well as the breach of the good faith principle and protection against arbitrariness**

- The Appealed Decision violates the Appellant’s personality rights as well as the protection against abuse of said rights under Article 2 para 2 of the Swiss Civil Code. In accordance with Article 35 para 3 of the Swiss Federal Constitution, fundamental rights shall be respected in the context of a relationship between private parties. Any restriction of a fundamental right is unlawful unless it is proportionate to the pursuance of a legitimate aim and is carried out on a statutory basis.
- Articles 9.1 and 9.2 of the ECM Rules should not be applied to the present matter. Handing down an automatic disqualification of the Individual Results, in a case of minor

contamination with no effect on the Horse's performance and resulting from the Respondent's gross negligence, is not proportionate to the aim sought.

- With respect to the Appellant's Results of 26 July, the ECM Rules don't provide for their automatic subtraction from the Team Result, while such penalty would not be justified by a legitimate aim. And even if it could be justified by a private or public interest, it would never outweigh the Appellant's lawful interests, particularly considering that Article 11.2 of the ECM Rules call for the contemplation of exceptional circumstances to determine the consequences to teams.
- The disqualification of the Individual Results violates the Appellant's right to economic freedom, which means that the Appellant will qualify for the PanAm Games, which is necessary to achieve a subsequent qualification for the Olympic Games 2020. The Appellant disputes such disqualification, arguing it could affect a number of his future opportunities, his professional reputation, his relationship with sponsors and the possibility of him being appointed as a trainer.

**g) Violation of the Appellant's right to be heard**

- Article 29 section 2 of the Swiss Federal Constitution protects the right to be heard, which includes the right to make statements, to submit arguments and to participate in the procedure.
- The Appellant alleges that his right to be heard was violated by the FEI Tribunal as it did not hear, evaluate or consider the evidence and arguments he submitted to prove his case. The above-mentioned arguments and evidence were relevant for the case, especially since Articles 11.1.2 and 11.2 of the ECM Rules expressly grant discretion to the deciding body regarding the disqualification of the team results.
- The FEI Tribunal utterly ignored the facts which provided the exceptional circumstances to exercise the discretion granted by Article 11.2, but also the appropriate basis to conclude that the automatic disqualification set out in Articles 9.1 and 9.2 was arbitrary and an abuse of law.
- Finally, the FEI Tribunal wrongly inferred that the Appellant did not contest the positive results while it failed to hear his arguments related to the test materials.

**B. The Position of the Respondent**

32. In its Answer, the Respondent sought the following relief:

*For these reasons, the FEI respectfully asks the CAS Panel to:*

*to reject the Appellant's request for relief in their entirety and to dismiss the Appeals in its entirety, so that the Partial Decision of the FEI Tribunal is left undisturbed;*

*in accordance with Article 64.5 of the CAS Code of Sports-related Arbitration, to order the Appellants to pay all of the costs incurred by the CAS and payable by the Parties in these proceedings; and*

*in accordance with Article 64.5 of the CAS Code of Sports-related Arbitration, to order the Appellants to pay a contribution towards the legal costs that the FEI has incurred in these proceedings.*

33. The Respondent's submissions, in essence, may be summarized as follows:

**a) Automatic disqualification of the Individual Results**

- The automatic disqualification of the individual results is usually imposed by the FEI Tribunal as part of the final decision. However, Article 9.2 allows the automatic disqualification in some urgent cases whereby the FEI Tribunal renders a partial decision dealing only with this issue.
- Article 9 of the ECM Rules applies even if the period of ineligibility is reduced or eliminated under Article 10 on the basis of no or no significant fault or negligence.
- The Appellant's Individual Results (confirmed by the B Samples) are subject to an automatic disqualification because the Horse tested positive on 26 and 29 July 2018. The Appellant may rebut this automatic disqualification by establishing a procedural flaw with the sampling process on site at the Event or with the testing process at the laboratory, which is not the case here.
- The FEI Tribunal has not ruled yet on the disqualification of the 27 July 2018 results obtained by the Appellant and is therefore not subject to appeal since the internal remedies have not been exhausted.
- Article 9.1 of the ECM Rules do not provide for any exceptions to the rule requiring automatic and mandatory disqualification of the individual results arising from a test in a given Competition.
- Exceptional circumstances may be relevant to other aspects of a particular case for example in relation to how the prohibited substance entered the Horse's system, but never to the automatic disqualification of the individual results.
- The Appealed Decision disqualifies the Appellant's Individual Results in the two competitions where the Horse tested positive, namely on 26 and 29 July. However, since the overall individual competition and the overall team competition for the first two competitions are based on the results of the same competitions, the automatic disqualification of the Individual Results as a consequence, also leads to the disqualification of the Appellant's Results of 26 July from the Team Result. Consequently, they do not count for the team result in the first team competition of 26 July.

**b) The FEI Tribunal did not disqualify the Team Result**

- The Team Result was never disqualified in the Appealed Decision. It is simply a consequence of the Appellant's automatic disqualification for the first competition's individual results and the nature of the team competition.

- The explanation of how the substance entered the body of the Horse and of whether the Prohibited Substances did or did not affect the performance is totally irrelevant for the purposes of this appeal.

**c) Concentrations found in the samples highly unlikely to be feed contamination**

- The levels of the Prohibited Substances found in the Horse are entirely immaterial to the appeal and nevertheless, the estimated concentrations found in the A Sample are very high. According to the Respondent's experts, it is very unlikely that such concentrations resulted from feed contamination.
- The FEI-approved laboratories have already adapted their reporting limits to avoid recording a positive test due to feed contaminations for caffeine and its metabolites. In fact, the reporting level has been adjusted to a limit 10 times higher than a normal positive finding derived from feed contamination.
- In the present case, the concentration is over 500 ng/ml and is higher than the reporting limits. Not to mention that it is also about 5 times higher than any other caffeine case the FEI has ever had from Colombia.
- The Respondent highlights that many other horses were stuck at customs and ate the alleged contaminated feed provided by the OC. Out of the 30 samples taken from the other horses at the CAC Games, none of them tested positive for caffeine.
- Hence, the Appellant's scenario doesn't prove that the feed provided by the OC was contaminated by caffeine and that it was the cause of the positive finding.

**d) B-Sample concentrations are not available**

- Under the FEI rules and regulations, the Respondent has no obligation to report any levels of estimated concentrations in the A and B Samples, with the exception of the threshold substances, namely pursuant to 7.1.10 of the ECM Rules.
- Moreover, the FEI equine testing is performed under the FEI Standards for Laboratories, which follows the II-AC Standards and states that "*quantification of a sample component is not necessary for a report of a non-threshold substance*".
- The ECM Rules mirrors the WADA rules with respect to the WADA International Standard for Laboratories, which indicates at Article 5.4.4.1.1 that for "*Non-Threshold Substances - Laboratories are not required to quantify or report a concentration for Non-Threshold Substances*" and at Article 5.2.6.7 that the "*the Laboratory is not required to quantify or report a concentration for an analyse of non-threshold Prohibited Substances in urine Samples*". The Respondent also cites Article 6.2.4.2.2.4, which points out that "*for exogenous Threshold Substances, the "B" Sample results shall only confirm the "A" Sample identification for the Adverse Analytical Finding to be valid. No quantitation of such Prohibited Substance shall be performed.*"

- Even if the WADA Laboratories are not required to quantify or report any concentrations for Non-Threshold Substances, the Respondent provides the estimated concentration of the A Sample in equine cases when available and requested by the PR.
- Neither the laboratories nor the Respondent have the concentrations of the B Sample analysis. Since this information is not available, the Respondent cannot submit any B Sample concentrations.

## V. JURISDICTION

34. Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.*

35. Pursuant to Article 165.1.3 of the FEI General Regulations (the “FEI GR”), an appeal may be filed with CAS by any person or body with a legitimate interest against decisions rendered by the FEI Tribunal, provided it is admissible.

36. This is reiterated in the Appealed Decision, which provides that “[t]his Decision can be appealed before the Court of Arbitration for Sport (CAS) within twenty-one (21) days of the present notification”.

37. The Respondent does not object to CAS jurisdiction as it relates the disqualification of the Appellant’s Individual Results from the Event. However, considering that the FEI Tribunal did not rule on the results obtained on 27 July 2018, and noting that the internal remedies for such results had not been exhausted at the time of this appeal, the Respondent objects to the Panel’s jurisdiction as to any determination regarding the results obtained on 27 July 2018 at the Event.

38. The Panel notes that the results of 27 July 2018 do not form part of the present appeal and as such it is not necessary to consider whether or not CAS has jurisdiction as regards those results. The present appeal concerns only the results of 26 and 29 July 2018. The Panel is satisfied that CAS has jurisdiction as to these results for the reasons outlined above, something which was also confirmed by both Parties when signing the Order of Procedure.

## VI. ADMISSIBILITY

39. Article R49 of the Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*

*After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

40. Pursuant to Article 165.6.2 of the FEI GR, the time limit to appeal shall be 21 days from “the date on which the Secretary General’s notification of the FEI Tribunal Decision was received by the National Federation of the Person Responsible”.
41. The Appealed Decision was rendered and notified to the parties on 9 November 2018. The statement of appeal was subsequently filed on 15 November 2018.
42. The Respondent does not challenge the admissibility of the statement of appeal.
43. It follows, therefore, that this appeal is admissible.

## VII. APPLICABLE LAW

44. Article R58 of the Code provides as follows:

*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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

45. In both their written and oral submissions, the Parties extensively relied on and referred to the FEI GR (1 January 2018 edition) and the ECM Rules (1 January 2018 edition). Subsidiarily, both Parties rely on the applicability of Swiss law.
46. The Panel finds no reason to dispute the applicability of law chosen by the Parties.
47. The relevant rules concerning the disqualification of individual and team results are set out in Articles 9 to 11 of the ECM Rules, which provide (so far as is material to this appeal) as follows:

*As to individual results:*

### *ARTICLE 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS*

*9.1 A violation of these EAD Rules in connection with a test in a given Competition automatically leads to the Disqualification of the result of the Person Responsible and Horse combination obtained in that Competition with all resulting Consequences, including forfeiture of any related medals, points and prizes. Where applicable, consequences to teams are detailed in Article 11 below. Even if a Sanction is reduced or eliminated under Article 10 below, such reduction or elimination shall under no circumstances reverse the automatic Disqualification of Individual Results mandated by this Article 9.*

*9.2 In circumstances where the Person Responsible and Owner are informed of an Adverse Analytical Finding in accordance with Article 7.1 and (i) the B Sample analysis confirms the A Sample analysis; or (ii) the right to request the*



*analysis of the B Sample is not exercised; and (iii) where requested by the FEI and/or the Person Responsible, the matter will be submitted to the FEI Tribunal who shall decide whether or not to apply Article 9.1 at that stage of the proceedings.*

#### ARTICLE 10 SANCTIONS

##### *10.1 Disqualification of Results in the Event during which an EAD Rule Violation Occurs*

*The following rules relating to the Disqualification of results will apply:*

*10.1.1 At the Olympic Games, Paralympic Games, FEI World Equestrian Games, FEI Championships for Seniors, and Regional Games: An EAD Rule violation occurring during or in connection with an Event shall lead to Disqualification of all of the Person Responsible's individual results obtained in that Event, with any and all Horses with which the Person Responsible competed, with all Consequences (and the resulting consequences to teams as provided in Article 11), including forfeiture of all medals, points and prizes, except as provided in Article 10.1.4.*

*10.1.2 At Events other than those listed above: an EAD Rule violation occurring during or in connection with an Event may lead to Disqualification of all of the Person Responsible's individual results obtained in that Event, with any and all Horses with which the Person Responsible competed, with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.4. Where applicable, consequences to teams will take place as provided in Article 11).*

*10.1.3 Notwithstanding the above, for all Events, including but not limited to the Olympic and Paralympic Games, exceptional circumstances may be considered. Generally, and subject to 10.1.4 and 10.1.5 below, all Results from Competitions in which the Person Responsible or Horse participated prior to Sample collection shall be Disqualified unless it can be demonstrated that such Results were not likely to have been affected by the EAD Rule violation.*

*10.1.4 If the Person Responsible establishes that he bears No Fault or Negligence for the EAD Rule violation, the Person Responsible's individual results in the other Competitions shall not be Disqualified unless the Person Responsible's results in Competitions other than the Competition in which the EAD Rule violation occurred were likely to have been affected by the Person Responsible's EAD Rule violation. 10.1.5 In addition, the Person Responsible's Horse may also be Disqualified from the entire Event with all Consequences, including forfeiture of all medals, points, and prizes even if earned while being ridden by someone other than the Person Responsible, if the Horse's results in Competitions other than the Competition in which the EAD Rule violation occurred were likely to have been affected by the EAD Rule violation.*

As to team results:

*ARTICLE 11 CONSEQUENCES TO TEAMS*

*11.1 Unless otherwise provided in the FEI Regulations for Equestrian Events at the Olympic or Paralympic Games, the Consequences to teams set forth below will apply.*

*11.1.1 At the Olympic Games, Paralympic Games, FEI World Equestrian Games: If a member of a team is found to have committed a violation of these EAD Rules during an Event, the results of the Person Responsible will be Disqualified in all Competitions and the entire team Disqualified.*

*11.1.2 At all other Events than those listed above: If a member of a team is found to have committed a violation of these EAD Rules during an Event where a team ranking is based on the addition of individual results, the results of the Person Responsible may be Disqualified in all Competitions and will be subtracted from the team result, to be replaced with the results of the next applicable team member. If by removing the Person Responsible's results from the team results, the number of Athletes counting for the team is less than the required number, the team shall be eliminated from the ranking.*

*11.2 Notwithstanding the above, for all Events, including but not limited to the Olympic and Paralympic Games, exceptional circumstances may be considered.*

As to both:

*APPENDIX 1 – DEFINITIONS*

**Competition.** *As defined in the FEI General Regulations: "Refers to each individual class in which Athletes are placed in an order of merit and for which prizes may be awarded."*

**Disqualification, Disqualify, or Disqualified.** *A consequence of an EADCM Regulation violation whereby results in a particular Competition or Event are invalidated, with all resulting consequences including forfeiture of any medals, points and prizes.*

**Event.** *As defined in the FEI General Regulations: "A complete meeting, 'Show', 'Championship' or 'Games'. Events may be organised for one or more than one Discipline."*

**VIII. MERITS**

**A. De Novo Hearing**

48. The Appellant made a variety of complaints concerning the absence of "a fair and transparent hearing" before the FEI Tribunal. The Panel need not dwell on these complaints. Under Article R57 of the Code, the Panel considers both fact and law *de novo* on appeal. Accordingly, any procedural defects which (may or may not have)

occurred in the internal proceedings of a federation are in principle cured by the present arbitration proceedings before CAS (*see* F v. FINA CAS 96/156 p.61; M v. Swiss Cycling CAS 2001/A/345 at para 8). The Panel does not see any reason to deviate from this.

49. Since the Panel is conducting a *de novo* hearing pursuant to Article R57 of the Code, it will decide the appeal on the evidence before it, whether or not the same evidence was available to the FEI Tribunal, subject only to its rejection of any fresh evidence under the discretion vested in it under paragraph 3 of the same Article.
50. For this reason, the Appellant's argument concerning any perceived violation of his right to be heard before the FEI Tribunal is dismissed as moot.

## **B. Application and Interpretation of the ECM Rules**

### ***i. Disqualification of the Individual Results***

51. The Panel notes that in the Appealed Decision, the disqualification of the Individual Results has been based on Article 9 of the ECM Rules.
52. According to Article 9.1 of the ECM Rules, a violation of the ECM Rules "*in connection with a test in a given Competition automatically leads to the Disqualification of the result of the Person Responsible and Horse combination obtained in that Competition with all resulting Consequences, including forfeiture of any related medals, points and prizes.*"
53. The Appellant strongly argues that Article 9.1 of the ECM Rules shall not cause the automatic disqualification of his Individual Results because he acted with "*No Fault or Negligence*", and moreover, that the amount of the substance found in the Horse's body had no performance-enhancing effect on the Horse whatsoever.
54. At this stage, however, the Panel does not consider it necessary to determine whether the Appellant's explanation leads to "*No Fault or Negligence*" or to "*No Significant Fault or Negligence*" or if the dosage absorbed by the Horse could have a performance-enhancing effect. The factual considerations in this regard are of no importance to this Panel.
55. The wording of Article 9 of the ECM Rules is clear, strict and not open for arguments based on "*No Fault or Negligence*" or "*No Significant Fault or Negligence*". Based on the information submitted to the Panel, the automatic disqualification of individual results has been consistently followed by the FEI Tribunal in positive doping cases, in application of Article 9 ECM Rules, with the rationale of protecting horse welfare and to ensure a level playing field.
56. Article 9 ECM Rules mirrors Article 9 of the World Anti-Doping Code ("WADC"), which requires the automatic disqualification of individual results in doping cases. (See i.a. also Beloff, 'Drugs, Laws and Versapaks' in *Drugs and Doping in Sport*, Cavendish, 2001, pp 39 and 45: "*there can be no objection in principle from disqualifying anyone who has won a race with the aid of drugs, even though he, she or it was entirely innocent*")

*in the matter.*" See also 2013/A/3370 UCI v. Jack Burke and Canadian Cycling Association.)

57. The Panel is cognizant of the Appellant's argument that the wording "*Notwithstanding the above...*" at Article 11.2 of the ECM Rules allows it to consider "*exceptional circumstances*". But such an assertion is misplaced here. "*Exceptional circumstances*" can only apply with respect to the provisions of Article 11 concerning the consequences to teams, not to the Appellant's Individual Results.
58. The Panel is satisfied that the requirements foreseen under Article 9.2 ECM Rules were and are fulfilled (i.e. an Adverse Analytical Finding, identification of the Person Responsible and the Owner concerned, confirmation of the finding through the B Sample etc.). Consequently, the arguments raised by Appellant against the disqualification of the Individual Results fail, at least as far as they are directed against the application of Article 9 of the ECM Rules.
59. For these reasons, in accordance with Article 9 ECM Rules, the Panel is satisfied that the Individual Results of the Appellant shall be disqualified. It remains acknowledged that the Appealed Decision explicitly left open the issue whether or not other individual sanctions had to be imposed on the Appellant, referring this issue to a decision that the Respondent's bodies had still yet to take at the time that the Appealed Decision was rendered. This issue is, therefore, not part of this Appeal.

***ii. Subtraction of the Appellant's Results of 26 July 2018 from the Team Result***

60. The Panel appreciates the Parties' vigour in their submissions and oral arguments on issues concerning the subtraction of the Appellant's Results of 26 July 2018 from the Team Result. The issues brought forth required significant deliberation and the Panel has extensively discussed and analysed the Parties' arguments. The Panel's findings are as follows:

**Standing to sue**

61. The Panel recognizes a legal paradox as it relates to the Appellant's standing to sue which, while not raised by the Parties, gives the Panel pause. Therefore, for the purposes of completeness, the Panel wishes to explore this issue.
62. The Appellant filed his appeal individually – not on behalf of or with his team, and not alongside his national federation. So on the face of it, the Appellant's appeal could be said to (with respect to standing) only affect him personally. But this is not correct *in factum*, because the crux of the appeal concerns the subtraction of the Appellant's Results of 26 July 2018 from the Team Result. Indeed, as a consequence of such a subtraction, the team is eliminated from the rankings since, without the Appellant, only two team members remained and this number is insufficient for participation in the Event. In other words, the Appellant's appeal sought to recover his Individual Results, which in turn would positively affect the Team's Result. So the Panel asks: does the Appellant have standing to sue when the effects of his claim not only impact him, but also his teammates and national federation who are not a party to the procedure?

63. The Panel highlights that the team, which can only be represented by the Venezuelan National Association, has apparently not appealed against the FEI Decision. And one could argue that the Appellant, as a single member of the team, has no legal standing to bring a claim on behalf of his team.
64. This said, the Appealed Decision does not directly concern the disqualification of the team results. On the contrary, the Appellant's Results of 26 July 2018 were subtracted from the Team Result and the Respondent highlighted on different occasions during the present proceedings that the FEI Tribunal did not rule on whether or not the team results should be disqualified.
65. Nevertheless, and notwithstanding the foregoing, the Panel notes first that the Appellant's standing to sue has never been challenged. In addition, the Panel is of the opinion that the addressee of a decision always has standing to sue according to Swiss Law. Against this background, the Panel confirms that the Appellant has standing to bring this appeal as filed.

#### **Wording of Article 11 of the ECM Rules**

66. The wording of the applicable rules has created an issue for the Panel in determining whether the Respondent had a clear and valid legal basis for the subtraction of the Appellant's Results of 26 July 2018 from the Team Result, and whether the FEI Tribunal in the Appealed Decision correctly applied the ECM Rules.
67. In this respect, sections 10.14 and 10.15 of the Appealed Decision read as follows:

*“Pursuant to Article 11.1.2 of the ECM Rules, the results of the PR and Horse combination from the Team Competition on 26 July 2018 shall be subtracted from the team result, and consequences to the VEN team, such as elimination from the CAC Games Team Competition, following from the disqualification of the PR and Horse combination included in this Decision, have to be calculated in accordance with the CAC JRs.*

*Lastly, the Tribunal finds that any other sanctions as defined in Articles 10 and 11 of the ECM Rules shall only be determined in a Final Decision following a hearing, as requested by the PR and to be held at a time to be determined later. The foregoing also includes disqualification with regards to results of 27 July 2018.”*

68. When examining Article 11 of the ECM Rules, and when trying to garner the actual meaning of its content, the Panel must interpret the wording therein objectively. The Panel considers first the wording by looking at the linguistics in application to the circumstances, and trying to identify the intention of the draftsman (i.e. the ruling body). Moreover, the Panel must explore their regulatory context and how the addressees of the rules could understand them, in good faith.
69. The Appellant argues that the subtraction of his Results of 26 July 2018 from the Team Result represents a disciplinary sanction against the team, for which the Respondent has no legal basis. Conversely, the Respondent frames the subtraction of the Appellant's Results of 26 July 2018 from the Team Result as a natural consequence of the automatic disqualification of the Individual Results, over which it has no discretion.

70. By reading the ECM Rules, the Panel notes that the terms defined in the Appendix 1 are generally written in italics with the first letter capitalized, for instance “*Competition*”, “*Disqualification*” and “*Person Responsible*”. However, this is not the case for the terms “Consequences” and “Individual Results”. In fact, this section of the ECM Rules derives partially from the WADC. As the ECM Rules introduction states, they have “*been modeled after the 2015 WADA Model Code for human athletes*” and “*are adopted and implemented [...] in the spirit of the World Anti-Doping Code [...]*”. While this is arguably an oversight on the FEI’s part, the definition of “Consequences” in the WADC is informative.
71. The WADC provisions that must be incorporated into signatories’ anti-doping rules ‘without substantive change’ are Article 1 (Definition of Doping), Article 2 (Anti-Doping Rule Violations), Article 3 (Proof of Doping), Article 4.2.2 (Specified Substances), Article 7.6 (Retirement from Sport), Article 9 (Automatic Disqualification of Individual Results), Article 10 (Sanctions on Individuals), Article 11 (Consequences to Teams), Article 13 (Appeals), Article 15.4 (Mutual Recognition), Article 17 (Statute of Limitations), Article 24 (Interpretation of the Code), and Appendix 1 (Definitions). If read in line with the WADC, it is possible to ascertain, or at least speculate from an informed position, how the FEI drafted its rules:
- As detailed above, Article 9 WADC mandates an International Federation to automatically disqualify the individual results of an athlete for the competition in which he or she committed a doping violation. The FEI drafted Article 9.1 of the ECM Rules accordingly, meaning that the Appellant’s Individual Results must automatically be disqualified.
  - In connection with the question whether a violation of the ECM Rules by a Person Responsible shall have a consequence for his or her team, Article 9.1 of the ECM Rules is clear and reads as follows: “*Where applicable, consequences to teams are detailed in Article 11.*”
  - The Panel needs therefore to turn its attention to Article 11 of the ECM Rules.
  - Article 11.1.1 of the ECM Rules provides for a mandatory disqualification of the results of the Person Responsible and the disqualification of the entire team in case of a violation of the ECM Rules by a team member, if such violation occurred at the Olympic Games, the Paralympic Games or the FEI World Equestrian Games.
  - For all other events, including the CAC games, Article 11.1.2 indicates that there is no mandatory disqualification. In fact, Article 11.1.2 reads as follows: “*At all other Events than those listed above: If a member of a team is found to have committed a violation of these ECM Rules during an Event where a team ranking is based on the addition of individual results, the results of the Person responsible may be Disqualified in all Competitions and will be subtracted from the team result [...].*”
72. The Appealed Decision orders the subtraction of the Appellant’s Results of 26 July from the Team Result by referring simply to Article 11.1.2: “*[...] pursuant to Art. 11.1.2 of the ECM Rules, the results of the PR [...] shall be subtracted from the team result [...].*”

The FEI Tribunal does not provide any guidance as to on which basis it decided to use its discretionary power granted under Article 11.1.2 in such a manner.

73. The Respondent asserts that a logical and factual interpretation of the ECM Rules dictates the automatic subtraction of the Appellant's Results of 26 July from the Team Result because it is an implicit requirement to ensure effectiveness of the ECM Rules. The Panel is not convinced.
74. The Panel bears in mind that the word "*may*" in Article 11.1.2 refers to a choice to act or not, while Article 9.1 as well as Article 11.1.1 make the disqualification imperative by articulating that a violation "*automatically leads*" to it.
75. For comparative purposes, the Panel makes reference to other associations' rules where the subtraction is undoubtedly automatic and where discretion is not an option for the ruling body. For instance, Article 11.3 of the Fédération Internationale de Motocyclisme (FIM)'s Anti-Doping Code reads as follows: "If a member of a team is found to have committed a violation of these Anti-Doping Rules during an Event (Competition) where a team ranking is based on the addition of individual results, the results of the rider committing the violation will be subtracted from the team result and replaced with the results of the next applicable team member" [emphasis added].
76. The same applies for Article 11.2 of the International Association of Athletics Federations (IAAF) Anti-Doping Rules, according to which: "Where the Athlete who has committed an Anti-Doping Rule Violation competed as a member of a team other than a relay team, in an Event where a team ranking is based on the addition of individual results, the team shall not be automatically disqualified from the Event in question but the result of the Athlete committing the violation will be subtracted from the team result and replaced with the result of the next applicable team member" [emphasis added].
77. Therefore, the majority of the Panel is of the opinion that the word "*may*" within Article 11.1.2 should not and cannot be interpreted as a "*must*". The members of the Panel discussed but did not share the Respondent's interpretation that Article 11.1.2's language "*may be Disqualified in all Competitions*" should be interpreted to mean all *other* Competitions: The precise language of Article 11.1.2 does not provide anything specific regarding an automatic subtraction/disqualification of team results.
78. In this respect, the majority of the Panel finds these applicable rules clear and therefore determines the FEI had no legal ground to *automatically* subtract the Appellant's Results of 26 July from the Team Result.
79. Separately, the well-established CAS jurisprudence has repeatedly indicated that the rules must be constructed *contra proferentem* and that in principle 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 & CAS 2017/A/5006 para.187 with further references).
80. The Panel notes that even if it were to have concluded there was a lacuna in the rules and that Article 11 should have been construed according to this principle, the obvious ambiguity of the rules would have also resolved in favor of the Appellant with the

consequence that there would be no clear and binding legal basis which would provide for the Appellant's Results of 26 July to be automatically subtracted from the Team Result. Thus, applying this principle would have led to the same conclusion, i.e. that there is no legal basis for a mandatory and automatic subtraction in question.

81. This said, Article 11 of the ECM Rules makes as described above an explicit differentiation for different events. Whether the event at stake falls into the category of Article 11.1.1 or 11.1.2 determines which rule the Panel will use in applying the consequences to teams. Once this is established, the Panel is of the opinion that Article 11, with respect to the Event, is comprised of two prongs:

*i. First Prong: Discretion under Article 11.1.2 of the ECM Rules*

82. The Event concerns Article 11.1.2 of the ECM Rules, which reflects the idea that team results “*may be disqualified*”. Unlike 11.1.1, Article 11.1.2 gives a power of discretion with regard to the team results, i.e. the latitude to decide what should be done in a particular case based on ordinary circumstances.
83. The Appealed decision did not evaluate whether the power of discretion under Article 11.1.2. ECM Rules had or could be used in favour of Appellant. This question must now be answered by the Panel.
84. As a first consideration, the Panel is of the view that the aim of Article 11.1.2 of the ECM Rules has to be taken into account. It primarily regulates the outcome of the team results if a PR has committed a violation of the ECM Rules in one competition, whereas no further tests occurred following the other competitions at an event. It would be possible in a case where the other competitions’ results were influenced by a doping violation, but this fact could not be proved here since further testing did not occur. In order to avoid this, Article 11.1.2 grants discretion to the sanctioning body to act flexibly and considering all the circumstances of the case at hand, which could not occur if such discretion was denied to the governing body.
85. The nature of a provision like Article 11.1.2 of the ECM Rules (“...*may*...”) requires the exercise of discretion, which the FEI arguably has not established regarding the subtraction of the Appellant’s Results of 26 July from the Team Result. Discretionary decision-making occurs when there is no definite and automatic outcome dictated by the rules. In the case at hand, the use of the word “*may*” is a strong indicator as Article 11.1.2 does not command a specific outcome, i.e. the automatic disqualification of team results.
86. Since the Respondent failed to exercise any discretion in this matter, the Panel needs to ensure its inclusion by exercising discretion in the FEI’s stead, taking due account of all the circumstances of the case. These include the absence of doubt relating to the sample’s analysis and the uncontested presence of the Prohibited Substances identified in the Horse during the Event.
87. Further, the Respondent expressed the following reasons for the enforcement of the automatic disqualification of the Individual Results and the subtraction from the Team Result of the Appellant’s Results of 26 July:



- Protection of the horses' welfare;
- Safeguard of the level-playing field; and
- Preservation of the public's interest and perception of equestrian sport.

88. The Panel recognizes that these reasons are a basis for any federation to maintain stringent anti-doping regulations. Indeed, all anti-doping regulations not only seek to safeguard a level playing field on which a participant, human or equine, gains no unfair advantage from prohibited substances, but also to protect their health. Moreover, horses cannot exercise all reasonable care to avoid the ingestion of prohibited substances, in contrast to humans. They are, in most respects, victims of the actions (or inactions) of their owners, trainers, doctors, and riders. However, if the Respondent indeed wished to apply such principles in a stringent manner, this would not be in line with a power of discretion that the Respondent has decided to leave to the deciding body, when evaluating whether or not in certain competitions, individual results obtained by a rider shall be detracted or not from any team results. In other words, were the Respondent indeed to opt for such an approach, it would have to amend the ECM Rules accordingly, and follow the route chosen by other international federations, as described above.
89. The Panel is of the view, that whether or not individual results shall be subtracted from team results under Article 11.1.2 ECM Rules depends on the specific circumstances of every given case. No judicial body can properly apply a power of discretion, without evaluating carefully and in all detail the individual facts of the case.
90. On the basis of the evidence submitted, in particular, that the Horse tested positive on 26 and 29 July, 2018, at considerably high levels, and was the only Horse to test positive for caffeine of the 30 samples taken from other horses at the CAC Games, the Panel is satisfied that the present circumstances support a proper and appropriate use of the discretionary power afforded, leading to the subtraction of the Individual Results from the Team Results.
91. For all these reasons, the Panel uses its discretion pursuant to Article 11.1.2 to conclude that the subtraction of the Appellant's Results of 26 July from the Team Result is justified and shall be imposed in accordance with the specific circumstances of this case.

***ii. Second Prong: Exceptional Circumstances under Article 11.2 of the ECM Rules***

92. The Panel still has to determine, in a second step, if "*exceptional circumstances*" exist and may be considered in the case at hand. Indeed, the Panel believes that Article 11.2. ECM Rules gives to the judiciary body a discretionary power to determine different consequences to teams in case of "*exceptional circumstances*". To this extent, the Panel shares the view of Appellant that the wording of Article 11.2. ECM Rules does not provide the basis for an automatic, mandatory or "blind" deduction of individual results from team results.
93. More specifically, Article 11.2 points out the contemplation of "*exceptional circumstances*" with regard to the team's consequences in all events, "*including but not limited to the Olympic and Paralympic Games*". Indeed there might be "*exceptional*

*circumstances*” in particular cases, which require that the team does not have to suffer for the wrongdoing of a single team member.

94. The Panel observes that the wording of Article 11.2 of the ECM Rules does not contain any restrictions whatsoever with respect to “*exceptional circumstances*” about an individual team member, which would justify a reduction of any sanctions against him as regards the entire team.
95. The Panel has to examine again the circumstances of this case. The Panel is satisfied that the threshold for applying “*exceptional circumstances*” must necessarily be set very highly, as the concept of “exceptional” entails.
96. Discretion must be exercised in accordance with the principle of proportionality. Thus, as already mentioned above, the Panel analysed the specific circumstances of the present case, namely:
  - Were the substances involved Controlled Medications rather than doping substances?
  - What was the level of the substances detected in the Samples and was such a (low) amount capable of any performance-enhancing or therapeutic effect?
  - Do the violations raise issues as to the welfare of the Horse?
  - Did the Appellant seek or obtain any actual unfair sporting advantage from the doping offence?
  - In connection with the applicability of Article 11.2 of the ECM Rules, were there in the present case circumstances that can be considered to be of an extraordinary nature?
97. The Panel is aware that the Appellant has been disqualified previously (at the CAC Games in November 2014) for an anti-doping rules violation.
98. Regardless of the above-mentioned, the categories of Specified Substances and of Controlled Medications both recognise that certain substances may be present for credible reasons not related to intentional doping, and apply more flexible sanctioning regimes accordingly. The rationale for each of these is however quite different. In the case of Controlled Medications, the concern is for the welfare of the horse, while the concern with Specified Substances remains the risk of doping to enhance performance.
99. The Panel notes that the impact of caffeine, as a performance-enhancing or welfare-threatening substance, is neither clearly nor sufficiently evidenced in the record. The Appellant argues that there is no evidence that the performance of the Horse would have been affected or that it would have obtained some unfair competitive advantage. Nevertheless, the Panel observes that the Appellant did not comment on the Horse’s welfare, which may have been affected. It appears, however, that the Horse did not compete again for more than six months following the Event.

100. Following the Appellant's approach, which the Panel considers to be credible, there is insufficient evidence indicating that there was an intention on the Appellant's part to enhance the Horse's performance or to acquire an unfair advantage. However, it must be noted that although the entire Venezuelan team's feed was delayed at customs, and thus other team members used feed provided by the Organizing Committee, no other horse tested positive for theophylline or caffeine.
101. Further, the Respondent was wrong in finding it unnecessary to address the issue of "*exceptional circumstances*" at the hearing, based on an interpretation of its rules. Nevertheless, one can certainly not assume that "*exceptional circumstances*" exist solely on the premise that they are not explicitly and duly challenged by a party.
102. While the Respondent was regrettably not ready to enter a debate regarding the "*exceptional circumstances*", the Respondent contested the entitlement of the Appellant to have his Individual Results be counted in favor of his team. Hence, the Panel does not feel comfortable assuming "*exceptional circumstances*" apply to the case by purely relying on the fact that the Respondent did not fully argue this matter at the hearing.
103. Not least due to the lack of any submissions and/or evidence from the Respondent, i.e. absence of statements from experts, doctors, members of the OC, responsible person etc., the Panel identifies several negligent omissions and failures of information on the part of the FEI towards its members, namely:
- The Respondent knew of the issue regarding the horse feed contamination from caffeine in Colombia, but did not warn the participating teams about it. The Respondent failed to disclose the potential risks while it failed to provide any proposal to prevent possible contamination and the endangerment of the health of horses.
  - The Respondent was made aware of this problem, namely during the Bolivarian Games of 2017. The Presidents of several National Federations, including Venezuela, sent a letter to the Respondent complaining about the entrance of horses and feed into Colombia. Notwithstanding this warning notice, neither the Respondent nor the President of Venezuela's National Federation notified the Venezuelan competitors of this concern. The Panel believes the Respondent was negligent in failing to further investigate the situation in Colombia or set the minimum level of conduct required by its members.
  - The Respondent was made aware of this problem during the Bolivarian Games of 2017. Notwithstanding the warning notices it had received in connection with this concern from its members, the Respondent exposed all competitors to a risk of caffeine contaminations by failing to set the required safety measures for participating at a location where this was a known issue. On the basis of the evidence made available to this Panel by the Appellant, Colombia was arguably an inappropriate venue for the Event and the Respondent was negligent in failing to further investigate the situation in Colombia or set the minimum level of conduct required by its members in order to avoid positive testing due to feed contamination.

- The Respondent had knowledge of the customs issues in Colombia, but did not notify the Venezuelan team. Moreover, the Respondent let the OC offer feed to every competitor while it was alleged to be potentially contaminated with caffeine and subject to eventual positive tests. Nevertheless, the Panel observes that no other horses tested positive for theophylline or caffeine at this Event.
- The other national federations were never informed that the Colombian national federation, in cooperation with the Colombia FEI Officials, provided a sealer and plastic bags to keep feed samples at the Event. The Veterinary Commission provided the sealer and plastic bags and notified veterinarians at a meeting, but not all veterinarians were in attendance.

104. In the Panel's opinion, the Appellant cannot be totally faulted for the negligence of the Respondent, especially where the task of making certain important disclosures as listed above was not an unreasonable or overbearing one. The Respondent could have simply raised a few important red flags in preparation for the Event.

105. However, the Panel considers the aforesaid wasn't enough to conclude that exceptional circumstances exist in this case, as the test of exceptionality is naturally and necessarily a very high bar. In particular, the undisputed fact that the Horse was the only horse which tested positive for the reported substances at the Event, makes very difficult to establish a link between the failures by Respondent and the local organisers of the Event on the one hand, and the presence of these substances in the Horse's sample on the other.

106. The Panel bears in mind that it is the duty of a Person Responsible to ensure that no Prohibited Substance is present in the Horse's body. Furthermore, of the thirty horses tested, including another horse from the Venezuelan team, no other horses tested positive due to feed contamination at the Event.

107. Consequently, the Panel considers that "*exceptional circumstances*" do not arise on the facts as found in this case. Therefore, Article 11.2 ECM Rules cannot be applied.

108. The Introduction of the ECM Rules stipulates that "*the policies and minimum standards set forth in these Regulations 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*". The discretionary power under 11.1.2 and the power to consider extraordinary circumstances under Article 11.2 were thereby framed within the ECM Rules, to be followed by the relevant decision-makers. The Respondent failed to do this. For this reason, the Panel, as an adjudicating body, was required to exercise such powers by respecting "*the policies and minimum standards set forth in these Regulations*".

109. Within the sphere of the powers provided by Article 11, the Panel finds the subtraction of the Appellant's Results of 26 July from the Team Result to be justified. While the automatic disqualification of the team results was not an unreasonable decision from the Respondent, it did not respect its own rules.

110. The Panel believes the Appealed Decision was, to a certain extent, not correctly argued, and the same applies to the Answer filed by Respondent before CAS. The ECM Rules may be perhaps wrongly conceived, but they do not clearly provide for the automatic

disqualification of individual results from a team result, except for in connection with the events listed in Article 11.1.1.

111. The Panel, in accordance with its *de novo* power under Article R57 of the CAS Code, verified and applied the discretionary power granted by the ECM Rules. The urgency of the matter *de facto* did not allow the Panel to send the matter back to the previous instance.
112. In summary, the current ECM Rules effectively establish a two-class system of competitions. The automatic disqualification of individual results of riders for the team results is foreseen only in the competitions listed in 11.1.1.
113. If it is the FEI's intention to develop comprehensive anti-doping rules which properly reflect the fundamental rationale behind them of maintaining a clean sport, as enshrined in the WADC, then it is its own responsibility to do so. The Panel's role is to uphold the rules and act as an adjudicating body, not as a legislative one. It is not for the Panel to express views on legislative decisions taken by an International Federation when issuing its rules and regulations. If the FEI wished to apply the automatic disqualification of the team results to all competitions, it could have drafted the ECM Rules differently.

## IX. CONCLUSION

114. Considering the foregoing, the Panel finds that the appeal filed by the Appellant shall be dismissed. Consequently, the results of the PR and Horse combination of the Competition of 26 and 29 July 2018 shall be disqualified and the individual results of the PR and Horse combination from the Team Competition of 26 July 2018 shall be subtracted from the team result.

## X. COSTS

115. Article R65.1 of the Code provides as follows:

*This Article applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body.*

116. Moreover, Article R65.2 sec. 1 of the Code provides that these proceedings "*shall be free*" which means that the costs for the arbitration, as set forth in Article R65.2 sec.1 second sentence of the CAS Code, are borne by CAS. Therefore, considering that this is an appeal against a disciplinary decision rendered by an international federation, the Panel must apply Article R65 of the Code with regards to the costs.

117. Separately, as a general rule, Article R65.3 of the Code provides as follows:

*...in the arbitral award, the Panel has the discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred on connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*

118. Having taken into account the outcome as well as the specificities of the present proceedings, the Panel finds it reasonable that each party shall bear its own costs and other expenses incurred in connection with this arbitration.

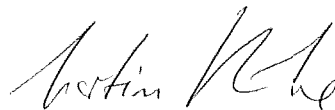
## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Pablo Barrios on 15 November 2018 against the Fédération Equestre Internationale (FEI) with respect to decision rendered by the FEI Tribunal on 9 November 2018 is dismissed.
2. The decision rendered by the FEI Tribunal on 9 November 2018 is confirmed.
3. The award is pronounced without costs, except for the Court Office fee of CHF 1000 (one thousand Swiss Francs) paid by Mr. Pablo Barrios, which is retained by CAS.
4. Each party shall bear its own costs and other expenses incurred in connection with this arbitration.
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland  
23 September 2019  
Operative Part issued on: 15 April 2019

## THE COURT OF ARBITRATION FOR SPORT



Prof. Dr. Martin Schimke  
President of the Panel