Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2014/A/3591 Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan v. Fédération Equestre Internationale (FEI)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr John A. Faylor, attorney-at-law in Frankfurt am Main, Germany
Arbitrators: Mr. Mark Hovell, solicitor in Manchester, England
Mr. Paul David QC, barrister in Auckland, New Zealand

in the arbitration between

Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan

Represented by Mr. Adam Lewis QC, barrister, and Mr. Nilo Effori, Mr. Karel Daele, Ms. Ramona Mehta and Ms. Emma Woollcott, Mishcon de Reya Solicitors, London, England

Appellant

and

Fédération Equestre Internationale (FEI)

Represented by Mr. Jonathan Taylor and Ms. Lauren Pagé, Bird & Bird LLP, London, England

Respondent

I. PARTIES

1. His Highness Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan (the "**Appellant**") is an endurance rider of the United Arab Republic ("**UAE**") with his residence in Abu Dhabi. He is registered with the United Arab Emirates Equestrian and Racing Federation ("**UAE National Federation**"), which is, in turn, a member national federation of the Fédération Equestre Internationale.

2. Fédération Equestre Internationale ("**FEI**" or the "**Respondent**") is the international governing body for equestrian sports. It has its registered seat in Lausanne, Switzerland.

II. FACTUAL BACKGROUND

A. Background Facts

3. On 11 February 2012, the Appellant competed as rider on the horse Glenmorgan (the "**Horse**") in the CEI3* 160 KM in Abu Dhabi, Al Wathba, UAE, also known as the President's Cup, in the discipline of Endurance (the "**Event**").

4. Immediately after winning the Event, the Horse was taken for anti-doping sampling in accordance with the FEI Equine Anti-Doping and Controlled Medication Regulations, effective 5 April 2010 with updates effective 1 January 2012 (the "**EADCM Regulations**").

5. The EADCM Regulations are comprised of two chapters, the Equine Anti-Doping Rules (the "**EAD Rules**") and the Equine Controlled Medication Rules (the "**ECM Rules**"). The distinction between Banned Substances under the EAD Rules and controlled medication substances under the ECM Rules did not take effect until the effective date of the new EADCM Regulations on 5 April 2010.

6. The results of the A-Sample Analysis notified on 12 March 2012 revealed the presence of Propoxyphene and Norpropoxyphene. Propoxyphene is a Prohibited Substance under the FEI Equine Prohibited Substances List (the "**List**", Annex II of the FEI Veterinary Regulations). The analysis was performed by the Hong Kong Jockey Club Racing Laboratory ("**HKJC**").

7. Propoxyphene is an opiate analgesic, used for the treatment of pain. Norpropoxyphene is a metabolite of Propoxyphene. Both substances are classified as "**Banned Substances**" under the EAD Rules, the presence of which in the Horse constitutes an Anti-Doping Violation.

8. As the Person Responsible ("**PR**") pursuant to the EADCM Regulations, the Appellant was immediately suspended as of 12 March 2012. The Horse was also provisionally suspended as of the same day for a period of two (2) months.

9. Following a Preliminary Hearing before the FEI Preliminary Panel on 2 April 2012, the provisional suspension of the Appellant was maintained, pending a decision of the

FEI Tribunal based upon the explanation and evidence which the Appellant would submit in the course of the proceedings.

10. The B-Sample Analysis was performed by Laboratoire des Courses Hippiques on 12 April 2012. The results of the B-Sample Analysis confirmed the results of the A-Sample Analysis.

11. Between 19 June 2012 and 24 February 2014, the Appellant conducted extensive investigations to establish the source of the Propoxyphene contamination and various submissions were made to the FEI Tribunal. During this period, the proceedings rested with the provisional suspension remaining in effect.

12. The FEI Tribunal rendered its Decision on 7 April 2014. The Appellant was found to be guilty of the Anti-Doping Violation. The FEI Tribunal imposed a two (2) year and three (3) month period of ineligibility under the EAD Rules with the three (3) month period representing an increased period of ineligibility due to Aggravating Circumstances resulting from a previous doping rule violation in 2005 (CAS 2005/A/895).

13. The Appellant was also fined five thousand Swiss Francs (CHF 5,000.00) and ordered to contribute another two thousand Swiss Francs (CHF 2,000.00) towards the legal costs of the FEI Tribunal procedure.

B. Proceedings before the FEI Tribunal culminating in its Decision of 7 April 2014

(1) The Parties' Submissions and Evidence

14. The Appellant did not dispute the results of the laboratory analyses or the fact that an Anti-Doping Violation occurred.

15. The Appellant submitted already in June 2012, upon commencement of the proceedings before the FEI Tribunal, the report of an expert witness, Dr. Mark Dunnett, which confirmed that the A- and B- (Blood) Sample analyses had been performed correctly. The expert stated that there was no legitimate use for Propoxyphene in horses, and that, based on estimated concentrations of the substances found in the A- and B-Samples, administration of the Propoxyphene had occurred probably eleven (11) to nineteen (19) hours prior to sample collection.

16. The Appellant's initial submissions were to the effect that a thorough investigation by an independent company had not discovered the source of the prohibited substance in the Horse's sample, but that the risk of deliberate contamination by staff at the stables was very low and stringent measures including pre-race testing were in place to prevent positive tests (and had been negative on the Horse), and that he had not signed to be the PR and that the responsibilities of a PR under the FEI General Regulations did not fit with the actual role of the Appellant as rider of the horse nor with the nature of endurance racing in the Middle East.

17. The Appellant further submitted that a doping violation under the earlier FEI rules found by CAS in 2005 could not be considered as an aggravating factor where no period of ineligibility or fine had been imposed for the violation.

18. The FEI response was, in summary, that the Appellant must be considered the PR under the EAD Rules because he had been the rider at the Event and there was no basis not to apply the EAD Rules, that the Appellant could not establish the source of the prohibited substance and that accordingly there could be no reduction in the two (2) year period of ineligibility. In addition, the earlier CAS finding of an anti-doping rule violation in 2005 should be considered an aggravating feature.

19. After this exchange the Appellant sought time to respond to the FEI submission and subsequently provided a further statement and submission. This further statement from Dr Syed Kamaal Pasha, the Chief Veterinarian at the Stables, provided an explanation of the way in which the prohibited substance had come to be in the Horse's sample.

20. The Appellant also submitted additional witness statements at the beginning of the proceedings from key members of the support personnel employed by W'rsan Stables, the home stable of the Horse. Among these were the statements of Dr. Syed Kamaal Pasha, Chief Veterinarian of W'rsan Stables, Mr. Majid Ali Al Kayoumi, Racing Manager, Dr. Jose de Souza Meirelles, Deputy Stable Manager and Horse Physiologist and Nutritionist, Mr. Yahia Mohamed Hamid, Mr. Mohamed Adam Eina, both grooms/riders and Mr. Elliot David Hall, director of Penumbar Partners, a company based in London engaged in investigatory and due diligence services.

21. One year later, in September 2013, the Appellant provided an additional submission containing a supplemental statement by W'rsan's chief veterinarian, Dr. Pasha. In this statement dated 31 July 2013, the veterinarian stated the following:

- Around the same time as the Event, three other horses from another stable within the UAE had also tested positive for the substance Propoxyphene.
- Tests conducted by this competing stable on a quarantined horse to which a product called FUSTEX, produced by a company named Chinfield S.A. in Argentina, had been administered, resulted in a positive result for Propoxyphene.
- Following these findings, additional tests were conducted on the product FUSTEX through the UAE National Federation. These analyses performed by the HKJC and the Abu Dhabi Police laboratories revealed the Banned Substance FUSTEX.
- Following these findings, Dr. Pasha had, on his own initiative, requested laboratory tests with the Abu Dhabi Police and the HKJC in December 2012 and February 2013, respectively. These results also revealed the presence of Propoxyphene in FUSTEX.
- It was only upon the receipt of these two FUSTEX analyses that he remembered having himself administered 1 cc of FUSTEX to the Horse as a "pick-me-up" after the Horse had completed its pre-race training on the evening of the day prior to the endurance race, i.e., on 10 February 2012.
- It was his intention with this FUSTEX injection to help the Horse to relax after the hard pre-race training, "even though the Horse seemed fine."

- Dr. Pasha remembered having been told by another veterinarian that FUSTEX was a good and effective pre-race muscle stimulant and was freely marketed by Gulf Center in Bhuraimi, Oman. This veterinarian, whose name was "Federico", had given him a vial of the product and had spoken positively about the product. This had taken place prior to the Event.

- Dr. Pasha further stated that the vial had been given to him in a branded box. The vial was sealed and contained the manufacturer's leaflet. He had checked all the ingredients listed on the product's leaflet and the insert did not list Propoxyphene.

- Following receipt of the vial, he placed it in his emergency medical kit. Because he had received the vial from a fellow veterinarian, he had not recorded it in his log book of purchases. He had no reason to believe the medication contained a Banned Substance.

- He claims to have informed the Stable Manager, Mr. Al Kayoumi, that he was intending to administer FUSTEX to the Horse and that he had not used the product before. He told Mr. Al Kayoumi in answer to his question that he believed at that time that the substance did not contain any Prohibited Substances.

- In a leaflet (which was provided to the FEI Tribunal and was before this Panel), it was stated merely that each 5 ml of FUSTEX contained 250mg of "Paradiphenbutirate" and 5 ml of formulation agents.

22. Upon receipt of this submission, the Respondent requested additional time in order to investigate the Appellant's claim that the Propoxyphene contained in the FUSTEX was the source of the contamination. The FEI Tribunal granted this extension request until 24 February 2014. The supplemental response from the Respondent of the same day included the following additional submissions:

- In the expert witness statement of Dr. Stuart Paine, Associate Professor Veterinary Pharmacology at the University of Nottingham, England, Dr. Paine came to the conclusion that it was "plausible" that the content of the vial of FUSTEX administered to the Horse on the evening before the Event had caused the positive finding, provided, however, that the vial administered had contained the same content as the sample of FUSTEX analysed by Dr. Paine's laboratory.

- Dr. Paine also stated that Propoxyphene was not a muscle stimulant, as contended by the Appellant, but a narcotic analgesic, or pain killer.

- Dr. Paine also explained that the term "Paradiphenbutirate" was a term that was "unknown, complex, fictitious and meaningless from the chemical point of view." He further claimed that Dr. Pasha should have recognized from the leaflet the names of the recommended antagonist drugs, nalorphine and levalorfan. These are opiate reversal agents. Hence, Dr. Pasha should have recognized that he was dealing with a *mu opioid* agonist, with pain-killing and anaesthetic properties.

23. The Respondent further submitted that it had contacted the manufacturer, Chinfield S.A., in Argentina to inquire about the content of FUSTEX. It was informed by the Director, Mr. Enrique Fischer, that the product FUSTEX contained Dextropropoxyphene, that for "commercial reasons", the name "Paradiphenbutirate" had been used instead, and that Paradiphenbutirate had been accepted as being synonymous for Dextropropoxyphene by Argentina's official organisation of Registration of Veterinary Products, SENASA.

24. In addition to the foregoing, the Respondent also submitted a statement from Dr. Terence See Ming Wan, Director of HKJC which stated that in 2009, the HKJC had been requested by a forensic laboratory in Abu Dhabi to analyse a sample of FUSTEX. This analysis resulted in a positive finding for Stanozolol. Dr. Wan also confirmed that the name of the product's main ingredient, Paradiphenbutirate, is not a real chemical term and meant nothing to any qualified chemist.

25. The Respondent concluded on the basis of its own evidence that (1) it was possible that the FUSTEX administered to the Horse had caused the positive finding, but it could still not be excluded that the FUSTEX actually administered to the Horse on the eve of the Event contained other substances such as Stanozolol; that (2) the tests performed by the Appellant on subsequent samples of FUSTEX were not conclusive in that there was no proof submitted regarding the source of those samples or information on the chain of custody; and (3) that the Appellant had submitted no supporting evidence with respect to his allegation that two or three other horses in the UAE had also tested positive for Propoxyphene following administration of FUSTEX.

26. The Respondent also cited the negligence of the veterinarian, Dr. Pasha, who, with the intention of enhancing the Horse's performance, had used a product unknown to him at the time, relying on the dubious representations made on the leaflet and the oral feedback by a fellow veterinarian. The Respondent's experts were able to confirm that the term "Paradiphenbutirate" was a meaningless name and that Dr. Pasha should have investigated it.

27. The Respondent attributed the fault of Dr. Pasha to the Appellant, citing the decisions of the FEI Tribunal which are based on the principle that competitors, meaning the PRs, are responsible for the fault or negligence of their support personnel and the care given their horses. PRs must ensure that their support personnel -- by means of procedures and protocols, checks and personal responsibility – are aware that Prohibited Substances, even if authorized, must be treated as extremely dangerous products which can lead to positive doping findings with all of their attendant consequences.

28. Finally, the Respondent refused to accept the Appellant's argument that "Aggravating Circumstances" were not applicable in the case at hand, pointing out that in 2005 a completely different system of sanctions had been applied in Equine Anti-doping cases and that sanctions had been generally lower and milder.

29. The Respondent therefore repeated its request for a two (2) year period of ineligibility without any elimination or reductions under Art. 10.5 of the EAD Rules with consideration given for an additional sanction based upon "Aggravating Circumstances".

(2) **The Decision of the FEI Tribunal dated 7 April 2014**

30. The decision of the FEI Tribunal can be summarized as follows:

- The definition of Person Responsible under the EAD Rules which is applicable to determine which party is liable for an anti-doping rule violation in competition refers to the FEI General Regulations ("GRs"). Article 118.3 provides as follows:

  "The Person responsible (PR) shall be the Athlete who rides, vaults or drives the Horse during an Event but the Owner and other Support Personnel including but not limited to grooms and veterinarians may be regarded as additional Persons Responsible, if they are present at the Event or have made a relevant decision about the Horse"

- The status of the PR is acquired by the actions described under Article 118.3 of the GRs, specifically by riding the Horse at the Event on 11 February 2012. The signing of a document or other declaration was not a pre-requisite to be considered as a PR under Art. 118.3.

- Absent any legislated change to the concept of the PR in the FEI's GRs, the FEI proceedings did not present an "adequate forum" to enter into a discussion of the Appellant's claim that the concept of the PR was inconsistent with the way the discipline of Endurance is practiced in the Middle East. Art. 118.3 of the GRs was therefore to apply to each person competing in any FEI discipline anywhere around the world.

- The FEI Tribunal was comfortably satisfied with the laboratory findings that both the A- and B-Samples contained the Banned Substance Propoxyphene and its metabolite Norpropoxyphene. This Adverse Analytical Finding constitutes a violation of Article 2.1 of the EAD Rules.

- The strict liability principle set out in Article 2.2.1 of the EAD Rules applies. The burden of proving that the Appellant bears "No Fault or Negligence" for the positive finding as set forth in Article 10.5.1 of the EAD Rules, or "No Significant Fault or Negligence", as set forth in Art. 10.5.2 of the EAD Rules then shifts to the Appellant.

- The precondition for the application of the elimination or reduction possibilities under Art. 10.5.1 and Art. 10.5.2 of the EAD Rules is that the Appellant as PR first establishes how the Banned Substance entered the Horse's system. The standard of proof applicable is that the PR must establish "specified facts or circumstances" by a "balance of probability".

- In assessing the Appellant's explanations and evidence, the FEI Tribunal applied a two-step evaluation: (1) did Dr. Pasha actually administer the Propoxyphene-containing product FUSTEX to the Horse on the eve of the Event and (2) did the vial of the product FUSTEX given to the Horse really contain the Banned Substance Propoxyphene?

- With regard to step (1) above, the FEI Tribunal ruled that *"in taking into account the witness statement of Dr. Pasha, it believes that it is more likely than not that Dr. Pasha administered the product FUSTEX to the Horse on the day prior to the Event."*

- With regard to step (2) above, given that the Prohibited Substance Propoxyphene was not listed on the product label or in the product leaflet and that the subsequent laboratory analyses of later-procured FUSTEX provided no proof of origin or chain of custody and that a laboratory test done in 2009 revealed the presence of Stanozolol instead, the FEI Tribunal was unable to find on the balance of probability that the PR had established that the actual vial of the product FUSTEX given by Dr. Pasha to the Horse on the eve of the Event did indeed contain Propoxyphene.

- However, in the view of the FEI Tribunal, even if the PR could have established that the vial of FUSTEX given to the Horse in 2012 contained Propoxyphene, it would still have held that the PR acted negligently in this case and could not establish that he bore no Significant Fault or Negligence for the rule violation.

- The FEI Tribunal acknowledged that the PR had put into place "stringent procedures" for the prevention of contamination or positive testing of W'rsan horses. Based on the evidence submitted in the present case, however, the FEI Tribunal found that these procedures had not been followed in the case at hand, neither with respect to the acquisition or the storage of the product FUSTEX.

- Dr. Pasha never conducted a diligent check on the suitability of the product FUSTEX. Neither the limited perusal of the product's leaflet nor the oral feedback of a fellow veterinarian constituted only minimums checks. Dr. Pasha had been "clearly negligent when using a product unknown to him".

- The FEI Tribunal further found that it would have expected the veterinarian to have conducted "a profound search in scientific literature, as the substance listed as the main ingredient of the product, the compound Paradiphenbutirate, appeared to be an unknown chemical term." He should have conducted further research on a product used by him for the first time and contacted the manufacturer directly.

- The FEI Tribunal further held that, if Dr. Pasha administered the FUSTEX as a "pick-me-up", intending to help the Horse relax after a hard pre-race training, he should have made a notation of the injection somewhere in his records. But Dr. Pasha conceded that he had not recorded the administration of the product anywhere, neither in the Pre-Ride Medication list nor in his Statement of Truth dated 15 May 2012.

- The FEI Tribunal concluded, therefore, that "the evidence shows that Dr. Pasha intentionally used the product FUSTEX in order to enhance the Horse's performance."

31. Citing an earlier decision of the FEI Tribunal in TACKERAY, (Final FEI Tribunal Decision dated 14 September 2009), the FEI Tribunal held that PRs are responsible for their support personnel and the medical treatment given to their horses by their veterinarians. The FEI Tribunal therefore held that the negligence of Dr. Pasha was attributable to the PR in the case at hand.

32. After evaluating the above explanations and evidence, the FEI Tribunal held that the Appellant had not crossed that threshold which would have enabled the Tribunal to consider an elimination or reduction in the period of ineligibility imposed by Art. 10.5.2 and Art. 5.10.2 of the EAD Rules.

33. With regard to the rule violation committed by the PR in 2005, the FEI Tribunal ruled that the PR had not contested before the CAS Panel at that time that he had violated the then applicable anti-doping rule violations and that, based on that decision, the 2005 anti-doping rule violation had been "unequivocally established".

34. In the view of the FEI Tribunal, the CAS Panel had decided in 2005 that "under the circumstances" disqualification "was sufficient" and that no fine or suspension should be imposed on the PR. At that time, "a completely different system of sanctions had been applied to Equine Anti-Doping cases, and that sanctions had been generally lower and milder."

35. The FEI Tribunal continued:

"Whereas it is not entirely clear to the Tribunal which "circumstances" the CAS panel relied upon to determine that disqualification was sufficient at the time, the Tribunal finds that in order to determine whether or not to consider the 2005 rule violation as [an] aggravating factor, it is decisive that the CAS panel at the time had ruled disqualification of the Horse and the rider, due to a violation of the then applicable Anti-Doping Rules. Therefore, and in accordance with the Articles 10.7 and 10.6 of the EAD Rules, the Tribunal is considering the 2005 rule violation as a factor in determining aggravating circumstances, and therefore finds that aggravating circumstances are present in the case at hand."

36. The FEI Tribunal ruled in its Decision of 7 April 2014 to suspend the PR for a period of two (2) years for the present rule violation and, under Article 10.7 read together with Article 10.6 of the EAD Rules, to suspend the PR for an additional period of three (3) months for the 2005 violation. The period of Provisional Suspension, effective from 12 March 2012, was credited against the period of ineligibility, thus making the PR ineligible to 11 June 2014.

37. In addition to the ineligibility sanction, the PR was fined five thousand Swiss Francs (CHF 5,000.00) and ordered to contribute two thousand Swiss Francs (CHF 2,000.00) towards the legal costs of the judicial procedure, in addition to the cost of the B-Sample Analysis.

C. Proceedings before the Court of Arbitration for Sport

38. On 6 May 2014, the Appellant filed his statement of appeal at the CAS in accordance with Articles R47 et seq. of the Code of Sports-related Arbitration (the "CAS Code"). The Appellant also nominated Mr. Mark Andrew Hovell as arbitrator.

39. Together with his Statement of Appeal, the Appellant also filed a request for provisional measures in accordance with Article R37 of the CAS Code.

40. On 20 May 2014, the Respondent nominated Mr. Paul David QC as arbitrator. On 22 May 2014, the Appellant filed his appeal brief in accordance with Article R51 of the CAS Code.

41. On 23 May 2014, the President of the Appeals Arbitration Division denied the Appellant's request, *inter alia*, on the grounds that he had not made a sufficient showing that he would sustain irreparable harm if the measures were not to be granted. This was, in the view of the President of the Appeals Arbitration Division, especially true given that the Appellant's suspension was scheduled to expire in just a few weeks. The costs of the order were to be settled in the final award of the present arbitration.

42. On 30 June 2014, the Respondent filed its answer in accordance with Article R55 of the CAS Code.

43. On 9 July 2014, the parties were informed that the Panel appointed to decide this appeal was as follows:

President: Mr John A. Faylor, attorney-at-law in Frankfurt am Main, Germany
Arbitrators: Mr. Mark Hovell, solicitor in Manchester, England
Mr. Paul David, QC, barrister in Auckland, New Zealand

44. On 3 and 10 October 2014, the Appellant and Respondent, respectively, signed and returned the Order of Procedure in this appeal.

45. On 13 October 2014, a hearing was held at the CAS Headquarters in Lausanne, Switzerland. The Panel was joined by Mr. Brent J. Nowicki, Legal Counsel to the CAS, as well as the following:

For the Appellant:

- Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan
- Mr. Adam Lewis QC
- Ms. Ramona Mehta
- Ms. Emma Woollcott
- Mr. Nilo Effori
- Dr. Mark Dunnett
- Dr. Syed Kamaal Pasha
- Mr. Aamer Al Mazroni

For the Respondent:

- Mr. Jonathan Taylor
- Ms. Lauren Pagé
- Ms. Carolin Fischer
- Mr. Mikael Rentsch

D. The Parties' Submissions

(1) The Appellant's Submissions and Evidence in Summary:

(i.) The Factual Situation

46. The Appellant bases his request for relief upon the evidence already submitted to the FEI Tribunal, and the following additional written Witness Statements and documents.

- the written Expert Report dated 21 February 2014 of Dr. Stuart Paine;
- the Expert Witness Statement of Dr. Terence See Ming Wan, Head of the Racing Laboratory and Chief Racing Chemist at the HKJC dated 16 February 2014;
- the Expert Witness Statement of Mr. Steve Maynard of HFL Sport Science dated 20 February 2014;
- the Witness Statement of Carolin Fischer, Legal Counsel for the Respondent, dated 30 June 2014, with Exhibits, and testimony at the hearing;
- in addition to the E-mail chain between Enrique Fischer of Chinfield S.A., manufacturer of FUSTEX, and Carolin Fischer of the Respondent, dating from 2 December 2013.

47. The Appellant emphasized in his Appeal Brief of 22 May 2014 that, unlike a human athlete, a rider, as in the case at hand, often has little or no practical responsibility for, or knowledge or control of, what goes into the relevant horse's body. To hold such a person automatically and strictly responsible for a positive test by the horse

". . . is wrong in principle, contrary to relevant law and unacceptable as a matter of public policy. Such a blanket and irrational rule is not necessary to achieve the legitimate aims of the anti-doping agenda and unduly interferes with a rider's rights."

48. In addition, the Appellant argues that to impose a two year ban on the PR because of the positive test by a horse that he had no direct involvement in preparing for the race in question is "disproportionate and inconsistent with fundamental principles of law".

49. At the hearing, Mr Lewis QC submitted orally that the EAD Rules should be interpreted in a manner which allowed a rider to rebut a presumption of strict liability arising from a positive test on a horse and be held not to have committed a violation, if he or she could show that he or she had no knowledge of or means of knowing of or controlling the conduct which brought about the violation.

50. On a proper approach to the EAD Rules and on the facts, the Appellant should bear no fault or negligence, or, at least, no significant fault or negligence, for the presence of the Banned Substance in the Horse's body.

51. With regard to the Appellant's 2005 rule violation, the violation in question "is not only very stale, but also involved no blame on the Appellant's part. The CAS held in its decision of that case that the offence resulted from actions outside of his knowledge and contrary to his instructions."

52. The Appellant further argued that different rules were applied in 2005 and no suspension was imposed. To increase any sanction now on the basis of "Aggravated Circumstances" is not only unreasonable, but also constitutes "the impermissible retrospective application of the current rules to an old violation and/or places the Appellant in double jeopardy."

53. In filling out the background facts of the case, the Appellant confirmed that he is the son of His Highness Sheikh Sultan bin Zayed Al Nahyan, who is the owner and operator of the W'rsan Stables. Sheikh Sultan employs a staff of over two hundred people, including reputable and experienced veterinarians, nutritionists, trainers, grooms and riders.

54. Sheikh Sultan implements "stringent procedures" at W'rsan Stables to prevent any contamination of competitive horses, positive testing or indeed any cheating of any kind. The Appellant cites, in particular:

- members of the staff are all reputable, qualified, professional vets and nutritionists, trainers, grooms and riders who demonstrate the high standards of professionalism expected of staff employed by Sheikh Sultan;
- staff are trained specifically, instructed and continually reminded of their duties and obligations to uphold W'rsan's commitment to clean racing and compliance with the FEI regulations.

55. With regard to the veterinary department at W'rsan, the Appellant cites, in particular, the following procedures:

- all medicines are kept under lock and key;
- all drugs that are removed from their stock must be recorded by the veterinary assistant and head vet, Dr. Pasha;
- when purchasing products, the procedure is that the vets must seek a complete breakdown of the ingredients and where appropriate, seek a certificate confirming that they are "race allowed."

56. In addition, the following forms were required to be completed by the vets when administering medicinal substances:

- a pre-ride medication form;
- a list of products administered to each horse, and
- a list of medicines purchased from the pharmacies.

57. In addition, routine procedure for horses competing in endurance races include blood and urine samples being taken in advance of the race and then tested by an independent laboratory. The process is administered anonymously in order to ensure their security and integrity.

58. In this regard, the Appellant states that the Horse had undergone the prescribed blood and urine test nine days prior to the Event on 11 February 2012 and that these results, obtained from the Abu Dhabi Police laboratory, were negative.

59. Moreover, W'rsan's staff was responsible for the preparation of the Horse. With the exception of a short pre-race training ride on the eve of the Event, the Appellant had no involvement or contact with the Horse, including its training, diet and medical condition, and had never ridden it before.

60. Upon being informed of the positive finding on 12 March 2012, the Appellant immediately instructed the racing manager, Majid Ali Al Kayoumi, to carry out an urgent investigation. This investigation included an external analysis of each of the products routinely used at the stables, and the instruction of external lawyers and a special investigator.

61. Despite these comprehensive measures, the Appellant alleges to have been unable initially to point conclusively to the source of the contamination and could not explain how the substance entered into the Horse's system.

62. For this reason, the Appellant also engaged Dr. Mark Dunnett, independent expert doing business under the name "Independent Equine Nutrition" who, on the basis of his investigations, established the following:

- the Horse's exposure to Propoxyphene was likely to have occurred between 11 and 19 hours before the blood samples were taken, i.e., between 9.30pm on Friday, 10 February 2012, and 5am on Saturday, 11 February 2012;
- the estimated concentrations of the Banned Substances found in the Sample were very low in the context of the use of Propoxyphene as a therapeutic medication (typically used in humans);
- there are no published data or studies suggesting that Propoxyphene is effective for pain relief in horses and indeed the studies available indicate there are common adverse post-administration effects in horses;

- on the basis of the evidence submitted, there is "strong evidence" that there was no deliberate attempt on the part of anyone concerned to "dope" the Horse with Propoxyphene, not least since the quantity detected was very small and in general the adverse effects of this substance on horses are far more clearly scientifically established than any conceivable therapeutic benefit.

63. On the basis of the investigations performed by Mr. Elliot David Hall of Penumbra Partners in 2012, a private investigator and compliance consultant, the Appellant submitted the following:

- W'rsan Stables operated clear policies and procedures to prevent doping, and had comprehensive systems and practices in place to prevent and detect any behavior which might breach its policies and procedures;

- W'rsan staff clearly understood the division of roles and responsibilities, including the limited number of individuals who may administer prohibited or controlled substances;

- horses were tested nine days prior to a competition and the samples were analyzed by independent laboratories to ensure that that they were clear of controlled and prohibited substances;

- the Appellant had undertaken a short training ride around 6.30pm on the afternoon of Friday, 10 February 2012 and had left Al Wathba Endurance Village, the site of the next day's competition by 7/7.30pm. He had no prior involvement with the training and nutrition of the Horse, nor its preparation for the Event; and

- there were significant concerns over the security in place at the stables at Wathba Endurance Village, site of the endurance competition. It was, therefore, impossible to rule out contamination by an "outsider".

64. According to the Appellant, however, it was not until early 2013, when the real source of the contamination was determined. In January 2013, Dr. Pasha "was reminded" that he had administered FUSTEX to the Horse on the day before the Event. Dr. Pasha understood this to be a muscle stimulant which was freely marketed in the Gulf region. Dr. Pasha stated in his written Witness Statement that the product was common within the Middle East and was not thought to contain any prohibited substances.

65. Having remembered this administration of FUSTEX to the Horse one year following the Event and after the submission of his first Witness Statement on 15 May 2012, Dr. Pasha provided the supplemental Witness Statement dated 31 July 2013.

66. On the basis of the above, the Appellant asserts that the FEI Tribunal correctly concluded that Dr. Pasha administered FUSTEX to the Horse on the day prior to the Event and that this could be the only conceivable source of the Propoxyphene which turned up in the Horse's sample. For this reason, the Appellant can establish that the FUSTEX almost certainly (and certainly on the balance of probabilities) included Proxpoxyphene and was the cause of the positive test.

67. On these circumstances, it is submitted that the Appellant did not, and could not reasonably have known, that a product containing a Banned Substance had been administered to the Horse prior to the Event. He was entitled to rely on "the excellent and thorough procedures practiced at W'rsan Stables." Given his limited involvement with the Horse, the Appellant could not reasonably have been expected to do more. The ineligibility sanction set out in Art. 10.5.1 EAD Rules should therefore find no application in the case at hand.

(ii.) The Appellant's Challenge to the Validity and Enforceability of the FEI Rules applicable to the PR and Strict Liability

68. Referring to the principles in the CAS advisory opinion CAS 2005/C/976 FIFA & WADA, international court rulings ((Case C-519/04P) ECR 2006 I-6991, Meca-Medina and Majcen v Commission of the European Communities) and the Swiss Federal Tribunal decision (Guilhermo Canas ATF 133 III, 235), the Appellant argues that the FEI rules applicable to the liability of a PR violate fundamental rules of law regarding disproportionate and unjustified restrictions which hinder the ability of a person to participate in sport and which infringe his civil rights and obligations.

69. If a horse tests positive following a competitive event, the rider is treated as the primary offender, automatically and by default. In a nutshell:

> *"For the rider to be treated as guilty of an offence when his horse tests positive, without more, violates these principles, and is an affront to morality and public policy. It is unjust that, in such circumstances, the burden of proof immediately falls on the rider to establish that he bears no fault, or no significant fault, in relation to the violation (a burden which historically has proven difficult to discharge, . . .), and that even then he will still be found to be guilty of a violation in principle. That is an approach that might be acceptable or proportionate in cases relating to human athletes, where one can understand the presumption that they are responsible for what goes into their own body, since (barring extremely unusual circumstances such as sabotage or emergency medical treatment) they have complete physical control of it and make conscious choices about what food, drink and medicines they ingest. That factual reality is the bedrock for strict liability for human athletes."*

70. The Appellant also cites a long list of CAS decisions in which it has long recognized the importance of observing the principle of proportionality when considering an appropriate sanction in a doping offence, claiming that it is open to the CAS to depart from the relevant rules if they result in disproportionate outcomes (CAS 2004/A/690, Puerta v/ ITF CAS 2006/A/1025, Aanes v/ FILA, CAS 2001/A/317; Knauss v/ FIS, CAS 2005/A/847).

71. Alternatively, the Appellant argues that, if the Panel concludes that the relevant FEI rules are fair and proportionate, it must then be considered whether Art. 10.5.1 and 10.5.2 of the EAD Rules must be interpreted, and the level of fault must be so assessed, in a manner that reflects the unusual nature of the strict liability imposed upon riders under FEI rules and the fact that, by contrast with human athletes, they necessarily have less control over what goes into the horse's body.

(iii.) The Threshold laid down in Art. 10.5.1 and Art. 10.5.2 of the EAD Rules for the Elimination or Reduction of the Ineligibility Sanction has been achieved.

72. In order to reach the threshold for the consideration of an elimination or a reduction of the ineligibility sanction, the Appellant accepts that he must first prove on the balance of probabilities how the prohibited substance entered the Horse's body. This, as the Appellant submits, he can do without difficulty.

73. The Appellant cites the conclusion of the FEI Tribunal on the basis of the Witness Statements submitted "that it is more likely than not that Dr. Pasha administered the product FUSTEX to the Horse on the day prior to the Event". The issue is, however, whether the FUSTEX so administered contained the Banned Substance Propoxyphene.

74. In this regard, the Appellant states that on the basis of the five tests conducted between the end of 2012 and February 2014, three of which were carried out by persons having no connection with the Appellant, all of the tests generated the same result and consistently showed (notwithstanding any claim of lack of chain of custody or any other technical reason) that the FUSTEX produced in and around the time that it was administered to the Horse contained Propoxyphene.

75. The Appellant further submits that, not only the report of Dr. Paine in which he conceded that it was "plausible" the vial of FUSTEX administered to the Horse was the cause of the positive finding, the manufacturer of the product in Argentina also confirmed that Propoxyphene was the active ingredient of the product.

76. Even the Respondent accepted in its "FEI Response to the Explanations of the PR received on 16 September 2013" which was submitted to the FEI Tribunal on 24 February 2014 that "*the vial administered to the Horse at the time did indeed contain the same content as the sample of FUSTEX analyzed by HFL. It may however not be excluded with certainty that the vial allegedly administered to the Horse did not contain [a] different substance.*"

77. Indeed, according to the Appellant, there is no other realistic source of the Propoxyphene. This was also confirmed in the Expert Report of Dr. Dunnett where he clearly stated that it was unlikely that the cause of the contamination was contained in the Horse's feed or nutritional supplements. This leaves only the possibility of deliberate sabotage, as suggested by Mr. Elliott David Hall prior to Dr. Pasha's disclosure in February 2013 that he had injected FUSTEX into the Horse on the eve of the Event.

78. After all of the above, the Appellant submits that, under these circumstances, it is "overwhelmingly likely, and clear on the balance of probabilities that the FUSTEX administered to the Horse by Dr. Pasha contained Propoxyphene."

(iv.) Assessing the Appellant's Level of Fault

79. The Appellant takes the position that one cannot simply apply case law applicable to human athletes to cases of horse riders without carefully considering the circumstances. Horse riders are not in the same position as human athletes. The way

in which fault is assessed under EAD Rules 10.5.1 and 10.5.2 must be adjusted to recognize these realities.

80. Having said the above, proper scrutiny must be applied to the attribution of the acts or omissions of third parties to riders. The FEI Tribunal attributed the negligence of Dr. Pasha to the Appellant, citing a previous FEI Tribunal decision, TACKERAY, 14 September 2009.

81. The Appellant submits that "there must be limits to such attribution". If the test is whether the rider was negligent, then the question for the FEI Tribunal must be whether he took all reasonable care (and if he did, he will be deemed to be without fault or negligence) or whether he did not significantly fail to take reasonable care (in which case he will be deemed to be without significant fault or negligence).

82. The Appellant summarizes his position in the following:

"There is no safe legal basis for automatically attributing the actions of third parties whom riders do not and cannot fully control to the riders themselves. The relationship between the third party in question and the rider must be examined: it will only be in relatively unusual circumstances that it will be appropriate or fair to attribute a third party's acts to the rider, or, to put it another way, one holds the rider responsible for what the third party did, and treats him as having been negligent (or significantly negligent) for not preventing those actions. If the rider could not reasonably be expected to have prevented the third party's actions, he cannot fairly be held responsible for them."

83. The Appellant takes the position that, based on the facts and circumstances, it could not reasonably be expected of him to take any further steps as regards the integrity of the Horse. The key factors in this regard are enumerated as follows:

- The owner of W'sran Stables is the Appellant's father, Sheikh Sultan Bin Zayed Al Nahyan;
- He (the Appellant) had next to no personal contact with the Horse prior to the Event. He cannot supervise the Horse 24 hours a day prior to the Event or be expected to sleep with the Horse the night before the Event;
- The Appellant had no prior involvement with the training and nutrition of the Horse, nor in its preparation for the Event;
- The Stables in question have put in place stringent procedures and pre-emptive measure to ensure that horses are free from prohibited or controlled substances. The staff are highly qualified and continually instructed and reminded of their duties to comply with clean racing policy and the FEI regulations;
- The veterinary department follows procedures to ensure (1) that all medicines are continually kept under lock and key; (2) all drugs that are removed from their stock must be recorded by the vet assistant and Dr. Pasha; (3) when purchasing products, vets must seek a complete breakdown of the ingredients and where appropriate, seek a certificate confirming that they are "race allowed";

- The veterinary was required to complete the following records upon administering medical products: (1) pre-ride medication form; (2) a list of products administered to each horse; and (3) a lists of the medicines purchased from the pharmacies;

- With regard to the medication FUSTEX, this medication was marketed freely as a muscle stimulant by Gulf Center in Bhuraimi, Oman. Dr. Pasha obtained the assurance of a fellow veterinary, Federico, from Al Ain Endurance Stables at a local race a few weeks prior to the Event;

- Dr. Pasha received the FUSTEX in a branded box containing a sealed FUSTEX bottle (with the seal still intact) and the manufacturer's insert. He checked all of the ingredients listed on the manufacturer's insert which made no mention of any Banned Substances;

- Dr. Pasha did not conceal the fact that he was administering FUSTEX to the Horse, confirming this to Mr. Al Kayoumi. As Dr. Mark Dunnett confirmed in his expert opinion, the estimated concentrations of Propoxyphene found in the Sample were very low in the context of the use of the substance as a therapeutic medication.

84. Based on the above, the Appellant submits that Dr. Pasha did not act negligently and was certainly not significantly negligent. Even if his conduct is adjudged to have been negligent, such negligence cannot be attributed to the Appellant. The fault of the PR should be assessed by reference to his own personal fault in connection with the violation. Only in relatively unusual circumstances should the acts of a third party be treated as the fault of the rider.

(v.) The (Ir-)relevance of the Previous Violation from 2005

85. The Appellant's previous rule violation should not be considered as an aggravating factor, resulting in an additional three (3) month ban for the following reasons:

- the previous violation related to an event in January 2005, more than seven (7) years prior to the event in question. It is a historical matter. This is not the case of being guilty of multiple violations;

- in the decision of the CAS, there was no finding of responsibility or negligence on the Appellant's part;

- the Appellant was not banned for the violation at the time. The relevant rules were different then. The CAS could have sanctioned him then, but chose not to do so. Disqualification of the race result was considered sufficient;

- to deem the previous violation to constitute an "aggravating factor" amounts, effectively, to an impermissible fresh finding of fault in respect of that violation when none was made at that time. It represents the retrospective application of the current rules to that (wrong) finding of fault. It is unfair and an unacceptable form of double jeopardy.

86. In conclusion, the Appellant requests that the Panel set aside the Decision of the FEI Tribunal and instead to disqualify the result of the Event only, as well as maintaining the brief suspension of the Horse. The Appellant seeks his costs of this procedure and the costs of the first instance, from the Respondent.

(2) The Respondent's Submissions and Evidence in Summary

(i.) The EAD Rules are not unlawful

87. The Appellant submits that under Swiss law the rules of a sports federation will not be struck down as unlawful unless they are "evidently and grossly disproportionate" to the legitimate objectives the rules are aimed at achieving.

88. Citing FIFA & WADA, CAS 2005/C/976, 986, the Respondent avers that it is generally accepted under Swiss law that associations may impose disciplinary sanctions upon its members if they violate rules and regulations of the association. The association is granted wide discretion to determine the violations which are subject to sanctions and to define the kind and the measure of the sanction. This wide discretion is referred to as "the margin of appreciation".

89. Accordingly, a rule may not be held unlawful merely because the reviewing body thinks it is too severe. Instead, as laid down by FIFA & WADA, the rule will only be held unlawful if it is "evidently and grossly disproportionate". Only under these circumstances will a CAS Panel deem a sanction to be abusive and, thus, contrary to mandatory Swiss law.

(ii.) The EAD Rules, properly characterized

90. The Respondent objects to the Appellant's characterization of the EAD Rules regarding strict liability as unlawful, disproportionate and unjust, calling it a "confusing and inaccurate description of EAD Rules".

91. In clarification of the rule set out in Art. 2.1.1 and Art. 2.2.1, the Respondent asserts that "strict liability" means that "the results that the rider obtained on the drugged horse are automatically disqualified, irrespective of whether or not the rider was at fault for the violation." The Respondent emphasizes that even the Appellant does not challenge the lawfulness of this rule and does not dispute that the Appellant's victory on the Horse at the Event should be disqualified.

92. Beyond such disqualification of results, however, the Respondent proceeds to argue that there is no strict liability (i.e., imposition of consequences irrespective of fault) under the EAD Rules. Instead, any further consequences depend on a finding of fault. The PR will be presumed to be at fault for the presence of a Banned Substance. If that presumption is not rebutted by the PR, the two-year ban prescribed in Art. 10.2 of the EAD Rules is imposed.

93. In the view of the Respondent, the rider is given full opportunity to rebut the presumption by showing (on the balance of probabilities) that he/she bears No Fault or Negligence or, as the case may be, No Significant Fault or Negligence. The sanctions set forth in Art. 10.5.1 and Art. 10.5.2 of the EAD Rules mandating the two

(2)-year period of Ineligibility may either be fully eliminated or, in the case of No Significant Fault or Negligence, may be reduced by up to 50% depending on the rider's degree of negligence. The disqualification, however, will remain in place.

94. To sustain the Appellant's argument that the EAD Rules are unlawful, the Appellant would have to show that these rules are not necessary in order to fight doping in equestrian sport or that these rules exceed that which is necessary in order to fight doping and are hence "evidently and grossly disproportionate". The Appellant, in the view of the Respondent, does not and cannot satisfy this stringent requirement.

(iii.) The rule making the rider prima facie responsible for the condition of his horse at an event is entirely justified, and certainly well within the "margin of appreciation" afforded to the FEI and its member federations in making their rules.

95. Both the CAS and the Swiss Federal Tribunal have upheld the lawfulness of the presumption under the World Anti-Doping Code ("WADC") that an athlete is at fault for the presence of a prohibited substance in his system. This conclusion rests on the following considerations: (i) it would be difficult, if not impossible for a sports federation to prove fault affirmatively in every case; (ii) the presumption that the athlete is at fault is rebuttable, and (iii) the athlete, arguing in his own defence, can show that he exercised utmost caution in controlling what goes into his system.

96. The Respondent submits that the same reasoning applies with respect to the rider and his horse and cites the following principles:

- The central and distinctive feature of equestrian sport is the partnership created between the human athlete (the rider) and the equine athlete (the competition horse). The horse cannot speak and must depend upon the rider to put his welfare first, even though it is the rider who stands to benefit from any "plaudits, points and/or prize money" obtained by breaching the rules;

- based upon the above premises, it has been a fundamental cornerstone of the FEI regulatory framework since 1982 that the rider is responsible for looking after the welfare of his equine partner and for ensuring compliant with all regulatory requirements, including, but not limited to anti-doping requirements.

97. In enumerating the regulatory requirements which must be observed by the PR, the Respondent cites, in particular, Art. 118 of the FEI General Regulations, Art. 1002 of the FEI Veterinary Regulations and the FEI Athletes Guide ("What are my Responsibilities?").

98. With regard to the EADCM Regulations and the EAD Rules incorporated in the EADCM Regulations, the Respondent specifically cites the standard of care to which the PR is subject, namely (1) not to dope the horse deliberately, but also (2) to use "utmost caution" to avoid doping the horse carelessly or inadvertently (e.g. by giving the horse medications or supplements containing Banned Supplements.)

99. The Respondent "makes no apology" for making the rider of the horse responsible for its welfare and for ensuring compliance with all relevant regulations. The Respondent specifically disputes the Appellant's assertions that the rider is "not typically

personally responsible for the preparation of a horse for competition", and as someone who "in many cases will have little personal familiarity with the horse before he rides it", or as someone who "will not have trained it, will not have taken decisions about what it should eat or drink, or what medicines it should be provided with".

100. To the contrary, so the Respondent, in many if not most cases the rider will be personally involved in preparing his horse for competition. The Respondent continues:

> *"In fact at the higher levels of endurance competition, where the EAD Rules apply, the rider will usually be the trainer and may also own the horse that he rides in competition. Such a rider may delegate some of the work involved in preparing the horse for competition to others of his choosing, on terms of his choosing. Either way, however, he is entirely in control."*

101. With regard to the Appellant, the Respondent takes the position that "*as a member of the UAE ruling family, he [the Appellant] was completely in charge of the situation, and so able to control any and all aspects of the stable procedures, if he saw fit to do so.*" Whether or not the Appellant cared to exercise this control is a different matter.

102. This "control" was evidenced in the Appellant's authority to pick and choose the best horses at the stables and to select the competitions in which he would participate. Following the notification of the positive sample, the Appellant was able to instruct the racing manager, Majid Ali Al Kayoumi, to carry out an urgent investigation into the incident. This clearly demonstrated his authority at W'rsan Stables.

103. Citing Art. 111.5 of the GRs, the Respondent emphasizes that even in the case of the borrowed horse for competition, "it is still fair to hold the rider responsible for the condition of the horse at the event, because he is not forced to ride any horse at the event, rather he chooses which horse to ride." (Understrikings in the original).

104. The rider can always decide for himself which owners and trainers have proper standards of care for their horses and can also decide for himself to what lengths the wants to go in order to satisfy himself that sufficient care has been taken to ensure the horse he is considering riding has not been given (intentionally or inadvertently) any Prohibited Substance, be it a Banned Substance or a Controlled Medication Substance.

105. The Respondent points out that changing the rules to make the persons who prepare the horse for competition responsible for keeping the horse drug free would not only make the EAD Rules much more difficult and burdensome to enforce, it would also encourage riders not to take responsibility for the condition of the horses they ride, but to leave that vital task to others.

106. Specifically, such a change would discriminate in particular in favour of the wealthy:

> *"A rider who was wealthy enough to pay others to care for his horses would be able to avoid liability by delegating all responsibility to his employees (who may or may not be subject to the FEI's disciplinary authority). But it would effectively encourage all riders to avoid responsibility for the condition of their horses which is contrary to the fundamental tenets of equestrian sport, would put the*

welfare of the horse at risk, and would greatly undermine the fight against doping in the sport."

107. The Respondent cites the consultations of the FEI Endurance Strategic Planning Group held in 2013 with regard to the growing incidence of doping cases in the discipline of endurance. There, the issue arose whether the concept of the PR in light of the specificities of the endurance discipline should be modified. The Respondents summarizes the results of the survey of the FEI's member national federations:

> *"While many expressed the view that the trainer should be made responsible for violations of the EADCMR, this was not instead of the rider. To the contrary, all of the national federations agreed that the rider should remain prima facie responsible for the condition of his horse at an endurance event. There was no support for the notion that the way the discipline is practised (in the Middle East or otherwise) makes that requirement unrealistic or unfair to the rider."*

108. In conclusion, therefore, the Respondent submits that making the rider prima facie responsible for the condition of his horse while competing, subject to his ability to prove he bears No (or No Significant) Fault or Negligence for its doped condition, is not an unreasonable or unjustifiable stance. It does not fall outside the broad "margin of appreciation" afforded to sports federations under Swiss law to determine what is necessary and proportionate to protect the integrity of their sports.

(iv.) <u>It was not unlawful to hold the rider responsible for the actions of those to whom he entrusts the task of preparing his horse for competition.</u>

109. The Respondent also disputes the Appellant's alternative argument that to impose a two (2) year ban on a rider because of a positive test by a horse in which he had no direct involvement in preparing for the race (and indeed where the stables concerned put in place substantial measures to avoid such occurrence) is disproportionate and inconsistent with fundamental principles of law in this area.

110. The Respondent submits that the FEI Tribunal was correct to hold that "Persons Responsible are responsible for their support personnel and the medical treatment given to their horses by their veterinarians."

111. The Appellant, in the view of the Respondent, provided no good reason to disapply this fundamental rule in this case.

> *"After all, as a member of the UAE ruling family and the son of the owner of the W'rsan Stables, the Appellant was fully able to determine and control how the Horse was prepared for the Event. As a result, while he was free to decide that he would rely on the procedures issued at the W'rsan Stables to prevent the administration of Banned Substances to his horse, it was his responsibility to ensure not only that those procedures were sufficient but also (whether by instituting effective internal controls or otherwise) that those procedures were being properly and diligently implemented. And he is liable if (whether because of an absence of internal controls, or because of a failure of those whom he relied upon to implement the procedures, or otherwise) they were not implemented and followed."*

(v.) The FEI Tribunal was right to reject the Appellant's Plea of no (or no significant) Fault or Negligence; the Appellant failed to satisfy the threshold requirement of proving how Propoxyphene got into the Horse's system

112. The Respondent submits that proof of precisely how and when the substance got into the Horse's system is a strict threshold requirement of a plea of No (or No Significant) Fault or Negligence. Otherwise, it would be impossible to assess the rider's claim that he bears No (or No Significant) Fault or Negligence for its presence there.

113. Moreover, the Respondent cites the "stringent requirement to adduce specific, objective and 'persuasive evidence' that will satisfy the arbitral tribunal on the balance of probabilities not only of "the route of administration" of the substance (e.g. oral ingestion) but also of "what the factual circumstances were in which the substance entered the Horse's system."

114. In the view of the Respondent, in the case at hand, the Appellant has not met his burden of proof. Summarizing the Respondent's arguments:

- the FEI Tribunal was "very generous" to the Appellant in accepting that Dr Pasha administered FUSTEX to the Horse on 10 February 2012, "given how late and (bluntly) how convenient Dr. Pasha's recollection of that administration was . . .";
- there was also a "complete lack of contemporaneous records of such administration, even though the keeping of such records is mandated not only by the procedures apparently in place at W'rsan Stables, but also by the FEI Veterinary Regulations";
- the Appellant was unable to produce the vial of FUSTEX actually administered to the Horse for testing;
- furthermore, the ingredients list for FUSTEX did not mention Propoxyphene;
- although the manufacturer of FUSTEX now says the substance contains Propoxyphene, a vial of FUSTEX independently tested in 2009 tested positive not for Propoxyphene, but for Stanozolol;
- although other vials of FUSTEX were subsequently sent by third parties to the Abu Dhabi police laboratory, to the HKJC laboratory, and to HFL (at the request of the FEI), all of which tested positive for Propoxyphene, there was no evidence in the record of the source of the vials tested or of a secure chain of custody for those vials to the laboratory.

115. Based on the above, the Respondent takes the view that it is understandable why the FEI Tribunal was not satisfied that it was more likely than not that the vial of FUSTEX administered to the Horse on 10 February 2012 contained Propoxyphene. The Respondent submits that the Appellant has not identified any good reason to disturb the FEI Tribunal's finding.

116. Finally, the Respondent rejects the Appellant's assertion that "there is no other realistic source of the Propoxyphene". There are several other possible explanations, e.g. deliberate administration by the Appellant and/or the W'rsan staff for whom the Appellant is responsible.

117. This, however, is not for the Respondent to establish. The EAD Rules place the burden upon the Appellant to show that it was more likely than not that the actual vial of FUSTEX administered to the Horse on 10 February 2012 contained Propoxyphene.

(vi.) Even assuming that the threshold requirement is satisfied, the Appellant still cannot sustain his plea of No (or No Significant) Fault or Negligence.

118. Characterizing the CAS jurisprudence on the issue of accidental and inadvertent doping, the Respondent cites four risk factors which heighten the stringent requirement of utmost caution in the case at hand:

- Dr. Pasha states that he gave the Horse "1 cc of FUSTEX as a "pick me up" following its pre-race training session on 10 February 2012, even though the Horse "seemed fine" and that he did so in order "to help to relax [the Horse] after the hard training". The Respondent avers that it was correct for the FEI Tribunal to hold on this evidence that Dr Pasha administered FUSTEX to the Horse in order to enhance its performance;

- The product in question was a medication and was "inherently likely to contain one or more drugs that could be banned under the EAD Rules." The fact that the substance was, to the understanding of Dr. Pasha, a stimulant should have put him on "red alert" as to the risk of doping (even if in fact he was wrong – it is actually a painkiller/anaesthetic;

- Dr. Pasha had never used the product before either at W'rsan Stables or elsewhere. This factor heightened his duty to exercise utmost caution;

- There were two additional "red flags" which should have alerted Dr. Pasha of heightened risk: (1) the FUSTEX ingredients list did not mention Propoxyphene, but rather an ingredient "paradifenbutirate", which Dr. Paine described as an obscure name not commonly used in the industry. Even Dr. Wan of the HKJC confirmed that "paradifenbutirate" is not a chemical term and has not been described in any scientific literature, and (2) Dr. Pasha should have recognized on the product leaflet the two "antagonists" listed, namely nalorphine and levalofan;

- As a trained clinician, in the view of the Respondent, it is clear from the record, and the FEI Tribunal specifically found, that Dr. Pasha, the head veterinarian at W'rsan Stables to whom the Appellant had entrusted care of the Horse, failed to followed the prescribed procedures, despite all of the red flags identified above.

119. It is also plain, in the view of the Respondent, that there were no internal controls in place to identify that failure and to ensure prompt compliance with the procedures. The Respondent enumerates these failures as follows:

- Dr. Pasha should have known that these antagonist substances are used to counteract mu opioid agonist drugs such as propoxyphene, morphine and cocaine.

- Dr. Pasha kept no record at all of his acquisition of FUSTEX, because he did not purchase it, rather it was given to him by a vet he knew from another stable. These procedures are clearly required by the FEI regulations;

- these procedures, as well as the FEI Veterinary Regulations, also required Dr. Pasha to keep a record of all medications given to the Horse. Even Dr. Pasha explained that it was his usual practice to record all substances administered to each horse prior to competition on a "Pre-Ride Medication Form". He made, however, no record of his use of FUSTEX. His only explanation was that it "simply slipped my mind";

- Dr. Pasha, contrary to his own principles, failed to investigate the ingredients of the medications he administered to ensure they are "race allowed." The requirement for such an ingredients check was all the more compelling in view of the "red flags" which Dr. Pasha should have identified.

120. In light of the above, the Appellant must be held liable for Dr. Pasha's negligence as well as for failing, on his (the Appellant's) part, to ensure, whether by instituting internal controls or otherwise, that these measures at the W'rsan Stables were actually implemented.

121. As a result, in the view of the Respondent, the FEI Tribunal was clearly correct to reject the Appellant's plea that he bore No (or No Significant) Fault or Negligence for the presence of the Propoxyphene in his Horse's system at the Event.

(vii.) <u>There is no basis to disturb the FEI Tribunal's decision to impose a further three months of ineligibility due to the Appellant's prior rule violation</u>

122. In the view of the Respondent, the FEI Tribunal correctly held in its decision of 7 April 2014 that that this prior violation was an Aggravating Circumstance which warranted the addition of a further three (3) month sanction to the Appellant's Article 10.2 two (2) year ban.

123. In rebuttal to the Appellant's claim that the 2005 violation "involved no blame" and that even the CAS Panel had concluded that the offence resulted from actions outside of the Appellant's knowledge and contrary to his instructions, the Respondent asserts that the CAS Panel in that case had noted that it appeared that a member of the Appellant's entourage was at fault. The CAS Panel, according to the Respondent, thereupon explicitly stated that it did not need to consider the issue further, because the only relief sought on appeal was disqualification of the Appellant's results. No ban was sought.

124. For the Respondent, what is important is that the Appellant was given a clear warning by that CAS decision that he was responsible for the actions of his team, and therefore needed to do what was necessary to ensure that they used utmost caution to keep his horse clean of prohibited substances. The Appellant has failed to heed this warning. It

is therefore "well within the discretion of the FEI Tribunal to treat it as an Aggravating Circumstance (albeit a minor one) under Article 10.7.2. of the EAD Rules.

125. The Respondent explicitly rejects the Appellant's argument that the imposition of Aggravating Circumstances constitutes an "impermissible retrospective application of the current rules to an old violation and/or to double jeopardy." In the instant case, the Appellant is not being retroactively punished for his 2005 violation. Instead, he is being given an extra sanction for this violation "because [of] his failure to heed the warning from his previous violation clearly makes his fault for this violation worse."

(viii.) The Respondent's Request for Relief

126. The Respondent request the Panel to hold as follows:

- to confirm those aspects of the [FEI Tribunal's] Decision that are not challenged by the Appellant on appeal, namely that:
  - a Banned Substance was present in the Horse's system at the Event, in violation of Article 2.1 of the EAD Rules; and
  - accordingly, the Appellant's results at the Event are automatically disqualified, in accordance with Article 9 of the EAD Rules;
- to reject the appeal to the extent it challenges other aspects of the Decision, and so to affirm those aspects of the Decision, namely:
  - the imposition of a two (2) year ban on the Appellant further to Article 10.2 of the EAD Rules;
  - the imposition of a further three (3) month ban on the Appellant further to Articles 10.6 and 10.7.1 of the EAD Rules;
  - the imposition of a fine of CHF 5,000 further to Article 10.2 of the EAD Rules; and
  - the order that the Appellant contribute CHF 2,000 towards the legal costs of the judicial procedure, as well as the cost of the B-sample analysis, including transportation, and the costs of analysis of the FUSTEX sample analysed by the HFL;
- to reject the Appellant's request for an order that the FEI pay the costs he has incurred on his appeal and at first instance before the FEI Tribunal; and
- in accordance with Article R65.3 of the CAS Code, to order the Appellant to pay a contribution towards the legal fees and other expenses incurred by the FEI in defending this appeal.

III. THE LAW

A. Admissibility

127. Art. 12.2.2 (a) of the EAD Rules expressly grants the PR the right to appeal a decision of the FEI Tribunal to CAS.

128. Art. 12.3 of the EAD Rules provides the following:

"The time to file an appeal to CAS shall be thirty (30) days from the date of Receipt of the Hearing Panel [of the FEI Tribunal] decision by the appealing party."

129. The Appellant's Statement of Appeal was filed with the CAS on 6 May 2014, i.e., within the thirty (30) day deadline set out in Art. 12.3 of the EAD Rules. The decision of the FEI Tribunal dated from 7 April 2014. The Statement of Appeal was filed within the filing deadline.

130. The Respondent has also acknowledged the admissibility of the Appellant's appeal under Pt. 1.8 of its Answer.

B. Jurisdiction

131. Art. 12.2.1 of the EAD Rules states:

"In cases arising from participation in an International Event or in cases involving FEI Registered Horses, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before CAS."

132. Moreover, Article R47 of the CAS Code provides:

"An appeal against the decision of a federation, association or sport-related body may be filed with 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".

133. The Parties have expressly accepted the jurisdiction of CAS in the Appellant's Statement of Appeal and in the Respondent's Answer. Both parties have re-confirmed the jurisdiction of CAS in the Order of Procedure executed by both parties.

C. Applicable Law

134. In accordance with Article R58 of the CAS Code,

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 sport-related body which has issued the challenged decision is domiciled or according to the rules of law of the Panel deems appropriate. In the latter case the Panel shall give reasons for its decision."

135. The Panel will, therefore, be bound by the provisions of the EADCM Regulations, consisting of the EAD Rules in Chapter 1 and the ECM Rules in Chapter 2, the FEI Statutes, General Regulations, Veterinary Regulations ("VRs"), and any other relevant and applicable rules and regulations of the FEI. Subsidiarily, the Panel will apply Swiss law as the registered seat of the Respondent is in Lausanne, Switzerland.

D. Standard of Review

136. Article R57 of the CAS Code provides that

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."*

E. Merits

137. The questions on this appeal (and the questions which were before the FEI Tribunal) are concerned with the operation and application of the EAD Rules in the circumstances of this case. While the general approach to the operation and application of the Articles of the WADC assists, the Panel must keep in mind that the EAD Rules operate and have to be applied in the circumstances arising in equestrian sport.

138. In summary, the issues which arise on the appeal in relation to the EAD Rules are:

- Does the imposition of strict liability on the PR for the presence of a Banned Substance in the Horse's sample under the EAD Rules breach fundamental principles of law with the result that the EAD Rules are invalid and/or that the rules must be interpreted not to impose strict liability for a violation of Article 2.1 on the Appellant?
- If the EAD Rules are valid, and the PR has committed a violation under Articles 2.1 or 2.2, can the PR establish the requirements for a "No Fault" defence under EAD Article 10.5.1 and have the period of ineligibility eliminated?
- If the PR cannot establish the No Fault defence, can he establish that, in the circumstances of the case, his fault was not significant so that the period of ineligibility should be reduced under Article 10.5.2? If so, what is the appropriate period of ineligibility?
- Was the FEI Tribunal correct to decide that a previous violation under earlier FEI anti-doping rules amounted to "aggravating circumstances" which justified an increased period of ineligibility under Articles 10.6 and 10.7 of EAD Rules?

(1) Breach of Art. 2.1 and Art. 2.2 of the EAD Rules

139. The Appellant has contested neither the presence of the Banned Substance Propoxyphene and its metabolite Norpropoxyphene in the Horse nor the integrity of the collection and analysis procedures performed by the testing laboratories.

140. Propoxyphene is a Banned Substance under the FEI Equine Prohibited Substances List set out in Annex II of the FEI Veterinary Regulations (the "List"). It is an opiate analgesic used for the treatment of pain.

141. There is no dispute between the Parties that Articles 2.1 and 2.2 of the EAD Rules have been breached.

142. The rules governing Banned Substances and the sanctions to be applied are set out in the EAD Rules. Propoxyphene and its metabolite Norpropoxyphene are not governed by the Controlled Medication Substances provisions within the meaning of the ECM Rules.

(2) **Are the EAD Rules in breach of the fundamental rights of the Appellant?**

143. At the hearing, counsel for the Appellant gave oral submissions in support of the Appeal Brief. The central submission on the part of the Appellant on this question was that, to impose strict liability on a rider for the presence of a Banned Substance in the Horse's sample by designating him or her as the PR was fundamentally unfair. It was wrong to apply the strict liability regime applicable to human athletes under the WADC.

144. It was submitted by the Appellant that imposing strict liability in this way was an unjustified and disproportionate infringement of the fundamental rights of the rider, which are protected under Swiss and EU law, by EU competition rules and personality rights under Articles 27 and 28 of the Swiss Code and that the rules should not be enforceable against the Appellant on grounds of public policy.

145. It was further submitted that the EAD Rules infringed his right to a fair hearing by depriving the Appellant of a proper opportunity to have his culpability assessed on the facts, and that the EAD Rules infringed the principle of proportionality in going too far in pursuit of the aim of combating doping by imposing strict liability and a two (2) year period of ineligibility on the PR.

146. While the Appellant's Appeal Brief submitted that the EAD Rules should be declared invalid, counsel for the Appellant submitted in his oral submissions that the infringement of fundamental rights represented by the imposition of strict liability on the PR under the EAD Rules should be addressed by interpreting the EAD Rules as creating a rebuttable presumption that a breach had been committed by the rider as PR in the event of a horse testing positive. On this approach, if the rider could establish that he neither knew nor could have known nor exercised any control to prevent the violation from occurring he should be exonerated and found not to have committed a violation of Article 2.1.

147. Further, the Appellant asserted that the sanctions for breach of the EAD Rules are significant and involve significant periods of ineligibility and loss of prizes. The Appellant submitted that to impose strict liability on the rider in this context was in breach of fundamental protections under the law.

148. In implementing the EADCM Regulations, the FEI had expressly adopted and applied the well-known provisions of the WADC to competitive equine sport, in particular, in

relation to the regime on Banned Substances under the EAD Rules. The EAD Rules operate across a wide range of events and circumstances. Equine sport is of course different from human athletic endeavour because horse and rider compete together in partnership. Riders may have varying degrees of control over, and knowledge of, the horse they ride and it may be more or less difficult for a rider to exercise the standard of utmost caution to guard against positive tests required under the EAD Rules.

149. In the Panel's view, the FEI as a sporting association is afforded a margin of appreciation in making rules to regulate the conduct of its members. While this principle does not prevent a judicial or arbitral tribunal charged with examining the rules to determine whether they constitute an infringement of fundamental rights, it serves to emphasise that a sporting association will generally be in the best position to assess the rules which are required to address issues arising in the sport which it runs.

150. In this regard, the EAD Rules were adopted by the FEI after due consideration and, indeed, the continued designation of the rider as PR under the FEI rules has been recently confirmed by the Belgian, Dutch, Australian and Canadian National Federations and various FEI Commissions.

151. Accordingly, the Panel holds that the provisions of the WADC upon which the EAD Rules are modelled are an accepted regime to combat the problem of doping in sport and the provisions of the WADC have been held by the Swiss Federal Tribunal not to infringe fundamental rights or to impose sanctions for breach which are so evidently and grossly disproportionate as to infringe fundamental rights under Swiss law (see N., J.,Y., W. c/ FINA, Judgment of 31 March 1999, reported in CAS Digest II, p. 767, 772).

152. The designation of the rider as the PR for breach of the EAD Rules is, in the view of the Panel, soundly based in policy because the rider is generally in a position to take care and adopt appropriate precautions to avoid a positive test. Anti-doping rules can fairly and legitimately be formulated to encourage such conduct from riders who are generally vested with control over the horse.

153. The fact that riders will be in different situations and have varying degrees of involvement with the horse and its preparation is inevitable and the rules can no doubt produce harsh outcomes in certain circumstances.

154. In this regard, the Appellant's counsel cited the jurisprudence of Lucinda Turner v/ the British Equestrian Federation (FEI Tribunal Decision dated 1 August 2014) by way of an example of the position of a "catch-rider".

155. In Turner, the FEI Tribunal concluded that a rider was entitled to delegate her obligation to present her horse for testing to the owner who was also present and did not, as a result, and on the facts of case, commit the violation of refusal under Article 2.3 of the EAD Rules. The Panel considers that Turner was a decision on its facts in relation to the particular terms of the refusal violation.

156. The Panel does not consider that the decision in Turner supports the proposition that the EAD Rules should be interpreted as allowing a rider to delegate his explicit responsibility as PR for doping violations, so as to avoid strict liability for a positive

test by stating that, as a result of the delegation, he or she had no knowledge or means of knowing of the violation or ability to exercise control over the horse and the circumstances which gave rise to the violation.

157. After consideration of the FEI Tribunal's ruling in Turner, the Panel takes the view that the imposition of strict liability on the rider by his or her designation as the PR is a measure which falls well within the margin of appreciation permitted to the FEI in making rules for the sport.

158. Further, if there is any infringement of personal rights under the rules, then the Panel considers that it is justified by the public interest in the fight against doping in the sport, by the need to have rules which encourage careful conduct by riders and by the private interest of the FEI in having clear, readily applicable, rules.

159. In the Panel's view, the strict liability regime imposed on the rider under the EAD Rules amounts to a proportionate, justifiable response to the problem of doping in the sport. The possible availability of the "No Fault" or "No Significant Fault" defences, under which the PR may seek to eliminate or reduce the standard period of ineligibility upon consideration of his or her fault in connection with the violation, further supports the legitimacy of the imposition of strict liability for a positive test.

160. Accordingly, the Panel rejects the claim that the EAD Rules should be declared invalid as being in breach of fundamental rights or be interpreted so as to allow a rider in the position of the Appellant to rebut liability for a positive test so as to be found not to have committed a violation.

161. This conclusion means that the EAD Rules are enforceable and binding on the Appellant. A rider who, like the Appellant, is strictly liable for a positive test under the EAD Rules can seek to rely on the defences under Articles 10.5.1 and 10.5.2.

162. Articles 10.5.1 and 10.5.2 are directly taken from the equivalent provisions of the WADC. There are no notes or commentaries to guide the interpretation exercise under the EAD Rules (as there are in the WADC). Article 15 of the EAD Rules requires the Rules to be interpreted as an autonomous and independent text with the proviso in Article 15.5 that they shall be interpreted in a manner which is consistent with the FEI Statutes and GRs as well as other FEI rules and regulations and other FEI regulatory norms.

(3) **The Imputation of the Veterinarian's Negligence in the case at hand**

163. Before considering the Appellant's own negligence in the case in hand, the Panel notes the submissions of the Respondent that any negligence by third parties, such as Dr. Pasha, should be attributed to the Appellant.

164. The FEI Tribunal held that the head veterinarian at W'rsan Stables, Dr. Pasha, acted with negligence in administering the medication FUSTEX to the Horse without inquiring about its content.

165. The Panel concurs with the FEI Tribunal's findings that the actions of Dr. Pasha with regard to the handling of the substance FUSTEX and his injection of the Horse must be considered significantly, if not grossly negligent.

166. As a consequence, the Appellant, whatever his own personal fault, could not, by reason of the fault of Dr. Pasha, avoid the disqualification sanction mandated by Article 10.1 of the EAD Rules. He is forced to rely on the defences of No Fault or Negligence (Article 10.5.1) or No Significant Fault or Negligence (Art. 10.5.2). The standard of proof to be applied is the balance of probability (Article 3.1).

167. The Appellant submitted that this was not the correct approach to the application of the defences and that the inquiry should primarily concern the fault of the PR, and that only in unusual circumstances should the fault of a third party be attributed to the PR. Whether that was appropriate would depend upon the nature of the personal fault of the PR and its link with the fault of the third party.

168. In the view of the Panel, the focus of the inquiry should, on the proper interpretation of the EADC Regulations, be on the personal fault of the PR in the particular circumstances of the case, and the question whether the PR has discharged the onus on him or her to show that he has acted in the required manner to avoid a positive test of his horse.

169. In the case at hand and under the EAD Rules, the misdeed of Dr. Pasha is objectively imputed to the PR, regardless of the presence of intent, fault or negligence or even knowledge of the use on the part of the PR. The PR cannot avoid strict liability for the anti-doping violation by saying that he or she relied on others or delegated responsibility away from himself or herself.

170. In this case, the Appellant challenges the legality of this "immediate, automatic and irrebutable" imputation of Dr. Pasha's fault to himself as PR. He points out that whereas the athlete will always bear responsibility for his own body, the rider cannot be burdened at all times with the responsibility for an extraneous body, namely his horse.

171. The Appellant best articulates his position in the Appeal Brief as follows:

"Where the rider does not have complete control or supervision over the horse – and where it is not part of the sport for the rider to have to prepare the horse and take complete control of it for days or months before the competition, it cannot possibly be correct for the rider to be fixed with strict liability for any banned substance being present in the horse's body."

172. The Panel does not agree. If and when the rider, including the "catch rider" or the rider of a borrowed horse, mounts a horse which he or she has previously never ridden or perhaps never even seen, it is the intent of the EAD rule makers, in the interests of the horse's welfare, but also in the interests of fair play, that the PR be compelled to inquire about certain aspects of the animal's condition and care.

173. The innocent athlete must, therefore, assume liability for the misdeed of the third-party doper. He will indeed be disqualified from the competition and be forced to forfeit all

prizes, points, etc. But to the extent he can establish how the Banned Substance entered the Horse's system, he will be able to eliminate or reduce the severity of the ineligibility sanction. Only the disqualification will remain. But the PR cannot avoid the imputation of the misdeed.

174. To the extent the athlete incurs a sanction in addition to disqualification, the penalty imposed will be based on the athlete's own negligence in contributing to the fact of the third-party violation. He will, in many cases, not have properly exercised the standard of care in the selection and supervision of that third party or he will have been negligent in not having checked, controlled or investigated the nutritional supplement which he (or in the case of equine sport, the horse) ingested.

175. The Respondent relied on passages in two CAS awards to support its position on attribution - *Alabbar v FEI* CAS 2013/A/3124 and *Stroman v FEI* CAS 2013/A/3318. In the Panel's view, these awards do not support the position that the fault of the veterinarian should automatically be attributed to the PR in assessing the possible application of the defences. In both cases the PR was denied the privilege of hiding behind the failures of professionals (in the same way as an athlete cannot hide behind the failure of his doctor or coach), but was found to be personally at fault in the sense that his actions could not meet the requirements of the No Significant Fault test.

176. In Turner, the "catch rider" was exonerated, not because she had no involvement with the horse, but rather because she had properly delegated her duty under Art. 2.3 of the EAD Rules and had not personally known of or witnessed the evasion of the sample collection committed by the owner. Had she witnessed the evasive action and done nothing to prevent it, the outcome in Turner would have been different. It was the absence of fault in her conduct, not the fault of the Owner, which was deciding in the exoneration of Turner.

177. In all of these cases, the objective fact of the third party misdeed is imputed to the athlete. The athlete is disqualified from the competition, but the sanction remains commensurate with the athlete's personal fault or negligence in his selection and oversight of the physician, trainer or advisor or, alternatively, for his own negligence in not having checked or controlled the ingestion of the Banned Substance.

178. In stating this fundamental principle, the Panel acknowledges that the application of the strict liability rule in equine sport can pose imputation issues which differ from typical non-equine doping violations in which the doping of the athlete's own body is the object of the rule violation. The Panel takes the position, however, that the facts at hand do not constitute one of those cases.

(4) **Conclusion of the Panel with regard to the imputation rule**

179. In the case at hand, a breach of Art. 2.1 and Art. 2.2 of the EAD has occurred for which the Appellant as PR must bear legal responsibility. The question whether other persons employed in the W'rsan Stables should also be charged with a violation of the same provisions lies exclusively within the prosecutorial competence of the Respondent. The Panel expresses no opinion in this regard.

180. The Panel finds no basis or cause to diverge from the imputation rule inherent in the strict liability principle contained in Art. 2.1 and Art. 2.2 of the EAD Rules and Art. 118.6 of the GRs. The Panel has no authority to re-write the imputation rule set out in Art. 118.6 of the GRs, even if differences in the organisation, structures and practice of equestrian sport in various regions of the world differ from one another or that further refinement of the PR's liability in competition may be necessary and appropriate.

181. In summary, the Appellant must be held liable for the misdeed of the veterinarian, Dr. Pasha. This does not mean that Dr. Pasha's culpability is the measure of the Appellant's culpability. The nature and origin of the two are quite different. It does mean, however, that the Appellant as PR must bear the legal consequence of the rule violation. Disqualification is unavoidable, but any further sanction will be determined on the basis of the Appellant's own subjective fault and negligence.

182. Provided the accused PR is able to establish how the Banned Substance entered the Horse's system, something which the PR is in the best position to do, he will be able to either eliminate or reduce the ineligibility and other sanctions set out in Art. 10.5 of the EAD Rules.

(5) **Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances**

183. In addition to disqualification, the further consequence of an Art. 2.1 or Art. 2.2 EAD Rule violation is the presumption of doping and the imposition of two (2) years ineligibility, a fine of CHF 15,000 together with appropriate legal costs (Art. 10.2 EAD Rules). This presumption is subject to the rebuttal of the accused athlete.

184. In the event of a finding of No Fault or Negligence, the two (2) year period of ineligibility will be eliminated. In the event the PR can prove No Significant Fault or Negligence, the period of ineligibility can be reduced by not less than one-half of the period of ineligibility otherwise applicable. In both cases, however, the disqualification prescribed in Art. 10.1 of the EAD Rules remains in place.

185. In both cases, the athlete must cross a threshold in order to be eligible for elimination or reduction. He must be able to prove on the balance of probability and on the basis of more than a mere speculative claim or proposition how the contamination occurred. The athlete must prove on the basis of "actual evidence of specific circumstances" how the Banned Substance entered the Horse's body (*IRB v Keyter*, CAS 2006/A/1067). In this regard, the standard applicable to proof of these threshold requirements is no different from the standard applicable to the proof of No Fault or Negligence and No Significant Fault or Negligence.

(6) **The Presence of "Exceptional Circumstances"**

186. In its publication "World Anti-Doping Code" of 2009, WADA points out in its commentary to Art. 10.5.1 and Art. 10.5.2 WADC that these provisions "are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases." A showing of "Exceptional Circumstance" is also required in Art. 10.5.1 and Art. 10.5.2 of the EAD Rules.

187. The Panel, after reviewing the expert reports submitted in this case, finds that such exceptional circumstances are present in the case at hand. Dr. Mark Dunnett established in his Expert Report of 15 June 2012 the following:

"Propoxyphene is not considered an analgesic of choice in equine veterinary medicine and to the best of my knowledge there are not and never have been any propoxypyhene-containing medicines having a marketing authorization for horses. Given the availability of other effective drugs for the treatment of mild through to so severe pain in horses such as flunixen, meloxicam, pethidine and butorphanol, there is no legitimate use for propoxyphene in horses. As a consequence, very few pharmacological/toxicological studies have been conducted on this drug in horses".

188. Dr. Dunnett also testified that the minimal quantity of the FUSTEX alleged to have been injected by Dr. Pasha, namely 1 cc, would seem to be corroborated by the minimal residues detected in the sample. Dr. Dunnett testified, in this regard, that the estimated concentrations in the sample "are very low in the context of the use of propoxyphene as a therapeutic medication."

189. Dr. Stuart Paine pointed out in his Report dated 21 February 2014 that

"I am not aware of paradifenbutirate and after an extensive search using scientific databases, I can find no entries for this name with the exception of information pertaining to FUSTEX. I therefore intimate that the veterinarian who administered FUSTEX to the Horse could not have known either the ingredient pradifenbutirate, or that the active ingredient of FUSTEX was indeed propoxyphene."

190. Based upon this evidence, the Panel has concluded that the use of Propoxyphene in equine sports had been relatively unknown until 2012. FUSTEX appears to have been the only marketed medication for horses which contained this Banned Substance, the presence of which was concealed under the fictitious name "Paradifenbutirate".

191. Taken together, the Panel concludes that circumstances surrounding the administration of FUSTEX by Dr. Pasha, the absence of any legitimate use of Propoxyphene for horses, its minimal therapeutic benefit, the concealment of the correct chemical name of the propoxyphene by the manufacturer, Dr. Pasha's reference to the FUSTEX as a muscle stimulant, when the substance has a relaxing effect, all of these circumstances distinguish this case from the majority of cases involving intentional or negligent doping.

(7) **The FEI Tribunal's Holding that the Appellant had not met his burden of proof in establishing how the Banned Substance entered the Horse's System.**

192. The FEI Tribunal held in its decision of 7 April 2014 that, although none of the documents submitted by the Appellant regarding Dr. Pasha's treatment of the Horse, the Pre-Ride Medication Form and his list of medicines reference any administration of the product FUSTEX to the Horse, it was still able to believe "that it is more likely than not that Dr. Pasha administered the product FUSTEX to the Horse on the day prior to the Event."

193. Despite this finding, the FEI Tribunal was "unable to find on the balance of the probability" that the Appellant had established that the actual vial of the product FUSTEX injected into the Horse did indeed contain "some Propoxyphene".

194. The Panel takes a different view from the FEI Tribunal with regard to whether the Appellant has established how the Banned Substance entered the Horse. It finds that, on the basis of probability, the FUSTEX which he injected did, more likely than not, contain Propoxyphene.

195. In making this finding, the Panel has taken the following evidence into consideration.

- upon inquiry of Ms. Carolin Fischer, Legal Counsel for the Respondent, with Mr. Enrique Fischer, Director of Chinfield S.A. in Argentina, the manufacturer of FUSTEX, Mr. Fischer confirmed that "from the beginning" dextropropoxyphene (Propoxyphene) had been an ingredient in the original formula of the drug FUSTEX since 1981, but "for commercial reasons", the company chose to use the term "Paradiphenbutirate". This E-Mail exchange took place on 2 December 2013. The Panel finds no grounds to assume that Mr. Fischer's representation was intentionally false;

- The Respondent requested the analysis of a sample of FUSTEX by HFL Sport Science laboratory in the U.K. in February 2014. Mr. Steven Maynard, Laboratory Director, confirmed in his Witness Statement that the analysis performed on 12 February 2014, contained Propoxyphene. Mr. Maynard confirmed that "the product tested appeared unopened as the metal collar seal was intact on arrival at HFL and there was no evidence that the rubber septum had been pierced." The Panel has noted that no challenge has been raised by either party regarding the origin and chain of custody of this sample with regard to this test;

- In earlier sample analyses of two vials of FUSTEX requested by the Emirates Equestrian Federation and conducted by Dr. Terence See Ming Wan at HKJC on 7 February 2013, the presence of Propoxyphene was confirmed. The FEI Tribunal challenged the reliability of the origin and chain of custody regarding these samples;

- Dr. Pasha himself also submitted two samples of FUSTEX for testing by the Abu Dhabi Police laboratory on 25 February 2013. Both samples tested positive for Propoxyphene.

196. The balance of probability standard when expressed in percentage terms means that the Panel must be satisfied that the explanation provided by the Appellant for establishing the source of the violation has a chance of 51% or more of having actually occurred (CAS 2009/A/1930).

197. At the hearing, the questions from the Respondent put to Dr. Pasha focused on the steps he had or had not taken before administering the injection of FUSTEX rather than challenging him on whether he had given the injection. The Panel heard Dr. Pasha give evidence and have concluded (as the FEI Tribunal did) that Dr. Pasha gave an

honest account of the administration of the FUSTEX to the Horse the night before the race.

198. Dr. Pasha's statements could have been supported had he kept a record of his acquisition of the FUSTEX from Frederico, the entry of the medication into the Stable inventory or his administration of the FUSTEX to the Horse in his Medication Log Book as required in the VR. The record is unfortunately blank.

199. The Panel holds that the totality of the evidence submitted places the balance of probability in favor of the Appellant, even if the margin is very thin. The Panel does not ignore or overlook that Dr. Wan's Witness Statement spoke of a test result in 2009 after an analysis of FUSTEX in which Stanozolol was allegedly present and not Propoxyphene. Corroborating evidence of the test results was not submitted.

200. The Panel has also considered the possibility of alternative sources of the Propoxyphene, including the administration of pure Propoxyphene by a saboteur, a possibility which the Panel has discounted on the basis of Dr. Pasha's admission of having injected FUSTEX into the Horse on the eve of the Event.

201. Additionally, the Panel finds Dr. Dunnett's characterization of the chances of contamination of the feed, dietary supplements or stable environment at W'rsan as being minimal to be credible. All of the horses tested from the W'rsan Stables, including Glenmorgan, receive exactly the same range of feeds, dietary supplements and share the same stable environment. None of the other horses tested during this period show evidence of contamination.

202. After all of the above, the Panel concludes that, on the balance of probabilities, it was the FUSTEX injection on the eve of the Event which was the source of the contamination. The vial of FUSTEX most likely contained Propoxyphene, the active ingredient of FUSTAX since its introduction into the market in 1981, the presence of which was confirmed in subsequent laboratory analyses of FUSTEX since 2013.

(8) The Elimination or Reduction of the Sanction pursuant to Art. 10.5.1 and 10.5.2 of the EAD Rules

203. The Panel wishes to emphasize again that the fault or negligence which determines the measure of the Appellant's sanction is not that of Dr. Pasha. It is the Appellant's own fault and negligence in not having exercised the standard of care applicable to a PR which, like the non-equine Athlete, is placed at the exercise of "utmost caution". It is the PR's personal duty to ensure that no Banned Substance is present in the Horse's body.

204. The Appellant cannot challenge the fact that the rules and regulations of the FEI, in addition to other informative publications, set out the scope of the PR's duties and responsibilities.

205. In this regard, the "Athletes Guide to the Equine Anti-Doping and Controlled Medication Regulations", effective 5 April 2010, (the "**Athlete's Guide**"), contains straightforward advice both to PRs and to Support Personnel in a non-technical, non-legal form. The issuance of the Athlete's Guide accompanied the enactment of the

EADCM Regulations on the same day and can best be described as "required reading" for PRs.

206. The discussions of "Responsibilities" on page 5 of the Athlete's Guide addresses exactly the subject matter of this case. It should have been heeded:

"If you are the rider, driver, or vaulter of the horse, then you are the Person Responsible for the horse that will be held accountable for an EADCM Regulation violation. This is true even if you are riding, driving, or vaulting a borrowed horse! Therefore, you need to be very careful about who you trust to care for your horses and even more so who you trust to treat your horses. In the case of a borrowed horse, you should make sure you are comfortable with the horse's treating history before competing with it. In the regulations, if a member of your support personnel does something that leads to an EADCM Regulation violation, that person may be held accountable, ***but so will you****. For example, if you rely on your veterinarian who tells you that a substance can be used on your horse without violating any rules, and later you find out that your horse has tested positive for a Prohibited Substance, you will be in violation of the rules even though you were relying on your veterinarian. Similarly, if a groom who is working for you mistakenly gives one of your competition horses medication intended for an ill horse and the competition horse later tests positive,* ***you*** *will be in violation of the regulations (and your groom may be also)."* [Bold highlighting used in the original]

207. As an athlete bound by the rules of his National Federation, which, in turn, is bound by the rules of the FEI, the Appellant should have carefully heeded the advice in the Athlete's Guide. The Appellant has persistently pleaded that he has had, like the borrower, no involvement with the Horse. Yet, the Athlete's Guide also addresses the situation of the "borrowed horse" and expressly directs the rider to be "*comfortable with the horse's treating history before competing with it.*"

208. If and when the rider, including the "catch rider" or the rider of a borrowed horse, mounts a horse which he or she has previously never ridden or perhaps never even seen, it is the intent of the EAD rule makers, in the interests of the horse's welfare, but also in the interests of fair play, that the PR be compelled to at least inquire about certain aspects of the animal's condition and care.

209. In the case of the PR, however, the rule makers addressed several concerns in imposing the strict liability rule, even in cases of third party fault or negligence. Among them, the rider is best able to function as the "last check" on the physical condition of the horse immediately prior to and during the race, regardless of whether he knows the horse or mounts it for the first time. An experienced rider can quite often identify with the naked eye an irregularity in the condition and behaviour of the animal both before mounting and during the competition.

210. It is not unreasonable to expect of the rider that, even if he has had no previous experience with the horse, to request inspection of the medical and nutritional records prior to the event. In so doing, the PR serves as an independent "controller" of the condition of the horse and acts in the horse's welfare. The airline pilot does not enter

the cockpit without first having checked the tyres and the integrity of the aircraft's fuselage before taking off.

211. On the facts pleaded by the Appellant before this Panel, there has been no submission made regarding the Appellant's level of knowledge regarding the Horse's "treating history" before entering the Event. Dr. Pasha also confirmed in this oral testimony before the Panel that the Appellant made no inquiries regarding the Horse's medication record.

212. The Panel accepts that security considerations required that the Appellant reveal his choice of horse only a few hours prior to the Event. But only two or three horses stood to be selected by the Appellant for the endurance race. And even if the Appellant did not know himself which horse he would ultimately select on the evening of the Event, it would have been reasonably possible for him to inquire about the treatment history of those horses who came into question.

213. Inquiries about the "treating history" of the Horse presuppose, however, that treatment records exist. In this situation, the PR generally turns to the trainer or to the veterinarian, i.e., to that person who generally diagnoses equine illnesses and prescribes medicines.

214. In the case at hand, we learn from Dr. Pasha's first Witness Statement dated 15 May 2012 that he did not keep printed treatment records:

"I have been asked to set out details of any condition or ailment for which Glenmorgan required veterinary treatment since February 2011. I do not keep printed records and certificates of each treatment I administer, however I keep note on my computer."

215. If Dr. Pasha did not keep printed treatment records, the question arises as to how the Appellant or any other third party could have informed himself about Glenmorgan's "treatment history" prior to competition, if Dr. Pasha held this information presumably on his laptop computer.

216. Dr. Pasha's manually printed recitation of treatments for Glenmorgan between 21 January 2011 and 9 February 2012 do not even reach to 10 February 2012, although Dr. Pasha administered injections to Glenmorgan on 10 February 2012.

217. More relevant, however, is the fact that the Appellant never actively inquired with Dr. Pasha or the trainer regarding the past and more recent medical treatment of the Horse, if any. It is understandable why he did not. In his oral testimony, he confirmed that "*I don't ask about medication. I do not have a big role other than riding. I am not a trainer and certainly not a vet.*"

218. When asked by the Respondent's counsel in the course of this testimony how he would have reacted, if he had been asked by Dr. Pasha whether he could administer a new medication to the Horse on the eve of the Event, he responded that it is only "common sense" not to give the horse a new medication the day before the race without having tested it. "*I would definitely have said, don't do it.*"

219. The Appellant stated: "*Had I been consulted, I would have told the vet to first take a (blood or urine) sample (to determine whether the medication is clean).*" If Dr. Pasha had diligently recorded the pre-race administration of FUSTEX in his log, it might have acted as a red flag for the observant PR who would have requested to see it. He might have then asked whether the substance had undergone the pre-race sample analysis performed as part of the Stable's standard procedure or whether there was a "race allowed" certificate.

220. The Appellant, as evidenced impressively in his oral testimony before the Panel, made it clear that he relied entirely on the systems established at W'rsan Stables and the work of the professionals engaged to look after the horses to discharge his responsibilities under the EAD Rules.. The medication of the Horse was, in his view, the responsibility of the vet. It did not involve him.

221. Clearly, the Appellant did not appreciate his responsibilities as PR under the EAD Rules. Not only did he not understand his position as PR, a member of the W'rsan owner's family, but also as the rider of the Horse on 11 February 2012. His responsibilities did not end with the selection of the "best team", meaning a qualified and reliable expert staff of support personnel. The team also had to be supervised and controlled.

222. The Panel does note that the Appellant took the following steps:

- The Appellant's chosen approach to riding horses in competition is to have the professional staff employed at the W'rsan Stables prepare horses for events and be responsible for the necessary training, nutrition and veterinary care and medication. He has limited involvement with a horse before riding in an event, yet sought to employ "the best" staff.

- After the positive test was returned on the horse Hachim in 2005, more stringent measures had been implemented at the W'rsan Stables in order to avoid positive tests. This included a system of pre-race tests 9 days before an event on all horses which were being considered for the event. In this case the Horse (and 5 others) was tested 9 days before the Event. The Horse returned a negative test for Banned Substances.

- The staff employed at the W'rsan Stables are highly qualified and are instructed and reminded of their duties to comply with the policy of clean racing and with FEI regulations. The veterinary department consists of, Dr. Pasha, the head veterinarian another qualified veterinarian, 6 veterinary assistants, and two pharmacists. All are appropriately qualified and experienced. Dr. Pasha is an experienced veterinarian who has been working in his role for the Appellant since 2007. He has been a veterinary professional since 1991. He moved to W'rsan Stables in 2007 after 6 years as head veterinarian at the Royal Stable in Abu Dhabi.

- The veterinary department follows procedures to ensure (1) that all medicines are continually kept under lock and key; (2) all drugs that are removed from their stock must be recorded by the vet assistant and Dr. Pasha; (3) when purchasing

products, vets must seek a complete breakdown of the ingredients and where appropriate, seek a certificate confirming that they are "race allowed";

- Dr. Pasha was required to complete the following records upon administering medical products: (1) pre-ride medication form; (2) a list of products administered to each horse, and (3) a lists of the medicines purchased from the pharmacies;

- The Appellant at all material times trusted in the systems and procedures and the work of the staff at the W'rsan Stables.

- The system in place relied on the staff and key members such as Dr. Pasha carrying out their duties and following the procedures laid down.

223. Clearly missing at W'rsan Stables, however, was the effective supervision of the support staff, in particular, the chief veterinarian. In view of the comprehensive documentary requirements for medications which must be maintained by the veterinary department, the Panel is forced to conclude that certain measures and precautions, although clearly defined and to a certain extent practiced (e.g. blood and urine samples 9 days prior to competition), were either forgotten, ignored or concealed.

224. A higher level of control and supervision, above that of the Racing Manager, Majid Ali Kayoumi, did not exist at W'rsan Stables. The "last word" in veterinary matters was Dr. Pasha. With regard to nutritional matters, it was the Stable Manager and his Deputy, Dr. Jose De Souza Meirelles. With regard to the purchase and introduction of new medications, a "double signature" (Pasha and Kayoumi) was required.

225. Upon questioning by the Panel whether a "higher level" of control and supervision existed at W'rsan, the Appellant confirmed that a type of "management committee" had been created to coordinate and facilitate administrative and procurement decisions. It also served to resolve conflicts between managers and trainers. It had, however, no competence to ensure compliance with procedures or to oversee day-to-day administration. Every office in the world runs fire drills to ensure the procedures in place to get people out of buildings works; the management committee never appears to have tested the procedures in place at W'rsan. The Appellant could have tasked it (or indeed himself) to run some "fire drills".

226. Although the Appellant confirmed upon questioning that "*I have full control over the Stable*", he also confirmed that "*it was not for me to question the vet as to why he is doing something.*" His (the Appellant's) responsibility was to put the procedures into place and to ensure that the "best people" have been selected to carry out those procedures. "*My role is to ride the horse and to win the race.*"

227. After all of the above, it is clear to the Panel that the reasons for this complete and utter breakdown of the doping prevention rules at W'rsan lie not only with the chief veterinarian. More obvious, however, is the presence of an organizational defect in the management of the Stables.

228. The Athlete's Guide advises the PR in the penultimate bullet-point on the last page explicitly to do the following:

"Keep a medical record for your horse as well as for any borrowed horses. Ask the treating/team veterinarian and the grooms to document in writing all treatments administered to the horse stating date, time, substance(s) administered, dose, route (e.g. intravenous) as well as name and qualification of veterinarian."

229. In light of the comprehensive doping prevention regime practiced at W'rsan, it would have been advisable to have created a department of "Rule Compliance", consisting of a permanently-engaged professional, a "controller", who inspects required medication documentation, looks into medical kits, regularly checks inventories, ensures proper instruction of personnel, etc. This can be expected in a competitive racing enterprise consisting of 514 horses and 200 employees.

230. The Appellant's rejoinder to this observation of the Panel will likely be that, even if he had asked to review the medication history of the Horse before the Event, the record would have revealed nothing, because Dr. Pasha made no entries regarding the injection. But the Appellant overlooks that his mistake could have been prevented, had he been properly supervised.

231. The above discussion points up clearly where the core of the Appellant's negligence lies: in completely divesting himself of the responsibility of a PR. In his view, this responsibility could be delegated to the Stable's trusted staff of professionals. He has the right to rely on their competence and to expect of them that they will fulfill the same duties which would otherwise fall to him. The proverbial "trust is good; control is better" would have been the better axiom to follow.

232. But, from the perspective of Dr. Pasha, it was exactly this generous and unsupervised trust, coupled with the knowledge that the Appellant himself would never ask for the medication records (because he was never "involved" with the horses), which created the fertile ground for Dr. Pasha's careless actions in omitting to record the receipt of the new medication FUSTEX and to diligently investigate its content.

233. Dr. Pasha apparently assumed after observing the Appellant's past practice that the Appellant would never request to inspect the medication records of the horses which he rode and for this reason he felt comfortable in taking an unknown and untested medication into his medical kit, forgetting to ever enter it (and its administration) into the medication records for the Horse. Absent control and supervision, he himself became increasingly susceptible for the proverbial "slip up", to use his own terminology,

234. The Panel accepts that the Appellant and his father employed highly qualified, properly instructed staff to care for their horses and prepare them for racing and that they have implemented a significant range of procedures to avoid positive tests, including an extensive pre-race testing regime. This is entirely consistent with the Appellant's commitment to the welfare of his horses and to clean racing which was plainly evident in his evidence before us.

235. However, given the obligations of the PR under the EAD Rules, the Panel does not consider that the Appellant can show that he bore "no fault" in connection with the violation. The absence of any inquiry into the preparation and treatment of the Horse in the pre-race period and the absence of checks in the system on whether the

veterinary staff and other staff were acting properly represent fault by the Appellant in his role as PR. Both failures made it more likely that mistakes by those responsible for the preparation of the horses will not be detected and positive tests will result. Accordingly, the Panel find that the Appellant cannot establish the No Fault defence under Article 10.5.1.

(9) **The Reduction of the two (2) year Ineligibility Sanction**

236. The Panel approaches the possible application of the "No Significant Fault" defence by asking whether the Appellant can show on the particular circumstances relating to the violation that his fault was not significant in the natural ordinary meaning of that word.

237. The Panel acknowledges that this inquiry must be carried out in circumstances where the Appellant as PR bears strict non–delegable duties to exercise the "utmost caution" to avoid positive tests. The Panel also recognises that the bar for the application of the defence should not be set too high. While there are many CAS awards involving the consideration of the defence in differing factual circumstances, the exercise is essentially one of considering the possible application of the defence in the circumstances which led to the violation.

238. The Panel has considered the factual submissions of the Appellant in this case in relation to the No Fault or No Significant Fault defence and reached the conclusion that the fault of the Appellant can, in consideration of the particular factual circumstances of this case, be considered as meeting the "No Significant Fault" criteria.

239. While the Appellant failed to make proper inquiry of the staff, in particular the Chief Veterinarian, concerning the treatment and preparation of the horse after the pre-race test, and to institute a system for further checking that procedures were being followed, those failures must be considered in the context of equine sport where a PR, while having personal responsibility at all times, is likely to rely on systems and the work of third parties to a significant degree (and, of course, to a greater extent than a human athlete) and where the particular PR had, with his father, implemented a system involving pre-race testing, had employed experienced staff to look after his horses who were properly instructed to carry out their obligations.

240. While the PR should have done more to guard against mistakes and failures by those responsible for the horses from giving rise to positive tests, when his fault is considered in the overall circumstances, the Panel concurs that it can properly be termed as constituting a lesser degree of fault so that the No Significant Fault defence under 10.5.2 can be applied.

241. In those circumstances, the Panel must assess the applicable period of ineligibility between 12 months and two (2) years. This involves a further consideration of the degree of fault within the range of fault which qualifies under Article 10.5.2. In the circumstances, the Panel has concluded that a reduction of the period of ineligibility to eighteen (18) months appropriately reflects that degree of fault.

242. The Panel notes that this ineligibility sanction is in addition to a fine of CHF 5,000. The ineligibility sanction ended therefore as of 12 September 2013.

243. The provisional suspension of the Appellant ordered in the Notification Letter of the UAE National Federation on 12 March 2012 shall be credited against the term of the sanction.

244. The Panel considers that the provisional suspension of the Horse for two (2) months, imposed by the FEI at the beginning of the proceedings, was correctly imposed in accordance with Art. 7.5 of the EAD Rules.

(10) **Aggravating Circumstances; the Appellant's Disqualification in 2005**

245. The Panel holds that the additional three (3) month ineligibility sanction imposed by the FEI Tribunal is not supported by the facts nor is it justifiable under applicable law.

246. The doping violation which occurred on 27 January 2005 (the "**2005 Violation**") predates this violation by more than 7 years. Art. 14 of the EAD Rules sets the statute of limitations for violations at eight (8) years "from the date the violation is asserted to have occurred." The Respondent is correct in pointing out that each EAD Rule violation must take place within the same eight (8) year period in order to be considered a multiple violation". The 2005 Violation was very close to becoming "history."

247. Quite different sanctioning regimes existed in the years 2005 and 2012, the years in which the alleged first and second violations occurred. The sanctioning regime governing the 2005 Violation (CAS 2005/A/895 Lissarague et al. v/ HH Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan) applied by the CAS Panel in that year was significantly revised with the adoption of the EADCM Regulations and their enactment on 5 April 2010.

248. Among the revisions incorporated in the 2010 EADCM Regulations was the creation of a distinction between Banned Substances and controlled medications. Under the 2005 Rules, all prohibited substances were graded according to their capacity to enhance performance grades 1- 5. As the Respondent points out in footnote 90 of its Answer Brief,

"It is important to underline that in 2005, the sanctioning regime was discretionary, unlike the 2012 (and current) EAD Rules which set the standard ban for the presence of a Banned Substance and two years (absent mitigation). Under the current rules, Methylprednisolone (the substance at issue in the Appellant's 2005 case) is classified as a controlled medication substance."

249. Art. 10.7.1 last paragraph of the EAD Rules provides specifically that "where a PR is found to have committed an EAD Rule violation after having committed an ECM Rule violation, this may be considered as a factor in determining aggravating circumstances under Art. 10.5". The issue is whether this provision can apply to the 2005 Violation.

250. The application of the "aggravating circumstances" rule under Art. 10.6 of the EAD Rules requires on its wording that the Appellant should have committed either an EAD

Rule violation or an ECM Regulations violation in 2005. But the Appellant had committed, in fact, "neither/nor" in that year as the distinction between the two (2) categories did not (yet) exist.

251. The CAS decision relating to the 2005 Violation concerned a horse called *Hachim* on which the Appellant in this appeal, Sheikh Hazza, had placed first at the FEI World Endurance Championships on 27 January 2005. Sheikh Hazza did not contest the presence of the substance Methylprednisone in *Hachim* at that time.

252. The FEI Judicial Committee decided to terminate the disciplinary proceedings on the grounds that he had requested and been denied the right to be present at the analysis of the B Sample from the horse. The FEI Judicial Committee directed that he should be maintained as the winner of the race and should receive the Gold Medal and prizes.

253. On the appeal to CAS, the competing rider who came in second sought the annulment of this decision and the disqualification of the horse *Hachim* and Sheikh Hazza and requested that the FEI should take the necessary steps to have her declared as the winner and receive all relevant prizes. The main ground for the appeal was that under the then applicable rules there was no right to witness the B sample analysis.

254. The CAS held that the Appellant indeed had no right to attend on the B sample analysis under the rules at the time and that an argument that this rule contravened fundamental human rights failed. This 2005 rule denying an accused rider the right to be present at the B sample analysis has since been revoked in the EADCM Regulations in effect since 5 April 2012 with updates effective 1 January 2012.

255. The CAS Panel, in the exercise of its broad discretion granted under the FEI rules governing at that time, held in favour of the competing rider, but with regard to the question of the sanction to be imposed upon Sheikh Hazza decided succinctly and without further explanation to impose only the disqualification, not an eligibility sanction: "*The Panel considers that, under the circumstances, such sanction is sufficient and decides that no fine or suspension shall be imposed upon the Respondent 2*". ("Respondent 2" in that case is the Appellant in the instant case.") Fault or negligence on the part of Sheikh Hazza played no role whatsoever.

256. Again, this finding was made under earlier FEI rules which have been replaced by the EADCM Regulations which came into effect after 5 April 2010. Under Article 10.6 of the EAD Rules, if the FEI establishes the existence of aggravating circumstances which justify the imposition of a period of ineligibility greater than the standard sanction, the period of ineligibility can be increased up to a maximum period of four (4) years.

257. There is, however, no clear provision in the EAD Rules equivalent to Article 24 of the WADC which relates to the treatment of violations which occurred under previous FEI Rules and no statement or guidance as to how such earlier violations should be characterised.

258. Article 24.5 of the WADC sites as follows:

"The Code shall not apply retrospectively to matters pending before the date the Code is accepted by a signatory and implemented in its rules. However, pre-Code anti-doping violations would continue to count as "First Violations" or "Second Violations" for purposes of determining sanctions under Article 10 for subsequent post-Code violations."

259. In this regard, the Panel, in the absence of clarity in the provisions, could also take the position that a strict interpretation of Art. 16.3 of the EAD Rules with its clear statement of no retroactive application was intended by the rule makers to apply comprehensively to all pre-2010 violations which are invoked under the current EAD Rules for the purpose of finding "aggravating circumstances". The Panel has chosen not to apply this interpretation.

260. Article 16.3 of the EAD Rules provides that

"The 2010 EAD Rules shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of Ineligibility has expired."

261. The Panel takes the view that, if contrary to the above, the Appellant's 2005 violation could be considered as constituting possible aggravating circumstances for imposing an increased sanction for a 2012 EAD Rule violation, the violation would have to be characterized in terms of the EADCM Regulations. Under the current rules, a violation involving Methylprednisolone would be an ECM Rule violation. This has been conceded by the Respondent. While the time limit for an EAD violation to count as an aggravating circumstance is eight (8) years under Article 14 EAD Rules, the time limit for bringing an ECM Rule violation is four (4) years from the date the violation is asserted to have occurred under Article 14 of the ECM Rules.

262. While the occurrence of the earlier 2005 Violation cannot be removed, it would in the Panel's view be unjust and unfair to count that earlier violation as an ECM Rule violation for the purpose of increasing the sanction under the 2012 EAD Rules. It occurred will outside the four (4) year limitation period for ECM Rule violations under the EADCM Regulations.

263. Further, while the Panel are not really in a position to consider the substance of the 2005 Violation in "transposing" it for treatment under the EADCM Regulations, it would appear that under the current EADCM Regulations the defence which failed in 2005, namely that the Appellant was denied the right to attend the B sample analysis, would now be likely to succeed because the PR has indeed been granted the right to attend the B sample analysis under the new Rules (Article 7.2.5 ECM Rules), something which he did not have under the rules in 2005.

264. For the above reasons, the Panel concludes that it is neither just nor fair to consider the 2005 Violation as an aggravating circumstance justifying an increased sanction. As a secondary consideration, it would also clearly conflict with the principles of *lex mitior* and *contra proferentum* established in Article 16.2 of the EAD Rules and Article 16.2 of the ECM Regulations (see also Swiss Federal Court Decision of 25 January 2012 – 6B 776/2012).

265. These principles provide that if there are two possible legal constructions which can apply from the application of two sets of rules, the construction which is most favourable to the athlete must be adopted. The statute of limitations applicable to controlled medications under the EADCM Regulations is milder than the eight (8) year statute of limitations applicable under the old law. The milder rule must prevail.

266. In conclusion, the Panel holds that Art. 10.6 of the EAD Rules finds no application in the case at hand.

IV. COSTS

267. Pursuant to Art. R65.2 of the CAS Code, the proceedings related to disciplinary cases of an international nature ruled on appeal shall be free. The fees and the costs of the arbitrators are borne by the CAS.

268. However, Article R65.3 of the CAS Code provides:

"Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in 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

269. In the present case, the appeal filed by the Appellant has partially succeeded and the ineligibility sanction has been shortened, the fine remaining unchanged. The Respondent, however, was successful in defending the crux of the appeal, including its successful defence of the Appellant's request for provisional measures.

270. Based on the foregoing, and with regard to the parties' respective legal costs and expenses (Art. R65.3 CAS Code), the Panel grants the Respondent a contribution from the Appellant to his costs for witnesses, experts, including legal counsel and interpreters, if any, in an amount of CHF 10,000.

* * * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by His Highness Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan on 6 May 2014 is partially upheld.

2. The decision of the FEI Tribunal dated 7 April 2014 is partially amended.

3. His Highness Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan is declared disqualified from the CE13* 160 km in Ab Dhabi, Al Wathba, United Arab Emirates; all results of that competition, including all medals, points and prize money won, shall be forfeited.

4. His Highness Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan is declared ineligible (retroactively) for a period of (eighteen) (18) months commencing as of 12 March 2012. The period of Provisional Suspension, effective from 12 March 2012, the date of the imposition of the Provisional Suspension, shall be credited against the period of ineligibility imposed in this decision. The period of ineligibility ended on 12 September 2013.

5. His Highness Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan is fined five thousand Swiss Francs (CHF 5,000).

6. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the Appellant, which is retained by the CAS.

7. His Highness Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan is ordered to pay the Fédération Equestre Internationale a contribution to its costs for witnesses, experts, including legal counsel and interpreters, if any, in the amount of CHF 10,000.

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

Seat of arbitration: Lausanne, Switzerland

Date: 8 June 2015

THE COURT OF ARBITRATION FOR SPORT

John A. Faylor
President of the Panel