Arbitration CAS 2008/A/1654 Bernardo Alves v. Fédération Equestre Internationale (FEI), award of 6 March 2009

Panel: Prof. Michael Geistlinger (Austria), President; Mr Lars Halgreen (Denmark); Prof. Christoph Vedder (Germany)

Equestrian (jumping)
Horse doping (capsaicin)
CAS scope of jurisdiction with regard to a provisional suspension
Lack of CAS jurisdiction in absence of violation of the "ordre public"

1. **An international federation's preliminary decision deciding the provisional suspension of an athlete in a case of adverse analytical finding is a decision of a federation in the understanding of article R47 para 1 CAS Code. According to the applicable rules of the federation, the CAS has an exclusive jurisdiction to hear the appeal filed against such decision provided that the appellant has exhausted the legal remedies available to him/her and has also met the deadline to file his/her appeal. However, the CAS jurisdiction in the case of an appeal against a provisional suspension is limited by the provisions of the applicable anti-doping rules to the case of an alleged violation of the relevant provisions. In this respect, if the review of the competent investigating body does not reveal an applicable TUE or departure from the testing procedures or from the standard for laboratories that undermines the validity of the adverse analytical finding, CAS has no jurisdiction.**

2. **A provisional suspension primarily motivated by the needs of an international federation to suspend an athlete from further participation at competitions and events pending a sanction in order to guarantee a smooth functioning of the sport and which is less than the period of final sanction and is credited against it, does not cause substantial prejudice and cannot give rise to a violation of the procedural or material "ordre public" in the understanding of the Swiss Federal Supreme Court. In the absence of any violation of the Swiss material or procedural "ordre public", the CAS has no jurisdiction.**

The Appellant, Mr Bernardo Alves, a professional show jumping rider for Brazil, took part, with his horse Chupa Chup (the "Horse"), at the 2008 Beijing Olympic Games. The horse belongs to the Appellant's only sponsor Mr Johannpeter (BRA). As a member of the Confederação Brasileira de Hipismo (National Equestrian Federation of Brazil) he was bound to the FEI rules applicable at the Olympic Games, in particular the Equine Anti-Doping and Medication Control Rules (EAMCR), which are applicable through article 15 IOC Anti-Doping Rules for the 2008 Beijing Olympic Games.

The Respondent, the Fédération Equestre Internationale (FEI), is the sole IOC-recognized international federation for the equestrian sport. The FEI is the governing body for FEI Equestrian Disciplines (Dressage, Jumping, Eventing, Driving, Endurance, Vaulting, Reining, Para-Equestrian and any other forms of equestrian Disciplines approved by the FEI General Assembly) and is the sole representative of Horsesport at the International Olympic Committee.

The Appellant competed at the 2008 Beijing Olympic Games in the Brazilian team and as single rider. Upon arrival the Appellant used the Post Arrival Equine Testing (PAET). The Horse was tested negative. Before the finals, on 21 August 2008, the Horse was tested another time, this time positive for capsaicin. Both tests were performed by the Racing Laboratory of the Hong Kong Jockey Club, however, different tests were used. Only the second test was used for detecting capsaicin.

The Appellant through Mr. José Junio de Melo, Secretary General of the Brazilian equestrian federation, was notified of the positive test in writing on 21 August 2008 at 12:30 pm. The notification consisted of a letter by Mr. Mikael Rentsch, FEI Legal Department, which together with a Notification Form and four Annexes: (Annex I: a) FEI Anti-Doping and Medication Control Rules; b) Annex G of the FEI Regulations for Equestrian Events at the Olympic Games (22nd ed), effective for the 2008 Beijing Olympic Games (Hong Kong); Annex II: Form "Anti-Doping and Medication Control Rules violation"; Annex III: Form "Preliminary Hearing" and Annex IV: Form "B-sample Analysis") made 45 pages. The FEI Tribunal established in its decision dated 10 October 2008, which was not appealed, that no *"request had been made for the use of Capsaicin on the Horse, and no medication form had been supplied for this substance"*. There are no indications from any of the parties or any of the evidence submitted to the Panel that the notification was not done after the FEI Investigating Body had reviewed and determined that there was no applicable ETUE granted, no request for use of capsaicin on the Horse made, and no apparent departure from the Testing procedures of the FEI Veterinary Regulations of the FEI Standard for Laboratories that undermined the validity of the Adverse Analytical Finding.

The notification to the Appellant included the following information:

(a) the Adverse Analytical Finding;

(b) the rule violated;

(c) that the B Sample, based on Annex I b) (Annex G Accelerated Medication Control Procedure during & after the 2008 Olympic Games), which was to be applied at the 2008 Beijing Olympic Games, was mandatory and would be carried out at the same Laboratory as the A Sample, and that the identification and opening of the B Sample was scheduled for 23 August 2008 at 10:00 am;

(d) the right of the Appellant and/or the Appellant's representative to be present at the identification and opening of the B Sample and

(e) that the Appellant was provisionally suspended and granted the opportunity to be heard at a preliminary hearing before the FEI Tribunal.

The notification of the Appellant did not expressly include a reference to the requirement of article 7.1.3 lit (e) that the Person Responsible has a right to request copies of the A and B sample laboratory reports, but included the following sentence as part of Annex G ("Accelerated Medication Control

Procedure during & after the 2008 Olympic Games", number 3, second paragraph): *"When reporting the presence of a Prohibited Substance, the analytical report must include all relevant documentation from instrumental analysis"*. Obviously, this provision does not only refer to reports to the Medication Control Administrator and to the FEI General Counsel, but also to such to the Person Responsible, to the respective National Federation, the respective National Olympic Committee and to the relevant Olympic Games body.

According to an explanation of Dr. Paul Farrington, Associate member of the FEI Veterinary Commission Office, referred to by the Appellant in his Statement of Appeal, capsaicin is the active component of chilli-peppers and produces a sensation of burning in any tissues with which it comes into contact. It is not a normal nutrient for horses, medicinally, it can be used in one of three ways:

> *"By topical application to reduce the pain of arthritic joints and soft tissues.*
>
> *By topical application to the digital nerves into the foot to desensitise those nerves in horses with foot pain.*
>
> *By topical application to the front of the leg(s) to produce a burning sensation to unduly sensitise the limb(s) to touching poles to make the horse more careful in its jumping efforts thus improving performance".*

The first two cases of application are prohibited by the Equine Prohibited List Annex III (Substances and Methods Prohibited In-Competition) as Prohibited Substances (Medication Class A) and would lead to a start prohibition for a horse having been treated in such a way. The third case would come under Prohibited Substances (Doping) as hypersensitising agent and would be regarded as an abuse of the horse.

The Appellant confirmed that he wished the preliminary hearing to be held, but he indicated that he did not wish to be present or represented at the identification and opening of the B Sample. The B Sample Analysis confirmed the presence of capsaicin.

On 21 August 2008 a preliminary hearing was held. The Appellant admitted that he and his groom used Equi-Block DT, which they consider a care product, *"daily at periods of shows and at home on days with strenuous work after the work. In the period before the Olympics the Equi-Block DT was used on Saturday, 26 July, in Valkenswaard where the horses were in quarantine, because Mr. Alves jumped the horse on that day. Immediately after the arrival Appellant's groom started applying Equi-Block DT knowing that, at the Olympics, the Horse would have to go four Grand Prix within a week"*. The Appellant stated that he was of the opinion that the substance did not have a therapeutic effect and would therefore not come as Medication Class A under the EADMCR, but was legal, the more, since the product was also sold at all big events and very commonly used by riders.

The Appellant further argues that he felt strengthened in his opinion by the fact that the PAET undergone by the Horse did not show any Prohibited Substance. He admitted that the PAET was limited to certain substances. Considering the fact that *"a care product is very commonly used among riders"*, the Appellant holds that *"it was against the principle of good faith to apply a new test at the Olympics for the first time. Respondent and the laboratory knew in advance that the riders would step right into this trap"*. The Appellant also stated, never having paid attention to other products that he used, and that *"the anti-chew spray McNasty,… could also cause positive testing for capsaicin …"*. According to the Appellant this product is also

very commonly used for horses to prevent them from chewing or licking things, in the case of the Appellant the Horse's bandages and blankets.

Based on the preliminary hearing of 21 August 2008, the Appellant was provisionally suspended until the final decision by the FEI Tribunal. The Appellant asked two times for the full file and on 1 September 2008 for the transcript of the preliminary hearing, but only on 10 September 2008, at 17.47, did he receive an incomplete recording of the preliminary hearing which was later supplemented with a list of attending persons. Nevertheless about 20 minutes of the hearing are missing on the recording according to the Appellant, who had made his own written transcript of statements.

At the preliminary hearing, FEI's veterinary, Dr. Paul Farrington, in the eyes of the Appellant considered the current matter as a medication offence rather than as a doping offence. He repeated this opinion during the hearing in this matter which took place at the FEI headquarters in Lausanne on 5 September 2008. In the hearing of 5 September 2008 the discussion focused on the effects of Equi-Block DT, on the quality of the test performed and on the possible influence of the McNasty spray on the test result. In addition the competition schedule of the Appellant for the months of September and October 2008 together with his expectations of making prize money and other reasons why his participation at the competitions was deemed so important for the Appellant were discussed. From the records of the Appellant follows that the Panel finally concluded the hearing of 5 September 2008 by oral decision to set a deadline of 12 September 2008 for the FEI to provide any additional closing remarks and for the Appellant to respond on 19 September 2008. The final decision by the Panel was announced for around 30 September 2008. The provisional suspension of the Appellant was lifted until the final decision by the Panel.

On 6 September 2008, the Respondent protested to the FEI Tribunal against the lift of the suspension which had been pronounced orally on 5 September 2008. This protest was received by the Appellant on 7 September 2008, at 9.25 am, but he was not invited to respond or give a statement. On 8 September 2008, at 2.35 pm, the Appellant received the following decision of the FEI Tribunal in writing:

> *"a. The lifting of the provisional suspension is modified, such that the provisional suspension of the PR" (Person Responsible) "remains in effect from 8 September 2008 until the Tribunal's final decision is rendered in this case.*
>
> *b. The FEI is allowed to file by 12 September 2008 any additional expert witness statements and other pleadings addressing the recent filings with the PR.*
>
> *c. The PR is allowed to file by 19 September 2008 any additional witness statements and other pleadings addressing the filings to be made by the FEI subsequent to the Hearing.*
>
> *d. The Tribunal is expected to issue a final decision in this case by September 30, 2008".*

The Appellant doubts whether the decision is really one of the FEI Tribunal and whether it has been made independently from the Respondent. He holds that the FEI provisions with regard to protests were not applicable in the case at hand and that the Respondent has neither presented new arguments nor new facts between 5 and 8 September 2008. Due to the extent of the Respondent's submissions which were received on 12 September 2008, the Appellant finds that the deadline set for the Appellant to respond was unreasonably short and violated the Appellant's right to be heard. There was no

answer to his request to have the deadline extended, and other documents asked for have not been made available by the Respondent.

The Appellant, in his Statement of Appeal to CAS dated 19 September 2008, requested for relief:

> *"1. That the "modified" decision of the FEI Tribunal of 8 September 2008 be annulled and that the decision of the FEI Tribunal of 5 September 2008 (provisional lift of the suspension) be declared effective, i.e. that the provisional suspension be lifted until a final decision by the FEI Tribunal.*
>
> *2. Eventually, that the preliminary decision of the FEI Tribunal of 21 August 2008 be annulled.*
>
> *3. That a neutral and scientifically reliable expert opinion about the test method and test procedure by a director of a WADA approved laboratory shall be obtained.*
>
> *4. That Respondent be ordered not to impose provisional suspensions prior to a final decision by the FEI Tribunal in future cases of alleged offences against the Equine Anti-Doping and Medication Control Rules, unless in special circumstances.*
>
> *5. That respondent be ordered to publish the decision by the CAS including the reasons therein in the subsequent FEI-NewsLetter and the FEI-Bulletin.*
>
> *6. That Respondent shall bear the costs of the arbitration and the legal costs of Appellant".*

Further to that, the Appellant raised two procedural motions:

> *"1. That the execution of the "modified" decision of the FEI Tribunal of 8 September 2008 be stayed and that the decision of the FEI Tribunal of 5 September 2008 (provisional lift of the suspension) be declared effective, i.e. that the provisional suspension be lifted until a final decision by the FEI Tribunal.*
>
> *2. Eventually, that the execution of the preliminary decision of the FEI Tribunal of 21 August 2008 be stayed, i.e. that the provisional suspension be lifted until a final decision by the FEI Tribunal".*

The Appellant submitted arguments with regard to urgency, irreparable harm and balance of interests in order to support his request for a stay. In his Statement of Appeal also all arguments as to the merits were brought forward in the context of the request for a stay.

The Respondent in its Answer dated 29 September 2008 holds that no jurisdiction of the CAS is given to deal with the appeal of Mr Alves. As far as the appeal refers to the FEI Preliminary Panel Decision of 21 August 2008, which ordered a provisional suspension of the Appellant until a final decision in this case, the Respondent argues that the CAS has jurisdiction to hear an appeal only if that decision is in violation of article 7.2 EADMCR. According to the Respondent the Appellant does not submit any arguments that the decision of 21 August 2008 was made in violation of article 7.2 EADMCR. The Respondent requests the CAS to declare the appeal against the decision of 21 August 2008 inadmissible and to dismiss the appeal.

As far as the appeal is directed against the FEI Interim Decision of 8 September 2008, the Respondent holds that it is an interim decision which does not set out that it can be appealed, in particular before the CAS. The Respondent states that, since the decision of 8 September 2008 is a mere procedural interim order, the CAS has no jurisdiction to hear an appeal against that decision. Further to that the Respondent submits that the application for a stay of the provisional suspension of the Appellant

shall be dismissed, because the appeal has no reasonable chance of success, the provisional suspension has a firm legal ground, is not disproportionate, there is no irreparable harm and no violation of the balance of interests.

The Appellant in his Appeal Brief dated 3 October 2008, where he reacted to the arguments of the Respondent described under numbers 2.16 and 2.17 above, repeated his arguments from the Statement of Appeal, but directed them against the provisional suspension, whereas he has focused on the request for stay in his Statement of Appeal. He pointed at the fact that the FEI Tribunal in its Interim Decision of 8 September 2008 gave the following arguments for finding that the provisional suspension must remain in effect until the Tribunal's final decision:

> *"(i) the positive analytical results of both the A-Sample and the B-Sample indicate the likelihood of success on the merits of the case,*
>
> *(ii) a suspension is likely to be imposed on Appellant in the final decision and any harm that Appellant might incur from being suspended from competition now rather than later is unlikely to be material, given that any time spent provisionally suspended would be set off against a period of suspension decided in the final decision, and*
>
> *(iii) the balance of interests of the affected parties leans in favour of Respondent".*

The Appellant in his Appeal Brief pointed at the fact that the FEI Tribunal found that to allow the Appellant to return to competition in the context of widespread use of capsaicin and related substances discovered at the 2008 Beijing Olympic Games *"was disproportionately lenient and inappropriate to meaningful efforts at fighting doping and medication control rule violations"*.

In order to support his argument of suffering irreparable harm, the Appellant enumerated the competitions and possibilities of earning prize money at which the Appellant could not participate due to the provisional suspension. Also he could not ride two horses in their very last season and lost his only chance to compete at a competition in his own country. At the moment of filing the Appeal Brief, the Appellant has already been provisionally suspended 41 days without a final decision and could not use his right to establish conditions for elimination of any sanction. He could not challenge the test method in detail due to lack of documents and was never given the chance to cross examine the Respondent's expert witnesses based on all the documents.

The Appellant in his Appeal Brief enlarged his explanations how and why Equi-Block DT has been used, adduced the argument that capsaicin is a substance naturally occurring and that its use was allowed in care products or for therapeutic treatment, but only in training. The Appellant calls the Equine Prohibited List unclear and arbitrary and that the test method had flaws.

The Appellant requests in his Appeal Brief that the preliminary decision of 21 August 2008 shall be annulled. He demands that for *"doping and medication class A and class B cases the athlete shall have in each case, before a period of ineligibility is imposed"*, the chance to establish the basis for eliminating or reducing this sanction. He finds that the provisional suspension predetermines the final decision, because *"the suspension imposed with the final decision will always be at least as long as the provisional suspension"*. The Appellant repeats his arguments from the Statement of Appeal as to violation by the provisional suspension of the Appellant's right of economic liberty, as well as to be heard and properly defend himself. He upholds his position that the decision was arbitrary and violates Swiss cartel law. The Appellant

requests the CAS to order the Respondent to eliminate article 7.2 EADMCR. The Respondent shall not be allowed in future to impose provisional suspensions. Finally, the Appellant asks for a neutral expert opinion by the director of a WADA approved laboratory with regard to the quality standard of the test used in the case at hands.

The Respondent in its Answer to the Appeal dated 27 October 2008 repeats its statement and arguments from 29 September 2008. It mentions that the FEI Tribunal made its final decision on the merits on 10 October 2008 and imposed a 3,5-month suspension together with a fine of CHF 1'750 and a contribution of CHF 2'500 towards the costs of the Respondent. The Final Decision made the Interim Decision entirely moot. Thus, the Respondent assumed that the Appellant would withdraw his appeal against the Interim Decision, since it lacks any object. Nevertheless, the Appellant continued his appeal which is deemed by the Respondent completely artificial, purposeless and without any foundation. The Respondent calls the appeal abusive.

The Respondent refers to the Order of the Deputy President of the CAS Appeals Arbitration Division of 29 September 2008, which was notified on 10 October 2008 and, in particular to the extract below for holding that the CAS has no jurisdiction to hear an appeal against the 21 August 2008 Decision:

> *"Taking into consideration the FEI Rules, the Deputy President considers that the FEI Tribunal has provisionally suspended the Appellant based on an Adverse Analytical Finding from his horse's A and B samples and in respect of articles 7.1.2 and 7.1.3 EADMCR …*
>
> *Considering that within his statement of appeal, the Appellant also criticises the FEI preliminary decision rendered on 21 August 2008 but did not allege that this decision was made in violation of article 7.2 EADMCR …*
>
> *The Deputy President further takes into account the procedural requirements of the CAS Code with respect to the filing of the appeal, in particular that the Appellant must have exhausted all the legal remedies available to him prior to appeal the challenged decision.*
>
> *Having considered all aspects of the parties' submissions with respect to the Appellant's request for stay, the Deputy President concludes that the FEI proceedings have not been completed yet.*
>
> *Additionally, the Deputy President finds that there is no violation of Article 7.2 EADMCR, which could have exceptionally allowed an appeal against the provisional suspension of the Appellant of 21 August 2008, since the final decision is expected to be rendered shortly by the FEI Tribunal.*
>
> *Based on the foregoing, the Deputy President is satisfied that on a prima facie basis CAS does not have jurisdiction to rule on the appeal".*
>
> *Accordingly, the Deputy President does not further need to examine the above mentioned requirements specific to the CAS case law with respect to requests for stay as it appears that CAS does not have jurisdiction to rule on the application for provisional measures filed by the Appellant. …".*

The Respondent also refers to the Order of the Deputy President of the CAS Appeals Arbitration Division of 29 September 2008 for underlining that the FEI Tribunal's Interim Decision of 8 September 2008 cannot be appealed to the CAS, because the FEI proceedings have not been completed yet at the moment when the appeal had been raised. Since the Final Decision has been made by the FEI Tribunal, the appeal in the opinion of the Respondent has no longer any object. The

relief sought by the Appellant to have the decision of 21 August 2008 annulled, has no longer any relevance. According to the Respondent the CAS has no longer any reason and power to annul an interim decision which has been replaced by a final decision. The same reasons are brought forward against the 8 September 2008 Decision which was only a procedural measure in order to maintain the provisional suspension. The appeal is not directed anymore against a *"decision of a federation"* in the sense of article R47 CAS Code and the Respondent cannot be ordered to have a neutral and scientifically reliable expert opinion about the test method imposed, not to impose provisional suspensions in future cases, and to publish the decision.

With regard to the merits, the Respondent underlines that the provisional suspension rested on article 7.2 EADMCR, that it was allowed by article 7.5 World-Anti-Doping Code 2003 and is mandatory according to article 7.5 World Anti-Doping Code 2009 since 1 January 2009. The FEI Tribunal's decision of 8 September 2008 was entirely valid, a protest was not needed in order to have the FEI Tribunal reviewed its interim decision of 5 September 2008. There was no provision in the FEI General Regulations violated. The provisional suspension did also not violate any other law, provision or legal principle, it was also not disproportionate.

The Respondent requests the Panel to sanction the Appellant for maintaining these proceedings without good reasons based on article 65.3 CAS Code. The Appellant should indemnify the FEI for its legal costs caused by the Appellant's conduct. The CAS Panel is requested to

> *"- dismiss in its entirety the appeal filed by Mr Bernardo Alves;*
>
> *- order Mr Bernardo Alves to pay any and all costs of these appeal arbitration proceedings, including the legal costs incurred by the Fédération Equestre Internationale;*
>
> *- dismiss any other relief sought by Mr Bernardo Alves".*

On 29 September 2008, and with grounds on 10 October 2008, the Deputy President of the CAS Appeals Arbitration Division dismissed the request of the Appellant of 19 September 2008 for provisional measures and ruled that the costs of this order shall be determined in the final award.

By Order dated 8 October 2008 the Deputy President rejected the Appellant's *"request for reconsideration"* of the Order of the Deputy President dated 29 September 2008. In view of article R37 of the CAS Code, the Deputy President of the CAS Appeals Arbitration Division considered that there were no new elements alleged by the Appellant that would justify such a *"reconsideration"* of his Order.

By letter dated 14 October 2008, in view of the final decision taken by the FEI Tribunal on 10 October 2008, the Respondent proposed to the Appellant to withdraw his appeal in order to avoid additional costs and set a deadline of 16 October 2008. There was no recorded reaction by the Appellant by this deadline, thus, the CAS Court Office continued the proceedings. Whereas the Respondent by letter dated 4 November 2008 declared that a hearing was deemed not necessary for rendering the decision, the Appellant by letter dated the same day argued in favour of holding a hearing, but left it to the Panel to decide whether it deems itself sufficiently well informed and therefore no hearing shall be held.

The CAS Panel formed on 21 November 2008 decided to feel sufficiently well informed without a hearing and found that a jurisdiction of the CAS is given exclusively on the basis of article 7.2 read together with article 12.2 FEI EADMCR. This jurisdiction is limited to decide the question, whether the legal grounds and/or procedure laid down by article 7.2 EADMCR have been violated by the Respondent when imposing the Provisional Suspension on the Appellant.

The Appellant in his letter dated 23 December 2008 objected the Panel reducing the legal review in the current matter on whether article 7.2 EADMCR has been violated.

The Respondent considers in its letter dated 8 January 2009 that the Appellant did not explain why the 21 August 2008 Decision was flawed and what condition of article 7.2 EADMCR has been violated. It proposed to the Panel to disregard the Appellant's submission and *"make its decision in dismissing the appeal for lack of jurisdiction"*.

LAW

The Applicable Law

1. Pursuant to article R58 of the Code, the Panel shall decide the dispute according to the applicable rules and regulations. The applicable rules and regulations in the present case are the FEI Statutes, the FEI General Rules and the FEI EDMCR. According to article 34.3 FEI Statutes Swiss law is the applicable law of the CAS in the absence of other rules.

Jurisdiction of the CAS

2. By letter dated 24 September 2008, the CAS Secretary General informed the Appellant that there is no jurisdiction of the CAS with regard to an appeal against the interim decision of the FEI Tribunal of 8 September 2008.

3. By Order of 29 September 2008, with reasons on 10 October 2008, the Deputy President of the Appeals Arbitration Division of the CAS held on a prima facie basis that there was no violation of article 7.2 EADMCR, which could have exceptionally allowed an appeal against the provisional suspension of the Appellant of 21 August 2008. The Deputy President, thus, was satisfied *"that on a prima facie basis CAS does not have jurisdiction to rule on the appeal"*.

4. Article 7.2 FEI EADMCR reads as follows:

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

date which avoids substantial prejudice to the Person Responsible, or the Person Responsible shall be given an opportunity for a Provisional Hearing either before imposition of the Provisional Suspension or on a timely basis after imposition of the Provisional Suspension".

5. Article 7.2 EADMCR refers to article 7.1.2 and 7.1.3 which read as follows:

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

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

(a) the Adverse Analytical Finding;

(b) the rule violated;

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

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

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

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

6. Articles 12.2 and 12.3 EADMCR read as follows:

"12.2 Appeals from Decisions Regarding Anti-Doping and Medication Control Rule Violations, Consequences, and Provisional Suspensions

A decision that (a) a rule violation was committed;(b) a decision imposing consequences for a rule violation; (c) a decision that no rule violation was committed; (d) a decision that the FEI or its National Federation lacks jurisdiction to rule on an alleged rule violation or its consequences; and (e) a decision to impose a Provisional Suspension in violation of Article 7.2 may be appealed exclusively as provided in this Article 12.2. Notwithstanding any other provision herein, the only Person that may appeal from a Provisional Suspension is the Person Responsible upon whom the Provisional Suspension is imposed.

12.2.1 In cases arising from competition in an International Event the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court. Subject to these provisions, evidence that should have been readily available at the hearing held before the FEI Hearing Body and had not been presented to such Hearing Body shall be inadmissible on appeal.

12.2.2 In cases under Article 12.2.1, the following parties shall have the right to appeal to CAS: …

12.3 Time for Filing Appeals

The time to file an appeal to CAS shall be thirty (30) days from the date of dispatch of the decision to the appealing party".

7. The Panel refers to article R47 para 1 CAS Code which reads as follows:

"Appeal

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

8. The Preliminary Decision dated 21 August 2008 has been issued by the Preliminary Panel consisting of one member of the FEI Tribunal (Mr Erik Elstad). The Panel is considered as duly composed at the discretion of the Panel Chair according to article 10.2 Internal Regulations of the FEI Tribunal and acting as FEI Tribunal according to article 10.1 Internal Regulations of the FEI Tribunal and article 34 FEI Statutes.

9. Article 34 FEI Statutes reads as follows:

"FEI Tribunal

34.1 Subject to Articles 34.2 and 34.4, the FEI Tribunal shall decide all cases submitted to it by or through the Secretary general, whether Appeals from or matters not otherwise under the jurisdiction of the Ground Jury or Appeal Committee. These cases may be:

(i) Any infringement of the Statutes, General regulations, Sport Rules, or Procedural Regulations of the General Assembly or of violation of the common principles of behaviour, fairness, and accepted standards of sportsmanship, whether or not arising during a FEI meeting or Event;

…

34.5 The FEI Tribunal shall issue Internal Regulations setting forth its organization and processes compatible with established principles of procedural fairness".

10. Articles 10.1 and 10.2 Internal Regulations of the FEI Tribunal read as follows:

"10.1 The FEI Legal Department shall nominate a panel of members of the Tribunal to adjudicate each single case referred to the Tribunal (the "Panel"). The Panel is appointed by the Tribunal Chair.

10.2 A Panel shall, ordinarily, be composed of three members of the Tribunal. One of them shall be nominated by the FEI Legal Department to act as Chairman of the Panel (the "Panel Chair"). The Tribunal Chair, or his designee, shall however, in any case and at his discretion, be entitled to appoint a Panel of such number as considered appropriate, up to a maximum of seven and a minimum of one provided each such Panel has an odd number of members (including the Panel Chair)".

11. The CAS Panel, thus, finds that the Preliminary Decision dated 21 August 2008 is an FEI decision and therefore a decision of a federation in the understanding of article R47 para 1 CAS Code. Article 35 FEI Statutes read together with article 12.2 FEI EADMCR provide for the exclusive jurisdiction of the CAS against such decision and fulfil the further requirements of article R47 para 1 CAS Code.

12. Article 35 FEI Statutes reads as follows:

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

13. Article 12.2 EADMCR read together with articles 12.2.1 and 12.2.2 EADMCR leave no doubt that there is no internal remedy under FEI rules and regulations against a provisional suspension which the FEI Tribunal is competent to impose according to article 165 FEI General Regulations (*"suspension of individuals and Horses for any period…"*). The Appellant, thus, has exhausted the legal remedies available to him and has also met the deadline of 30 days according to article 12.3 EADMCR.

14. The Panel finds, however, that the CAS jurisdiction in the case of an appeal against a Provisional Suspension is limited by the text of article 12.2 EADMCR to the case of an alleged violation of article 7.2 EADMCR.

15. Article 7.2 EADMCR requires for a provisional suspension that an Adverse Analytical Finding from the A sample or A and B samples is given. From the Test Report of the Hong Kong Jockey Club Racing Laboratory dated 21 August 2008 it becomes clear that there was an Adverse Analytical Finding from the A sample for the presence of Capsaicin in the Horse when the provisional suspension was imposed and that this finding was the reason for imposing the provisional suspension.

16. Article 7.2 EADMCR by referring to article 7.1.2 EADMCR requires for a provisional suspension further that it can be based on a review of the FEI Investigating Body upon receipt of an A sample Adverse Analytical Finding that determined that no applicable TUE has been granted and that no apparent departure from the Testing procedures of the FEI Veterinary Regulations or from the FEI Standard for Laboratories that undermines the validity of the Adverse Analytical Finding has taken place. The parties did not provide the Panel with any indications that this review had not been done properly by the FEI Investigating Body which to Appendix 1 to the EADMCR is a panel of at least three persons, from time to time designated by the FEI Secretary General composed of persons from the FEI Legal Department and the FEI Veterinary Department, under the chairmanship of the Head of the FEI Legal Department or his or her deputy. The factual background as established by the FEI Tribunal in its decision dated 10 October 2008 and not appealed from mentions that during the Event, the Horse was granted three authorisations for the use of medication not listed as Prohibited Substances, but that no request has been made for the use of capsaicin on the Horse and no medication form had been supplied for this substance.

17. The Appellant also does not argue any apparent departure from the Testing procedures of the FEI Veterinary Regulations or from the FEI Standard for Laboratories that undermines the validity of the Adverse Analytical Finding. He argues that the test method has flaws and that the *"quality and reliability of the analysis method rests unclear, because the quality of validated reference material is not proven"*. The Appellant holds in general that *"the FEI laboratories apply different rules on the burden of proof and for establishing the presence of the substance than WADA laboratories"* and that they *"apply less strict quality rules than the WADA laboratories"*. All these and further arguments of the

Appellant with regard to the test method relate to the details of the applied test method(s) and as such to the FEI Veterinary Regulations as well as the FEI Standard for Laboratories themselves, but do not contain any indication of *"an apparent departure"* from these regulations. Thus, the Panel finds that also the second requirement of article 7.2 EADMCR has been fulfilled.

18. Finally, article 7.2 EADMCR requires that a notification as prescribed by article 7.1.3 EADMCR took place. The applicable rules for the 2008 Beijing Olympic Games which have been notified to the Appellant show that article 7.1.3 EADMCR has been partly overruled by Annex G (Accelerated Medication Control Procedure during & after the 2008 Olympic Games). This accelerated procedure made a B sample analysis mandatory and accelerated the analysis and reporting procedure. The Panel could establish, therefore, that the requirements of article 7.1.3 lit a – d EADMCR have been fulfilled. The requirement of lit f (*"if applicable, the Person Responsible's option to waive certain rights by accepting an administrative penalty"*) was not applicable during the 2008 Olympic Games in Beijing and, thus, was not to be considered. The requirement of lit e (*"the right of the Person Responsible to request copies of the A and B Sample laboratory reports"*) was replaced by article 3 read together with article 2.3 of Annex G (Accelerated Medication Control Procedure during & after the 2008 Olympic Games). Apart from this, the facts as described by the Appellant in his Statement of Appeal and Appeal Brief show, that all requests for documentation relevant for the provisional suspension have been fulfilled by the Respondent with the exception of a complete transcript of records of the preliminary hearing and on the food provided by the event organizers, which, however, has no relevance for article 7.2 EADMCR. The Counsel of the Appellant, having been duly authorised with a Power of Attorney on 25 August 2008, has asked the Respondent by letter dated 26 August 2008 *"to submit to us the complete files on the case including all data about the A and the B sample analysis…"*. The Appellant, thereby, shows having been fully aware of his rights under Annex G seen in the context of article 7.1.3 and 7.2 EADMCR. Even if the notification should have had to inform the Appellant of his right to request copies according to article 7.1.3 lit e expressly this defect had perfectly been cured.

19. The Panel, therefore, finds that no violation of article 7.2 EADMCR took place.

20. The Appellant having been asked to streamline its arguments from the Statement of Appeal and Appeal Brief in order to answer the question whether he holds that there was such violation argued no such violation, but submitted on 23 December 2008 that the CAS jurisdiction cannot be understood as restricted to a review whether article 7.2 EADMCR has been violated. According to the Appellant the CAS Panel is also bound to address whether article 7.2 EADMCR complies *"with the personal rights and public morality as well as the "ordre public" and the general principles of the law, such as equal treatment and proportionality, which also Respondent as an association under Swiss Law must respect according to the CAS jurisdiction"*.

21. The Panel holds that, indeed, based on chapter 12 of the Switzerland's Code on Private International Law and, in particular, its articles 182 and 190 as applied by the Swiss Federal Supreme Court a CAS award can be appealed before the Swiss Federal Supreme Court when it violates Swiss *"ordre public"* (public policy). The Swiss Federal Supreme Court has developed a

jurisprudence to confirm arbitration awards rendered by arbitration courts as e.g. the CAS as final and binding, as long as such decisions comply amongst other with the procedural and the material *"ordre public"*.

22. By decision of 21 February 2008 (decision 4A.370/2007) the Swiss Federal Supreme Court has defined the *"ordre public"* as follows:

"5.1 Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalent en Suisse, devraient constituer le fondement de tout ordre juridique. … On distingue un ordre public matériel et un ordre public procédural. Dans sa jurisprudence la plus récente, le Tribunal fédéral a donné de cette double notion la définition rappelée ci-après ….

L'ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au Tribunal arbitral d'une manière conforme au droit de procédure applicable; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit.

Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants; au nombre de ces principes figurant, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, l'interdiction de l'abus de droit, la prohibition des mesures discriminatoires ou spoliatrices, ainsi que la protection des personnes civilement incapables".

23. The Appellant in his letter dated 23 December 2008 considers the measure of *"Provisional Suspension"* as arbitrary, as well as a violation of personal rights, public morality, *"ordre public"*, economic liberty and the general principles of the law, such as equal treatment and proportionality. The Appellant holds that the provisional suspension causes substantial prejudice in most of the cases. The Respondent is held correct by the Panel in pointing at article 7.5 World Anti-Doping Code 2003 which authorised the international sport federations to introduce a *"Provisional Suspension"*. Under the revised World-Anti-Doping Code 2009, which entered into force on 1 January 2009, the provisional suspension became mandatory. The Respondent lists 18 international sports federations, which had introduced the provisional suspension under the World Anti-Doping Code 2003 and lists also 8 CAS cases, where the CAS dealt with provisional suspensions without having found or even addressed that this measure might violate Swiss law and the autarchy of an international federation under Swiss law.

24. The Panel finds that, indeed, the arguments raised by the Appellant, if at all, could be discussed relating to a final sanction, but not with regard to a provisional suspension which is primarily motivated by the needs of an international federation to suspend an athlete from further participation at competitions and events pending a sanction in order to guarantee a smooth functioning of the sport. In this period of suspension, the participation of such an athlete would have an impact on a level play ground between athletes and would cause turmoil in start and result as well as ranking lists, once the final sanction will have entered into effect. Since in general and also in particular in the case at hand the provisional suspension period (50 days until receipt of the final decision) is less than the period of final sanction (105 days) and is credited against it does not cause substantial prejudice. The Panel, thus, does not see any specific facts

or particulars based on the arguments of the Appellant that could give rise to finding a violation of the procedural or material *"ordre public"* in the understanding of the Swiss Federal Supreme Court.

25. The Panel, thus, rules that it has no jurisdiction because there was neither a violation of article 7.2 EADMCR nor a violation of the Swiss material or procedural *"ordre public"*.

The Court of Arbitration for Sport rules:

1. The CAS has no jurisdiction to rule on the appeal filed by Mr Bernardo Alves on 19 September 2008 against the provisional suspension imposed by the FEI Tribunal on 21 August 2008.

(…)

4. Any and all other prayers for relief are dismissed.