Arbitration CAS 2013/A/3124 Rashid Mohd Ali Alabbar v. Fédération Equestre Internationale (FEI), award of 27 September 2013

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Graeme Mew (Canada); Mrs Maidie Oliveau (USA)

Equestrian (endurance)
Doping (testosterone)
Establishment of the presence of the prohibited substance on the balance of probabilities
Significant fault or negligence of the Person Responsible
Absence of aggravating circumstances
Inapplicability of the principle of proportionality to a fixed sanction

1. **In order to rebut a presumption or establish a fact or circumstance on the "balance of probabilities", a Person Responsible (PR) is required to show that the fact or circumstance advanced by him or her is more probable than not. By providing invoices, scientific evidence, statements from his or her veterinarian, the supplier of the product and the feed team, a PR can be considered to have established on the balance of probabilities that the ingestion of a supplement was the probable explanation for the presence of a banned substance in a horse**

2. **An assessment of the significance of any fault or negligence must be viewed in the totality of the circumstances bearing in mind that pursuant to the applicable anti-doping rules, the PR must use "utmost caution" to ensure that he or she does not administer anything to his or her horse that will cause it to test positive for a banned substance. The commentary to the applicable anti-doping rules makes clear that a finding of no significant fault or negligence should only be made where the circumstances are truly exceptional. In any event, according to the clear CAS case-law, it is not reasonable to rely on informal advice given by unqualified people or people who would not be impartial such as the manufacturer or the supplier of the product. A finding of No Significant Fault or Negligence is not justified for a PR who only checked the listed ingredients against the Prohibited List but did not do an internet search for the ingredients, which would have instructed him or her that the supplement did contain a prohibited substance.**

3. **A prior violation of the FEI Equine Controlled Medication Rules shall not be treated as an aggravating factor under the FEI Equine Anti-Doping Rules. In this respect, sporting regulators' breach ofwhose rules can have serious consequences must ensure that the rule breakers are advised both of the breach and its potential consequences. Moreover, an Equine Controlled Medication Rules violation is not as serious as an Anti-Doping Rule violation as the rules impose more minor sanctions and no period**

of ineligibility. Therefore, the increase of a PR's period of ineligibility in this respect is not justified.

4. Where a finding of No Significant Fault or Negligence is not applicable and where there is no basis for adding any further period for aggravating circumstances, the particular period of ineligibility is fixed. Thus, deployment of the principle of proportionality, whatever its theoretical reach, is foreclosed.

1. INTRODUCTION

1.1 This is an appeal by Rashid Mohd Ali Alabbar (the "Appellant") against a 30-month suspension and other sanctions imposed on him for breach of the anti-doping regulations, specifically Article 21 of the FEI Equine Anti Doping Rules, 1st edition, effective 5 April 2010 (the "EAD Rules") by a disciplinary tribunal (the "Tribunal") of the Fédération Equestre Internationale (the "Respondent") on 5 March 2013 (the "Decision").

2. THE PARTIES

2.1 The Appellant is the owner, manager, trainer, and rider of a stable of horses in Dubai that compete in FEI-sanctioned events in the discipline of endurance racing (i.e. equestrian "marathons") contested over distances of up to 200 km.

2.2 The Respondent is the international governing body for the equestrian sport disciplines of dressage, jumping, eventing, driving, endurance, vaulting, and reining.

3. FACTUAL BACKGROUND

3.1 The Appellant, born on 2 September 1987, a university graduate and by profession a businessman, has a life-long interest in and passion for horses. He rides for pleasure, not for profit, and has recently (in or about 2008-9) taken up competing in equestrian endurance events.

3.2 In 2010 the Appellant, upon invitation, rode a horse named Aldjani Safinat, from Al Asifa 2 Stables, in a 120km endurance event. Aldjani Safinat subsequently tested positive for phenylbutazone (the "previous ECM violation") for which the Appellant was subjected to an administrative sanction under the FEI Equine Controlled Medication Rules (the "ECM Rules").

3.3 On 6 February 2012, the Appellant came third in a 120 km international endurance event staged in Dubai (the "Dubai Event"), on a horse called Cromwell (the "Horse"), in his family's ownership and from their own Rabdan Stables.

3.4 A urine and blood sample taken from the Horse at the Dubai Event tested positive for testosterone at a concentration of 35 ng/ml after analysis at the Horse Racing Forensic Laboratory Sport Science Limited (UK), an FEI approved laboratory.

3.5 The Appellant's explanation for the presence of testosterone in his Horse at the Dubai Event is that from October 2011 to the date of the Dubai Event the Horse was fed a supplement called "The Enhancer" (the "Supplement"), manufactured by Cox Veterinary Laboratory, Inc. in South Carolina, USA ("Cox") and purchased by the Appellant from the EMIRTA Horse Requirements Centre in Dubai (the "Supplier").

3.6 The supplement contains Dehidroepiandrosterone ("DHEA").

3.7 DHEA (the "Prohibited Substance") is not specifically listed on the FEI's Prohibited Substances list, but has a similar chemical structure or biological effect to testosterone: it can be a precursor of testosterone and therefore increase testosterone levels in a horse. It is known to be abused for that very purpose. See, *inter alia*, JOURNAL OF ANALYTICAL TOXICOLOGY, Vol.25 November/December 2001, p.689.

3.8 A gelding (i.e., a castrated male horse) such as the Horse produces a tiny amount of testosterone in its system naturally. To exclude the possibility that the testosterone found in a gelding's sample is natural, the FEI uses the internationally recognised threshold limit of 20 ng/ml testosterone, which was accordingly exceeded in the Horse's sample.

4. PROCEEDINGS BELOW

4.1 On 14 December 2012 the Tribunal held a hearing at its Headquarters in Lausanne. The FEI was represented by counsel. The Appellant represented himself.

4.2 On 5 March 2013 the Tribunal handed down the Decision.

5. PROCEEDINGS BEFORE CAS

5.1 In accordance with Articles R47 and R48 of the CAS Code, on 18 March 2013, the Appellant filed his statement of appeal.

5.2 In accordance with Article R51 of the CAS Code, on 11 April 2013, the Appellant filed his appeal brief.

5.3 In accordance with Article R55 of the CAS Code, on 13 May 2013, the Respondent filed its answer.

5.4 Pursuant to Article R57 of the CAS Code, the Panel called the parties to a hearing, held at the CAS headquarters in Lausanne on 25 June 2013 before the Panel constituted by the Honourable Michael J. Beloff QC, Barrister in London, England (President); Mr Graeme Mew, Barrister in Toronto, Canada; and Ms Maidie E. Oliveau, Attorney at Law, Los Angeles, California, USA. The Panel was assisted at the hearing by Ms Louise Reilly, Managing Counsel and Head of CAS Mediation.

5.5 At the outset of the hearing, the parties informed the Panel that they agreed that each party should bear its own costs.

5.6. The Appellant was present in person at the hearing and was represented by Mr Jeremy Dickerson and Ms Mairi Pollock of Burgess Salmon. The Appellant provided a witness statement from the following:

- Dr Massimo Puccetti, veterinarian at Rabdan Stables
- Mr Muhaveer Singh, rider and groom at Rabdan Stables
- Mr Wareed Khan, foreman at Rabdan Stables
- Mr Abidulla Zabeehullah, Annees Ur Rahman Usman and Zakir Ullah Amin Ulla, the feed team at Rabdan Stables
- Dr Mohammed, veterinarian of EMIRTA Horse Requirements Centre
- Mr Mohamed Al Shafar, neighbour of Mr Alabbar
- Dr Stuart Paine BSc (Hons), PhD, MRSC, CCHEM, CSci, ACS, expert witness

The Respondent accepted their testimony and abstained from cross-examination of anyone except for the Appellant.

The Respondent was represented by Ms Lisa Lazarus, FEI General Counsel and Ms Carolin Fischer, FEI Counsel, and by Mr Jonathan Taylor and Ms Elizabeth Riley of Bird & Bird.

The Respondent did not call any witnesses.

5.7 Both parties at the outset endorsed the composition of the Panel and at the conclusion agreed that they had a fair hearing.

6. PARTIES' SUBMISSIONS

A. The Appellant's Submissions

6.1 The Appellant accepts that:

(i) the facts disclose an anti-doping rule violation under FEI EAD Rules Article 2.1.

(ii) he (as the rider of the Horse, and so the "Person Responsible" under the rules) is strictly liable.

(iii) consequently his results at the Dubai Event must be disqualified.

(iv) he is liable under the FEI EAD Rules for a fine of CHF 3,000, costs of CHF 2,000, and the costs of analysis of the B sample. [Decision para 10.3]

(v) Absent mitigation, he is liable to a period of Ineligibility of two years, under FEI EAD Rules Article 10.2.

6.2 The Appellant argues, however, that he bears No Significant Fault or Negligence for the presence of the testosterone in the Horse's sample, so that the Tribunal should have reduced (and the Panel should reduce) his Article 10.2 two year period of Ineligibility to one year, in accordance with Article 10.5.2.

6.3 The Appellant submits for that purpose:

(a) the cause of the banned substance in the Horse's system was the Supplement.

(b) he had no intent to enhance the performance of the Horse, but rather was concerned with its welfare and its lack of appetite.

(c) he took significant steps to check that it would be safe to feed the Supplement to the Horse, consulting (most importantly) with his veterinarian at the Dubai Equine Hospital (Dr Puccetti), his neighbour (Mr Al Shafer), the manufacturer (Cox), and Dr Mohammad of the EMIRTA Horse Requirements Centre, his Supplier.

(d) he had a lack of substantial experience with horses in the sport of endurance.

(e) he had shown a willingness to co-operate with the FEI and the Tribunal.

(f) he bore no responsibility for the previous ECM violation.

6.4. In its appeal brief the Appellant requested the following relief.

i. "He should be held as bearing No Significant Fault or Negligence in respect of the violation of Artide 2.1 of the EAD Rules in accordance with Article 10.5.2 of the EAD Rules;

ii. His previous ECM Rule violation should not be considered as an aggravating factor under Article 10.6 of the EAD Rules; and

iii. In all the circumstances of the case, any period of suspension imposed upon him should be no longer than 12, or alternatively 13 months, in order to respect the fundamental principle that the severity of the sanction imposed must be commensurate with the severity of the offence.

In addition, pursuant to Articles R64.4 and 64.5 of the CAS Code, Mr Alabbar requests that the FEI should pay the Responsible Person's costs of these proceedings".

B. FEI Submissions

6.5 The FEI submits that:

(1) Where a steroid is found in a Horse's sample, the presumption under the FEI EAD Rules (as under the Code) is that it was administered to the Horse deliberately, in an attempt to enhance its performance.

(2) In order to rebut that presumption, the Person Responsible must prove to the satisfaction of the Panel that he bears no (or no significant) fault or negligence for the presence of the steroid in the Horse's system.

(3) If the Person Responsible fails to discharge that burden, the presumption of intentional administration to enhance performance subsists.

(4) The Appellant had not established how the banned substance entered the Horse's system and was put to proof thereof.

(5) Alternatively insofar as the cause of the presence of the banned substance in the Horse's system was the Supplement, that the Horse was not eating less than it needed to eat to maintain its normal state of health, but, rather, less than the Appellant felt it needed in order to be able to compete in endurance racing at the level he desired.

(6) The Appellant gave the Horse the Supplement (during the racing season only) to increase its strength and stamina for purposes of competition, as was its claimed effect described both in its label and on the manufacturer's website.

(7) Alternatively the steps taken by the Appellant to ensure that he had not administered a banned substance to the Horse did not establish an absence of significant fault or negligence.

(8) The Appellant's previous ECM violation was an aggravating circumstance.

6.6 In its answer the Respondent requested

that the CAS Panel *"dismiss the appeal and leave undisturbed not only the unimpugned aspects of the Decision but also the impugned aspects of the Decision, i.e., the FEI Tribunal's decisions (a) not to reduce pursuant to FEI EADR Art 10.5.2 the two-year ban applicable under FEI EADR Art 10.2; and (b) to impose an additional ban of six months pursuant to FEI EADR Art 10.6 due to the Appellant's prior violation of the FEI Controlled Medication Regulations.*

In any event, the FEI respectfully requests that the CAS Panel reject the Appellant's application for a costs award against the FEI".

Reservation

The above is a summary of the parties' key submissions only. All written and oral development

of those submissions by either party have been carefully considered by the Panel.

7. ADMISSIBILITY

7.1. Article R49 of the Code of Sports-related Arbitration (2013 edition) (the "**CAS Code**") provides that: *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against"*.

7.2. The Decision was sent to Mr Alabbar on 5 March 2013; the appeal was filed at the CAS on 18 March 2013. In its answer, the Respondent expressly acknowledged that *"the appeal was filed within the relevant deadline and is therefore admissible"*. Accordingly, the Panel is satisfied that the appeal is admissible.

8. JURISDICTION

8.1. Article R47 of the CAS Code provides that:

"An appeal against the decision of a federation, association or sports-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".

8.2. Article 12.22 of the EAD Rules provides for a right of appeal to the CAS in respect of decisions of the Tribunal that impose consequences for a violation of them. The jurisdiction of the Panel is further confirmed by the signature of both parties to the Order of Procedure.

9. STANDARD OF REVIEW

9.1 Article R57 of the CAS Code provides *"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"*. It gives the CAS Panel full power to review the facts and the law on this appeal.

9.2 FEI submits, that notwithstanding its *de novo* powers, a CAS Panel in consideration of the appropriateness of any sanction *"naturally … pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy"*, and would *"not lightly interfere with such a Tribunal's decision"*, CAS 2012/A/2807, para 10.3, citing CAS 2010/A/2283, para 13.46. The Panel observes that this bears on the exercise of the powers, not their extent; and is only germane in circumstances where the sanction is a matter of discretion.

10. APPLICABLE LAW

10.1 Article R58 of the CAS Code provides that:

"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 sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

10.2. The parties rely on various provisions of the FEI regulations, including the FEI Equine Anti-Doping and Controlled Medication Regulations. The Panel considers the FEI regulations to be applicable for the purposes of Article R58 of the CAS Code, and that Swiss law applies subsidiarily.

11. LEGAL INSTRUMENTS

11.1 The EAD Rules are based on the World Anti-Doping Code (the "Code"). See Introduction to the EAD Rules: *"These Equine Anti-Doping and Controlled Medication Regulations … are adopted and implemented in conformity with the undertakings of the FEI governing bodies in the spirit of the World Anti-Doping Code (2009 version) …".* It will accordingly fall to be interpreted, where possible, consistently with the Code.

11.2 The EAD Rules provide, so far as material, as follows

Article 2.1

"It is each Person Responsible's duty to ensure that no Banned Substance is present in the Horse's body … It is not necessary that intent, fault or negligence or knowing Use be demonstrated in order to establish an EAD Rule violation under Article 2.1".

Article 3.1

"Where these EAD Rules place the burden of proof upon the Persons Responsible and/or member of their Support Personnel to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability …".

Article 4.1

"These EAD Rules incorporate the Equine Prohibited Substances List (the "List") which is published and revised by the FEI from time to time".

Article 10.2

"The Sanction imposed for a violation of Article 2.1 (presence of a Banned Substance or its Metabolites or Markers) … shall be as follows unless the conditions for … reducing … the Sanction provided in 10.5 are met. First Violation: Two (2) years Ineligibility".

Article 10.5.1

"If the Person Responsible … establishes in an individual case that he or she bears No Fault or Negligenæ …, the otherwise applicable period of Ineligibility … may be eliminated …".

Article 10.5.2

"If a Person Responsible … establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility and other Sanctions may be reduced in regard to such Person, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable".

Both Article 10.5.1 and 10.5.2 are subject to the precondition:

"When a Banned Substance or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 … the Person alleged to have committed the EAD Rule violation must also establish how the Banned Substance or its Metabolites or Markers entered the Horse's system in order to have the period of Ineligibility and other Sanctions reduced".

Article 10.6

"If the FEI establishes … that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years …".

Article 10.7.1

"Where a Person Responsible … 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 Article 10.6".

Appendix 1 to the FEI Equine Anti-Doping and Controlled Medication Regulations – Definition:

"No Fault or Negligence

The Person Responsible establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of the utmost caution that he or she had administered to the Horse, or the Horse's system otherwise contained, a Banned … Substance …".

"No Significant Fault or Negligence

The Person Responsible establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the EADCM Regulation violation".

Article 118.3 of the FEI General Regulations (23rd edition, 1 January 2009, updates effective 1 January 2013):

"The Person Responsible shall be the Athlete who rides, vaults or drives the Horse during an Event".

12. MERITS

A. Key Issues

The key issues for determination are whether:

(a) The Appellant can demonstrate, on the balance of probabilities, that the explanation for the presence of the Prohibited Substance in the Horse's Sample is feeding the Supplement to him (the "threshold issue");

(b) If the Appellant has proven (a), whether he has demonstrated that he bears No Significant Fault or Negligence in respect of the manner in which the Prohibited Substance entered the Horse;

(c) Whether a previous violation by the Appellant under ECM Rules should be considered as an aggravating circumstance under Article 10.6 of the FEI EAD Rules and whether any period of Ineligibility should be increased as a result; and

(d) Taking into account (a) to (c) above, whether a period of Ineligibility of 30 months is appropriate in all the circumstances of the case in respect of the violation of Article 2.1 of the EAD Rules and, if not, what is the appropriate period of suspension?

B. Analysis

a) General

12.1 In order to rebut a presumption or establish a fact or circumstance on the "balance of probabilities", the Person Responsible is required to show that the fact or circumstance advanced by him is more probable than not. See CAS 2006/A/1130, paragraph 45 and CAS 2009/A/1926 & 1930, paragraph 5.9:

"…for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred".

b) The Threshold Issue

12.2 The Panel accepts that

"Obviously this precondition is important and necessary otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up" (CAS 2006/A/1130, at para 39).

12.3 Applying the *"cumulative effect"* approach adopted by an FEI Tribunal in *TACKERAY,* FEI Tribunal decision dated 24.9.09:, para 39C (which the Panel endorses), the Panel is entirely satisfied that the presence of DHEA in the Horse's system was caused by the administration to it of the Supplement.

12.4 The Appellant has put forward a credible explanation, leading to that conclusion backed up by:

(1) factual evidence, which demonstrates the fact that the Horse was fed daily one ounce of a supplement containing DHEA.

(2) scientific evidence as to the effect of such feeding. See the FEI expert report of Dr Stuart Paine that *"it is possible"* that the levels of testosterone detected in the Horse's Sample *"have come from the oral ingestion of a supplement containing DHEA"*.

12.5 The Panel notes that the FEI itself originally accepted the Appellant's explanation to that effect.

(1) The FEI's Response to the Explanations of the Person Responsible ("PR") dated 5 October 2012, states at paragraph 8.2:

"The FEI accepts based on the evidence submitted by the PR that he has proven, by a balance of probability as required by Article 3.1 of the EAD Rules, that the Testosterone found in the Horse's Sample was caused by the administration of the product The Enhancer. The FEI accepts the PR's submission on that point for the following reasons: Dr. Stuart Paine, BSc (Hons), PhD, MRSC, CCHEM, CSci, ACS, the FEI's expert witness, reviewed the explanations provided by the PR and accepted from a scientific perspective that the DHEA oral supplementation presents a plausible explanation of the source of the Prohibited Substance".

(2) Counsel for the FEI, Ms Carolin Fischer stated at the FEI Tribunal hearing:

"…it is the FEI position that the PR has established the source of the prohibited substance, which means the FEI is confident on the PR's explanation how the substance, Testosterone, entered the Horse's system. And so, today the hearing will mainly focus on the question of fault or negligence for the rule violation".

12.6 It was only because the Tribunal did not agree with the FEI that the threshold issue arose at all. The Tribunal accepted that the Appellant's explanation was plausible, but not proven, because *"you have not shown us any receipts that you purchased enhancer, and that enhancer was given to the Horse"* (Transcript page 45 per Prof. Dr. Jens Adolphsen, the Chairman of the Tribunal) and therefore *"For us, the chain is not tight"* (ibid, p.54).

12.7 Since the Appellant was not represented by a lawyer at the hearing, the Tribunal agreed to give the Appellant until 4 January 2013 to submit supplementary evidence to prove to the satisfaction of the Tribunal that ingestion of the Supplement was the explanation for the presence of the Banned Substance in the Horse.

12.8 On 24 December 2012, in order to prove his case to the satisfaction of the Tribunal, the Appellant submitted further evidence to the FEI including:

- Two invoices for the purchase of The Supplement dated 28 October 2011 and 6 January 2012;

- Further statements from Dr Puccetti (his veterinarian) and Dr Mohammed of EMIRTA (his Supplier);
- A joint statement from the Appellant's feed team.
- The Stablebook (showing that one ounce of the Supplement was to be added to the Horse's feed daily at his 6:00 PM feed) (although this record was incomplete as regards the administration of the original daily dose of 0.5oz. said to be fed to the Horse for two weeks in October 2011 and hence is not wholly reliable).

12.9 The FEI's position on this evidence was that it *"only to a limited extent"* answered the question of whether the Supplement had been administered to the Horse (Response to the Supplemental Explanations of the Appellant, dated 16 January 2013). In particular, the FEI noted that the Appellant had only produced invoices for the purchase of two quantities of The Enhancer in total and that *"the invoices would therefore only proof [*sic*] purchase of the product for a certain period of the alleged administration"*. This was, of course, a *volte face* by the FEI, conditioned it would appear, by the Tribunal's attitude.

12.10 The Tribunal itself reached the same conclusion as the FEI on this point, finding that the documents and explanations provided by the Appellant did not sufficiently establish that the Horse had been fed The Enhancer ([Decision paragraph 8.4]).

12.11 The Appellant has since remedied what the Tribunal saw as gaps in his evidence, specifically, copies of invoices evidencing the fact that he purchased enough of the Supplement to cover the whole period that the product was fed to the Horse between October 2011 and the Dubai Event. (See invoices dated 28 August 2011, 6 January 2012 and 3 February 2012), which would be consistent with the amount said to have been administered to the Horse (as to which see CAS 2006/A/1032, para 98).

12.12 The Appellant has satisfactorily explained to the Panel the reason that he did not include all of the invoices in the further evidence he submitted to the FEI on 24 December 2012, i.e. because the October 2011 and January 2012 invoices were the only two invoices that he had then in his office available to him.

12.13 Not only as the FEI own report states, is the explanation provided by the Appellant *"plausible"* but no other plausible hypothesis has been advanced – although the Panel accept that this is not in principle dispositive (CAS 2010/A/2230, para 11.5):

"seeking to eliminate all alternative hypotheses as to how the substance entered his body and thus to proffer the conclusion that what remains must be the truth reflects the reasoning attributed to the legendary fictional detective Sherlock Holmes by Sir Arthur Conan Doyle in "The Sign of Four" but is reasoning impermissible for a judicial officer or body".

12.14 The Panel nonetheless considers that had the Tribunal not itself raised the matter, it would have remained common ground both before it and (earlier) the Tribunal, that the Appellant had at least satisfied this precondition for the engagement of Article 10.5.2. It notes that the experienced advocate for the FEI did not press the contrary case with his accustomed vigour.

c) No Significant Fault or Negligence

12.15 The establishment of no significant fault or negligence is a necessary but not sufficient precondition for the exercise of any discretion to reduce the prescribed two year sanction. See, e.g., CAS 2005/C/976 & 986, para 75 (*only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may apply art. 10.5.2 of the WADC and depart from the standard sanction'*); CAS 2005/A/847, para 7.3.5 (*"Firstly it [the degree of fault or negligence attributable to the athlete] is relevant in deciding whether Artide 10.5.2 … applies at all"*).

12.16 It is therefore necessary to consider at the outset what is meant by no significant fault or negligence in the context of the FEI EAD Rules before applying that meaning to the facts found by the Panel.

12.17 The following matters are clear from the language of the regulations themselves:

(1) Significant fault or negligence must mean something different from (mere) fault of negligence. Otherwise one or other of the concepts would be redundant.

(2) No significant fault or negligence must be easier to establish than no fault or negligence; if established, it results in a lesser discount in the presumptive period of ineligibility.

(3) The word "significant" should, absent any contrary indication, be given its ordinary and natural meaning (the nearest relevant dictionary definition is "notable").

(4) The criteria for no fault or negligence, e.g. degree of care taken to avoid presence of banned substance in the Horse's system, must be taken into account, i.e. borne in mind but <u>not</u> (see 1 and 2 above) applied exactly.

(5) An assessment of the significance of any fault or negligence must be viewed in the totality of the circumstances (such circumstances necessarily being those that could be relevant to such an assessment).

12.18 The commentary to the Code makes clear that such a finding of no significant fault or negligence should only be made *"where the circumstances are truly exceptional and not in the vast majority of cases"*. CAS has reiterated that comment on several occasions and used it as a guiding principle in construing Article 10.5, noting that it *"shows the intention of the World Anti-Doping Code to apply the exception in a very restrictive manner"*. See CAS 2004/A/690, para 72.

12.19 The Panel accepts too that the analysis of fault in this context must be construed against the backlog of the fundamental duty that the FEI EAD Rules place on the Appellant to use "utmost caution" to ensure that he does not administer anything to his horse that will cause it to test positive for a Banned Substance.

See, for example, CAS 2005/C/976 & 986, paras 73 – 75 (*"The WADC impose on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. … It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been*

identified"). See also CAS 2007/A/1395, para 87 (*"The more unusual or novel the food or drug administered, the greater the duty of the athlete to make appropriately prudent enquiries"*.).

12.20 By analogy with human supplement cases, it is incumbent upon a person such as the Appellant to "leave no reasonable stone unturned" in investigating each and every one of the ingredients of the Supplement, even if its packaging and its marketing claims appear totally benign. CAS 2008/A/1489 & 1510, para. 7. This must be *a fortiori* if on their face such claims reasonably raise concern.

12.21 In *CARRIERE ZWEI*, FEI Tribunal decision dated 10/08/07, the PR established to the satisfaction of the FEI Tribunal that the cause of the testosterone in her horse's sample was a supplement she had given it called "Equine Anabolic", a "muscle builder and energizer", the ingredients of which were DHEA, pregnenolone and gamma oryzanol (i.e., the same three ingredients as the Supplement) and creatine: and that she had relied on the absolution of its manufacturer and advice not only from her own vet but also from the vet of the German national jumping team, who "told her that "Equine Anabolic" would not test positive". *Ibid.* at paras 4.1(o), (p), (q) and (r).

The FEI Tribunal nonetheless held that given the name of the supplement: *"the PR acted with gross negligence and disregard to the risks of using doping substances, by providing clearly marked additives, with the suspicious name of "Equine Anabolic", that contained prohibited substances and having potential to cause production of Testosterone, by not listing the substance in the stable book* ***and by not receiving written advices from renowned veterinarians especially when dealing with a product of such name****. Ultimately the PR is the person responsible for actions relating to her Horse, including for her choice of personnel and treating veterinarian, and she is responsible that her Horse would not compete with a prohibited substance in its body. The Tribunal, therefore, considers that the positive result is sufficient to establish that despite the explanations given, the PR was grossly negligent by not having ensured that her Horse was competing drug-free at the Event"*. Ibid. at para 4.1(x) [emphasis added]. With all the reservations subsequently expressed about seeking to read across from one fact specific case to another the Panel finds this a useful analogy. Although it would comment that receipt of a **written** advice goes more to the ability to prove appropriate care than to the subsistence of such care.

12.22 The FEI Athlete's Guide to the Equine Anti-Doping Rules and Controlled Medication Regulations makes it clear that reliance on veterinary advice does not absolve the Appellant of his responsibilities under the FEI EAD Rules. See also CAS 2006/A/1133, para 35 (*"In accordance with the constant jurisprudence of CAS, the Athlete cannot hide behind the potential misunderstanding of the anti-doping rules by his doctor to escape any sanction. The prescription of a medicine by a doctor does not relieve the Athlete from checking if the medicine in question contains forbidden substances or not"*); CAS 2012/A/2959, para 8.19 (*"an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist"*). What is good for a doctor must equally be good for a vet.

12.23 In the Panel's view limited assistance can be gained from any previous case in which a tribunal from which an appeal is brought to CAS, simply applies an evaluation of all the circumstances

to see whether the criterion of no significant fault or negligence is met. *"Each doping case has to be considered as an individual case"* (CAS 2005/C/976 & 986 at para 78 quoting and endorsing Richard Pound QC then WADA Chairman). Given that the exercise is multi-factorial, it would be highly unlikely that there could be an exact read across from earlier to later cases. If in Case 1 it was held that factors A, B, C and D established no significant fault or negligence, it would not follow that in Case 2 with only factors A, B, and C or Case 3 with factors A, B, C, D and E the same conclusion would or should be reached, even putting aside the considerations first that the Panel in the latter case would not have the same "feel" for the factors which in their particular context influenced the earlier Panel(s), secondly that the Panel in the latter case might have, on the factors in the earlier case(s) itself reached a different conclusion; it is axiomatic that reasonable persons can reasonably reach different conclusions on the same set of facts.

12.24 In any event while consistency is a virtue, like cases should presumptively be treated alike (CAS 2005/C/976 & 986, para 137) - correctness is a greater one. Thus absent any precedent from the Swiss Federal Tribunal this Panel treats earlier cases decided on their facts as providing guidance but not direction, and would encourage a more sparing use of references than advocates sometimes feel constrained to provide, unless of course such cases contain statements of general un-fact specific principle or approach.

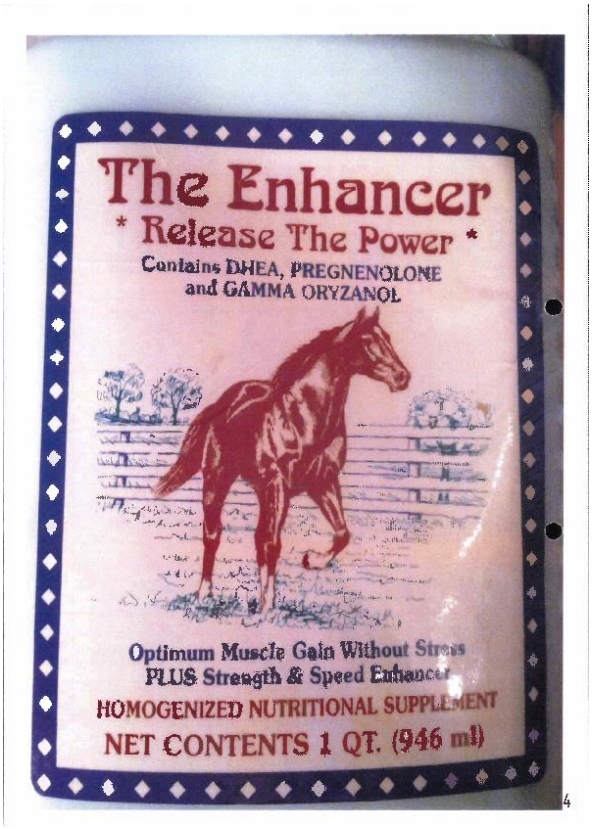
a) The Facts

12.25 The Panel, while acquitting the Applicant of any intent to violate the EAD Rules, finds itself constrained to conclude that nonetheless he administered the Supplement to the Horse in order to enhance its performance.

12.26 Indeed the Appellant is condemned on this issue out of his own mouth. See his statement to the Tribunal of 7 May 2012.

"[I]t is challenging for Cromwell to complete longer distances as he has a habit of not eating during trainings and events. Due to his lack of appetite, he always looses [sic] too much weight after completing his training schedule for an event. Consequently, Cromwell faces metabolic problems usually after 60 kms … I was concerned about Cromwell's welfare and his ability to cope with the stressful conditions in trainings and during events. As a result, I found an appetite enhancing product during the beginning of this season in October 2011, The Enhancer".

12.27 Moreover the label of the Supplement notably says nothing about appetite enhancement, but emphasises strength and speed enhancement.



12.28 The manufacturer's website claims that "The Enhancer's" ingredients DHEA and pregnenolone will *"build muscle, reduce fat, maintain running speed, increase bone strength, promote upbeat emotional states and energize the body and mind"*, thereby making the Supplement *"the most promising product for optimizing a horse's speed and strength in a safe and healthy way while increasing muscle mass"* [Cox Vet Lab, The Enhancer, equineesp.com/proddetail.asp?prod=enhance].

12.29 That the Supplement was used for performance-enhancing purposes, and not for welfare purposes, is confirmed by the fact that the Appellant only fed the Horse *"for the duration of the racing season"*. Appeal Brief para 10.14, see also ibid., para 10.11, and fn 37; and Rabdan Stablebook (aka the feed sheet), last two pages: *"Supplements During Season: … 6pm daily, The Enhancer, Cromwell 1 ounce"* (emphasis added).

12.30 Furthermore, the Appellant has candidly conceded that if "the Supplement" had not worked to stimulate the Horse to eat all of "his allocated feed", he would have withdrawn the Horse from competition (at which point the Horse would not have needed any appetite enhancement because he would not have needed to eat any more than usual to build up his strength for endurance racing). See statement of the Appellant dated 10 April 2013, para 12 (*"If The Enhancer had not worked and the Horse had continued to lose condition I would not have wanted to race him"*); Appeal Brief para 14.10 (*"If The Enhancer [had] not made any difference to the Horse's appetite, and he had continued to lose condition, the Appellant would not have competed with him"*).

12.31 The CAS has stated clearly that a lack of intent to enhance performance does not explain or excuse a failure of due diligence and so is irrelevant to the analysis of fault under Article 10.5.2 of the Code. CAS 2012/A/2822, para 8.18 (*"[C]ontrary to the Appellant's submissions, it has no influence on his degree of fault that it is established to the satisfaction of the Panel that he did not intend to enhance his sport performance through Methylhexaneamine"*).

12.32 However, the Panel accepts the fact that the Appellant intended that the Supplement should enhance the Horse's performance does not mean that he is barred *ipso facto* from establishing absence of significant fault or negligence because, on his own case (which was not in issue), he did not know that the DHEA in the Supplement could cause a prohibited level of testosterone to be present in the Horse's system. The question is whether he could and should have known.

12.33 Judged against the stringent standard set out in paragraph 12.19 above, the very limited steps that the Appellant did take fell short, in the Panel's view of an acceptable standard. This is particularly the case given that he had already been held liable once for riding a horse with an unauthorised medication in its system, which whatever his lack of personal culpability should have prompted him to take even more care than a person without such a track record.

12.34 The Panel found that the Appellant obtained ambiguous assurances from unqualified and/or presumptively partisan people that the Supplement was "safe" rather than unequivocal statements from an independent and authoritative source that, not only would it not harm the Horse, but also would not lead to a doping violation. (The statement said to have been made to the Appellant by Cox, that ingestion of the Supplement would not cause a horse to test positive, is not corroborated by Cox or by any written record and would in any event be unconvincing given a manufacturer's inherent bias).

12.35 The Appellant did not claim, either in his witness statement, or in his live testimony below, that anyone other than Cox to whom he spoke gave him any specific "anti-doping" assurance.

In his witness statement for the CAS appeal, the Appellant claimed for the first time:

- that not only the manufacturer but also the Supplier *"confirmed The Enhancer is a safe produt <u>which would not lead to a positive test</u>"*.
- Dr Puccetti *"agreed that The Enhancer was safe <u>and would not result in a positive doping test</u>"*.
- the Supplier and Dr Puccetti assured him *"that an increased dose <u>would not cause any problems with regards to the doping rules</u>"*.

12.36 However <u>none</u> of the counterparties to those conversations even now corroborates this new claim. Rather each of them (the Supplier and Dr Puccetti, and indeed the neighbour who made the original recommendation) carefully confines himself in the material provided to the Panel to saying that he told the Appellant the Supplement was "safe", and no more than that. The Appellant may genuinely have interpreted their more qualified statements as giving a green light to use of the Supplement from the anti-doping perspective. The Panel finds that the

evidence falls short of persuading it that he could reasonably (or safely) have done so.

12.37 In any event, even if (which is not accepted) specific anti-doping assurances were sought, and clearly given, the case-law is clear that it is not reasonable to rely on informal advice given by unqualified people (such as the Appellant's neighbour) or people who would not be impartial (such as the manufacturer and the Supplier of the product). See e.g. on the former point CAS 2011/A/2518, para 10.22(d) (*"circumstances adverse to* [the athlete] *include the following: …* [the athlete] *relied on unqualified people for advice on whether the supplement he used was "safe" or not"*).

12.38 The Appellant checked the listed ingredients against the Prohibited List but did not do an internet search for the ingredients, which would have instructed him that the Supplement did contain a prohibited substance. The very words and phrases used to market the Supplement set the red flags waving and demanded a more rigorous inquiry than he essayed.

12.39 In so concluding the Panel has given anxious consideration to the countervailing factors carefully marshalled by Counsel to the Appellant, to which it now turns.

b) The Appellant's Concern for the Welfare of His Horse

12.40 The Panel naturally accepts that one of the fundamental values espoused and promoted by the FEI, is the preservation of and regard for the welfare of the horse. See Article 1.4 of the FEI Statutes, which states that the objectives of the FEI are:

"To preserve and protect the welfare of the Horse…".

and the FEI's Code of Conduct for the Welfare of the Horse (the "Code of Conduct"), which states that:

"The Fédération Equestre Internationale (FEI) requires all those involved in international equestrian sport to adhere to the FEI's Code of Conduct and to acknowledge and accept that at all times the welfare of the Horse must be paramount…"

and (at Clause 1) that:

"At all stages during the preparation and training of competition Horses, welfare must take precedence over all other demands".

12.41 Where the Panel parts company with the Appellant is the suggestion that pursuit of the Horse's welfare excuses (or even mitigates) the administration of banned substances. In its view the duty not to administer banned substances to a horse and to give paramount importance to the horse's welfare ride in tandem, neither qualifying the other. If, absent administration of the Supplement, the Horse could not comfortably participate in an endurance event, concern for its welfare would have resulted in its being ridden for leisure not in competition.

c) Entitlement to Rely on Expert Veterinary Advice

12.42 The Panel accepts that FEI jurisprudence makes it clear that a PR should take veterinary advice (BURBERRY SPOT, FEI Tribunal Decision dated 11 October 2011, at paragraph 26), but as (ordinarily) a necessary, albeit (never) a sufficient step in discharge of his own responsibility. See above paras.

12.43 The Panel was confronted with two contrasting perceptions of Dr Puccetti, the Appellant's veterinary consultee. On the one hand the Tribunal identified Dr Puccetti as someone under whose care horses had tested positive for Prohibited Substances in the past couple of years, albeit he denied culpability. On the other hand Dr Puccetti who has a degree in Veterinary Medicine from Perugia University and a PhD in Veterinary Orthopaedics is himself a 3* Endurance Veterinary Treatment Official, used by the FEI's events.

12.44 The Panel is not disposed in the circumstances to seek to reconcile these two apparently discrepant versions. Suffice it to say that first Dr Puccetti was the Appellant's own veterinarian and hence lacked a desirable independence; secondly it is unclear, as already noted, that he gave unambiguous advice that the Supplement's use would not result in a doping violation; thirdly that even had he done so, that would not have sufficed to absolve the Appellant from a finding of significant fault or negligence.

d) Co-operation

12.45 It is submitted that the Appellant has demonstrated a willingness to co-operate with both the FEI and the FEI Tribunal at all stages of his case. The Panel are certainly prepared to find that he respected the disciplinary process to which he was subjected, but cannot regard that as being of any substantial significance.

e) Lack of Experience

12.46 Youth and inexperience can sometimes be prayed in aid by a person guilty of a breach of Article 2.1 of the EAD Rules (or its Code analogue).

12.47 The commentary to Article 10.5 of the Code indeed states:

> *"While Minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault under Article 10.5.2"*

It is to be noted that the two mitigating factors are treated conjunctively (*"and"*) not disjunctively (*"or"*).

12.48 It is submitted that, as noted above, the Appellant has only been riding horses since 2008 and has only been competing in the sport of endurance since October 2009. Therefore he had

only around four years' experience of horses and around two and a half years' experience of competing in FEI-governed sport, at the time of the notification of the rule violation concerning the Horse on 14 March 2012.

12.49 The Panel does not consider that the well-educated and mature Appellant can rely on this factor. He was admittedly always aware – as who in today's sporting world is not? – of the need to avoid use of performance-enhancing drugs; and he had anyhow been reminded of the dangers of undue care and attention by the previous ECM violation.

f) Generally

12.50 The Panel associates itself with the approach of the CAS panel in CAS 2011/A/2336, para 97 (*"sporting background, age, sporting behaviour, anxiety in proving their innocence, clean anti-doping record … are utterly irrelevant under the applicable anti-doping rules and do not justify any reduction of sanction where the requirements of article 10.5 are not satisfied"*). Moreover nothing in the Commentary to the Code where examples are given where Article 10.5.2 can be triggered gives any comfort to the Appellant; indeed - sensibly - none of those examples were urged upon the Panel by the Appellant's Counsel.

12.51 The Panel is not unsympathetic to the Appellant. He is by no fair evaluation a drugs cheat. For an amateur sportsman such as he is, the duties may appear onerous, but that is the price necessarily paid nowadays for participating in events regulated by a governing body which subscribes to or applies the Code.

12.52 The Panel therefore finds that the standard two-year suspension must stand.

12.53 As the Panel has determined that the Appellant's case was not so exceptional as to warrant a finding of No Significant Fault or Negligence, the issue of reduction of his suspension has become moot.

D. Aggravating Circumstance

12.54 The Appellant also challenges the Tribunal's decision to treat the prior violation of the ECM Rules as an aggravating factor under EAD Rules Article 10.6 that warranted a further six-month ban.

12.55 It is common ground:

(1) that a horse the Appellant was riding in an FEI-sanctioned event in November 2010 had an unauthorised Controlled Medication in its system, in breach of the ECM Rules.

(2) that the Appellant is responsible under the FEI rules for that violation, irrespective of his claim that the violation was the horse's trainer's fault, not his own.

(3) that the Appellant learned that he had been held liable for a violation on 1 February 2011 by information from the trainers and his inclusion in the FEI table of administrative sanctions online.

12.56 It is not disputed that:

(1) the Appellant was told by the trainer of Aldjani Safinat that the matter had been satisfactorily dealt with.

(2) it was not until the Appellant got the charge letter in this case that he learned his signature had been forged on a letter acknowledging the offence and accepting administrative sanctions. (The fact of the forgery was confirmed by the expert report of Ahmad Obeid Al Bah of the Arab Lab for Technical Inspection).

(3) the Appellant was not sent the standard letter at the time from the FEI (which should have been forwarded to him by the UAE- national federation) informing him of the positive test. The letter, *inter alia,* sets out the options available to him: acceptance of the administrative sanction, request for B sample analysis, provision of a *"thorough supportive explanation of the reasons of the presence of the Prohibited Substances"* and a request for an oral hearing. The accompanying explanatory pamphlet stated:

"you should note that the case will remain on your record. Any future EADCM rule violation committed in the … period … of (8) years will constitute a repeat offence and thus may entail very severe penalties including fines and a long suspension".

12.57 The Panel cannot speculate what might have happened had the Appellant been notified of his available options, and chosen a route other than acceptance of the administrative sanctions. The plain fact is that he was **not** given a fair opportunity to consider his position. If the FEI delegates the function of notification of a rule violation to the national federation, it must accept responsibility for any default in the national federation's performance of that function.

12.58 Sporting regulators' breach of whose rules can have serious consequences must ensure that the rule breakers are advised both of the breach and its potential consequences. This did not happen in the present case.

12.59 The Panel would add the following more peripheral point.

12.60 The Tribunal said that

"it was striking that the PR had not undertaken any steps towards the police or the UAE-NF following his allegations of forgery" Decision paragraph 5.3.

12.61 In the Panel's view the Appellant's decision not to seek criminal prosecution in respect of the forged signature is *res inter alios acta*. Whether or not he took such action is unrelated to his responsibilities under the FEI anti-doping regime.

12.62 Finally under this heading the Panel notes that the previous ECM violation concerned a Medication Control Rule and is not as serious as an Anti-Doping Rule violation. (This is

reflected in the ECM Rules by the fact that a PR who is notified of an ECM Rule violation may, in contrast to the position under the EAD Rules, have his or her case processed under the administrative procedure, which imposes more minor sanctions and no period of ineligibility (see Article 8.3 of the ECM Rules)).

12.63 For those reasons the Panel concludes that the FEI Tribunal was wrong to increase the Appellant's period of ineligibility by six months, and in all the circumstances is not disposed to add any period at all to the mandatory twenty-four (24) months.

E. Proportionality

12.64 The principle of proportionality was reiterated by the CAS in the cases of CAS 2012/A/2807, and CAS/2012/A/2808:

"Proportionality has been consistently upheld as a general and fundamental legal principle which requires that discretion as to sanction be exercised in such a manner that the severity of the sanction imposed is just and in proportion to the seriousness of the offence. […], CAS 2006/A/1133; […], CAS 2005/A/830; […], CAS 2004/A/690, para 6.16".

12.65 The CAS in the same case explained the relevance of this principle in the context of Article 10.2:

"…in exercising its discretion under Article 10.2, the key consideration should be the legal principle of proportionality, i.e., the sanction has to be commensurate with the seriousness of the offence, taking into account the underlying objectives of the [rules in question] and the mischief they are aimed at preventing". (para 10.24).

12.66 Given that the Panel has held that the Appellant is unable to rely upon Article 10.5.2, the particular period of ineligibility is fixed. However, there is no basis for adding any further period for aggravating circumstances. Thus, deployment of the principle of proportionality, whatever its theoretical reach, is in this case foreclosed.

F. Commencement of Period of Ineligibility

12.67 As regards the starting point for any period of suspension, the Appellant does not seek to challenge the Tribunal's finding that any period of Ineligibility should be effective from the date of notification, being 14 March 2012.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Rashid Mohd Ali Alabbar on 18 March 2013 is partially upheld.

2. Paragraph 10.3.1) of the decision of the FEI Tribunal dated 5 March 2013 is amended as follows:

   Rashid Mohd Ali Alabbar shall be suspended for a period of twenty-four (24) months to be effective immediately and without further notice from the date of this award. The period of Provisional Suspension, effective from 14 March 2012, the date of Provisional Suspension, shall be credited against the Period of Ineligibility imposed in this award. Therefore, Rashid Mohd Ali Alabbar shall be ineligible through 13 March 2014.

3. The remainder of the FEI Tribunal decision dated 5 March 2013 is confirmed.

4. (…).

5. (…).

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