



**Arbitration CAS 2005/A/829 Ludger Beerbaum v. Fédération Equestre Internationale (FEI), award of 5 September 2005**

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Dirk-Reiner Martens (Germany); Prof. Denis Oswald (Switzerland)

*Equestrian (jumping)*

*Doping (betamethasone)*

*General principles of interpretation*

*Interpretation of the FEI rules (art. 146.2 FEI General Regulations)*

*Strict liability*

*Balance of interests*

1. It is a general principle not only of Swiss law but of other civil and common law systems, that exceptions are to be restrictively construed. This is so whether this restriction derogates from rights or from liabilities.
2. Article 146.2 of the FEI General Regulations, which provides that *“any horse found to have a prohibited substance (...) is automatically disqualified, (...) unless the Judicial Committee decides based on the evidence provided to terminate the proceedings of the case”*, must be construed narrowly. Article 146.1 according to which *“the use of an expedient substance or method which is potentially harmful to the horse’s health or enhancing to its performance is forbidden”* is a strict liability rule which represents the general principle and Article 146.2 is the exception. Therefore, the latter proviso cannot give a general discretion to the FEI Judicial Committee in the light of relevant evidence to absolve a rider from disqualification, notwithstanding the presence of a prohibited substance. The proviso only allows the FEI Judicial Committee to do so if satisfied on the evidence that no prohibited substance was present.
3. To construe the proviso of article 146.2 as allowing the FEI Judicial Committee (or the CAS) to allow an appeal against disqualification on the grounds that it was proven that there was neither intent to gain competitive advantage nor success in so doing, would be contrary to the principle of strict liability. The CAS has confirmed its consistent case law concerning sporting sanctions and has reiterated that the presence of a banned substance in the urine of an athlete will automatically lead to his/her disqualification from the event in question, whether the ingestion of that substance was intentional or negligent and irrespective of the effect of that substance on the performance (principle of strict liability).
4. The interests of the sport overall must take precedence over the interests of any individual.

This is an appeal by Mr Ludger Beerbaum (the “Appellant”) seeking to annul the decision of the Judicial Committee of the Fédération Equestre Internationale (the “FEIJC”) dated 6 January 2005 (FEI Case No.2004/51) (the “decision”), rendered after a hearing held in Zurich on 2 December 2004, which imposes disqualification in consequence of a positive doping test for a prohibited substance, Betamethasone, found in the horse Goldfever 3 (“Goldfever”) at the 2004 Athens Summer Olympic Games (the “Olympic Games”) (the “Games”).

In a brief summary the FEIJC held that the FEI regulations provide a strict liability test for doping offences and that disqualification was automatic, notwithstanding the fact that Goldfever gained no competitive advantage from the administration of the cream, which was the cause of the positive test result and which was for legitimate medical purposes i.e. the treatment of eczema. In consequence the results of the German Team of which the Appellant was a member in the competition i.e. the Olympic Games Show Jumping were annulled and the Team lost its gold medal.

The Appellant is a show jumper of outstanding ability, and a multiple gold medallist in the Olympic Games and in World and European Championships.

The Respondent is the international governing body for equestrian sports, situated in Lausanne.

Goldfever represented Germany during the Olympic Games. It was ridden by The Appellant, a member of the German Show-Jumping Team which won the team Gold medal.

On 24 August 2004 Goldfever was selected for sampling during the Olympic Games, (Medication Control Form No. 008324 dated 24 August 2004).

Analysis of the sample taken from Goldfever, (Security Bag no. 297394 and Bar Code number JO04-10) conducted by the approved central laboratory of the FEI, Laboratoire des Courses Hippiques, France (“LCH”), revealed the presence of Betamethasone (LCH report dated 13 September 2004).

A confirmatory analysis was requested by the Appellant at the Laboratory in Newmarket UK. Because of the lack of capacity at that preferred laboratory, the confirmatory analysis was performed by the FEI’s approved reference laboratory, the Racing Laboratory of the Hong Kong Jockey Club (“HKJC”). Analysis of the urine, Sample number JO04-10, revealed the presence of Betamethasone (HKJC report dated 4 November 2004 signed by Francis P.W. Tang, chemist, and Terence S.M. Wan, Head of the laboratory). The confirmatory analysis was conducted in the presence of the Appellant’s selected witness, Professor Wilhelm Schänzer.

Betamethasone is an anti-inflammatory corticosteroid acting, *inter alia*, on the musculoskeletal or locomotor system and is graded 3 by the Medication Sub-Committee (“MSC”) of the FEI (LCH report dated 13 September 2004 and MSC reports dated 3 October 2004 and 9 November 2004). Under the MSC’s grading system a substance is graded “1” if it has a relative high potential to affect the performance of the horse and is graded “5” if it has a relative low potential to affect the performance of the horse. Betamethasone is also a prohibited substance pursuant to Article 1013 and Annex IV of the Veterinary Regulations of the FEI (9<sup>th</sup> edition, 2002).

Goldfever had suffered from a skin eczema on the pastern below the fetlock of his left foreleg that did not result in lameness. This was treated during prior periods by numerous substances.

The Appellant had made the Veterinarian of the German NF and the national coach aware of the skin condition months before the Olympic Games and they had requested that good care was taken of Goldfever in order to ensure that he performed in top condition at the Games.

Approximately two months before the Games a topical treatment for Goldfever with a cream, Soderm, prepared for human use and containing Betamethasone was started and proved effective.

During that period, Goldfever was tested on several occasions with negative results, although precisely when the cream had been administered prior to such tests was not established, and no reliance was placed on this fact.

While at the Games due to the hot and dry climate and the sandy nature of the practice arena, Goldfever's skin became sensitive and the same small area became red and scuffed with possible minor bleeding. In order to protect the area and treat the skin condition Ms Johnson (the "groom") continued to apply very small quantities of the cream to Goldfever at the Games.

While at the Games this treatment continued in the open and in the presence of team members, team and coach. However, both Ms Johnson and the Appellant have accepted that they did not inform the Team Vet or the team Coach that the treatment was continuing at the Games, and that no authorisation for such treatment had been requested or granted in accordance with GR 146.3 (see below).

The Appellant and the groom have stated that, based on professional advice they had received during the period prior to the Games, they were confident that the minor quantities applied topically would not result in a positive test result, hence their failure to seek or receive authorisation in accordance with the FEI rule. The Appellant had no intention to breach or bypass the rules.

At the Games the German team, including the Appellant, won the Gold medal, the USA team the silver, and the Swedish team the bronze.

On 4 February 2005, the Appellant filed his statement of appeal accompanied with 6 exhibits.

#### Witness Evidence for FEI

**Frederick Sluyter**, head of FEI Veterinary Department gave evidence elaborating his statement dated 2<sup>nd</sup> June 2005. In summary he said that (1) Betamethasone is not a substance included in the FEI list for threshold substances. (2) Any modification to the FEI Regulations in force at the material time will not take effect until 1<sup>st</sup> January 2006. (3) In any event because of its performance-affecting potential, use of Betamethasone during FEI events will not even then be authorised. (4) Betamethasone is a substance that can be administered via different routes and used for different conditions including some which may enhance performance. (5) The reasons for the required procedure of obtaining authorisation for use of medication at

FEI events, as detailed in the FEI rules, were to safeguard against misuse of such substances, and to ensure that treatment does not “mask” improper use of medication.

**Dr Marianne M. Sloet van Oldruitenborgh-Oosterbaan**, head of the Equine Internal Medicine Clinic at the University of Utrecht, gave evidence in a written statement dated 2 June 2005 to whose admissibility no objection was made. In summary she said that (1) Corticosteroids (of which Betamethasone is one) are potent drugs which operate on all body systems; (2) it is not possible through standard methods of testing to say whether such a drug has been administered externally or by injection; (3) an athlete can refuse treatment: a horse cannot; (4) there were alternative treatments for eczema which contained no prohibited substances; (5) an experienced rider (such as the Appellant) and his groom should have been aware of the consequences of their actions.

**Michael Stone**, FEI Sports Director, gave evidence about what he perceived to be FEI’s policy towards the implementation of the Task Force’s recommendations. This was consistent with that of Mr Sluyter (2) and (3) above.

#### Witness Evidence for Appellant

**Professor Dr M. Kietzmann**, of the Institute of Pharmacology, Toxicology and Pharmacy gave evidence elaborating his statement, filed on 16 February 2005 and confirmed in an addendum dated 19 May 2005. In summary he said: (1) in horses, after topical treatment of a small skin area (C100 m<sup>2</sup>), systemic glucocorticoid effects, which would induce an improvement of the performance “*are absolutely not expectable*” (sic); (2) WADA (2005 Prohibited List) stipulates in respect of glucocorticosteroids: “*Dermatological preparations are not prohibited*”; (3) The FEI task force recommended Betamethasone as an ingredient of medicines which can be administered, its administration in minor quantities would be included in Medication Class (B); (4) In many laboratories the concentration found in Goldfever’s urine would not have been detected.

The Appellant also gave evidence confirming, in effect, the findings made by the FEIJC as to his lack of intent to breach the regulations, accepting his responsibility for his groom’s error in not seeking authorisation and explaining his concern for the Team, and their concern for him.

## **LAW**

### **Jurisdiction**

1. According to R47 of the Code for Sports-related Arbitration (hereinafter the “Code”), decisions of sports federations may be appealed to the Court of Arbitration for Sport (the “CAS”) insofar as their statutes or regulations provide for such appeal.
2. Article 170.1.2 of the FEI General Regulations (20th edition, effective 1 January 2000), Article 170.1.3 of the FEI General Regulations (21st edition, effective 1 January 2005) and Article 059 of the Statutes of the FEI (21st edition, effective 21 April 2004) provide for a right to appeal decisions of the FEIJC to the CAS.
3. Rule 74 of the Olympic Charter in force at the Games, [and the identical Rule 61 in force from 1st September 2004] provides, inter alia, that disputes arising “in connection with the Olympic Games” shall be submitted exclusively to the CAS. Therefore, the CAS has jurisdiction to hear this appeal.
4. The CAS’s jurisdiction has also been confirmed by the signature of the parties to the order of procedure dated 15 April 2005.

### **Seat**

5. According to R28 of the Code, the seat of the Arbitration Panel (the “Panel”) is established at the Secretariat of the CAS, Château de Béthusy, Avenue de Beaumont 2, 1012 Lausanne, Switzerland.

### **Law applicable to the merits**

6. According to R58 of the Code, the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law or according to the rules of law, the application of which the Panel deems appropriate.
7. The applicable regulations are those of the FEI. In the absence of choice of another law by the parties, Swiss law will apply complementarily.

### **Legal instruments**

8. The FEI’s Statutes (21st edition) effective 21st April 2004 provide, so far as material, as follows:

**Chapter 1      PURPOSES AND PRINCIPLES**

**Article 001      PURPOSES**

*The purposes of the FEI are as follows:*

...

2. *To establish Statutes, Regulations and Rules for the conduct of international events in the equestrian disciplines approved by the General Assembly....*

3. *To establish Statutes, Regulations and Rules and to approve programmes for equestrian competitions at Championships, World, Regional and Olympic Games, and to control their technical organisation.*

...

5. *To enable and to facilitate individual competitors and teams from different nations to compete in international events against each other under equal and fair conditions.*

6. *To encourage the observance of the principles and spirit of equestrian sports particularly in the relationship with horses:*

6.1. *by promoting equal and fair conditions in the conduct of international events;*

6.2 *by preserving and protecting the welfare of the horse and the natural environment establishing appropriate codes of conduct;*

6.3 *by acting as the controlling authority of FEI events.*

7. *To promote the highest standards of ... veterinary and medication control ... at international events.*

...

**Article 002      PRINCIPLES**

...

5. *The Statutes, Regulations and Rules shall apply to all international equestrian events under the jurisdiction of the FEI and the National Federations.*

9. The FEI General Regulations 20th edition, effective 1 January 2000, in effect at the material time, provide so far as material, as follows:

**CHAPTER I    INTRODUCTION AND DEFINITIONS**

**Article 100      REGULATIONS AND RULES**

1. *The General Regulations (GRs) are established so that individual competitors and teams of competitors from different National Federations (NFs) may compete against each other under fair and equal conditions. If there is any doubt about the meaning of any of the Regulations, they should be interpreted in the sense of ensuring fair conditions for all competitors.*

2. *The GRs, together with the Veterinary Regulations (VRs), govern the conduct of all international equestrian events organised by NFs or by or on behalf of the Fédération Equestre Internationale (FEI). The GRs are published under the authority of the General Assembly.*
5. *Veterinary Regulations (VRs) are published under the authority of the Bureau to protect the health and well-being of horses and to enable them to participate in international competitions under fair and equal conditions.*
- ...
7. *FEI Statutes, GRs, VRs, Rules and SRs apply to international events and/or competitions as laid down in Chapter II.*
8. *The Rules and SRs must be read in conjunction with the GRs and VRs. In case of conflict of interpretation between the provisions of any of the VRs, Rules or SRs, the principles of the GRs shall take precedence.*
- ...
11. *In cases of doubt about the interpretation of Articles or their application to particular circumstances, NFs should obtain a ruling from the Secretary General. The Judicial Committee is the final authority within the FEI on the interpretation of the Statutes, Regulations and Rules.*

## **CHAPTER VI HORSES**

### **Article 142 PERSONS RESPONSIBLE**

1. *The Person Responsible for a horse has legal responsibility for that horse under the GRs and the VRs and, unless otherwise stated, is liable under the Legal System (Chapter IX).*
2. *For the purpose of the GRs and the VRs the Person Responsible shall normally be the competitor who rides ... the horse during an event....*
5. *The Person Responsible is responsible for any act performed in the stables, by himself or by any other person with access to the horse....*

## **CHAPTER VII PROTECTION OF COMPETITORS AND HORSES**

### **Article 145 MEDICATION CONTROL AND ANTI-DOPING AND PROTECTION OF COMPETITORS**

1. *Subject to prior authorisation, any competitor found to have a Prohibited Substance in his body at an event or evidence of the use thereof is automatically disqualified from all competitions at the event and the classification adjusted accordingly.*
2. *The IOC rules and list of Prohibited Substances existing from time to time and as laid down in the Olympic Movement Anti-Doping Code and any and all annexes and modifications thereto apply, subject to modifications by any of the governing bodies of the FEI as may be published from time to time.*

3. *The Ground Jury after consultation with the responsible Medical Officer may at any time exclude from further participation in the competition and/or event any competitor who is unfit to continue by reason of a serious or potentially serious injury or health condition.*
4. *The Executive Board may order the sampling of international competitors while in competition or out-of-competition.*

**Article 146      MEDICATION CONTROL AND PROTECTION OF HORSES**

1. *The use of an expedient substance or method which is potentially harmful to the horse's health or enhancing to its performance is forbidden. The precise rules concerning Prohibited Substances and Medication Control are laid down in the VRs.*
2. *Any horse found to have a Prohibited Substance in any of its tissues, body fluids or excreta at an event as the result of a Medication Test, is automatically disqualified, together with the competitor with that horse, from all competitions at that event<sup>1</sup> and the classification adjusted accordingly, unless the Ground Jury has authorised the horse to participate or continue in the event in accordance with paragraph 3 below, or **unless the Judicial Committee decides based on the evidence provided to terminate the proceedings of the case ("the proviso")**. If the disqualified horse and competitor are members of a team, the rest of the team is not disqualified.*
  - 2.1 *In the case of repeated violations of Art. 146.2, Art. 174.7.2 will always be applied.*
3. *The Veterinary Commission/Delegate must give written approval on the appropriate form before any veterinary treatment or medication with a Prohibited Substance is administered to a horse during the entire course of an event. If during this period it is urgently necessary to treat a horse with a Prohibited Substance, the Veterinary Commission/Delegate must be informed at once and the circumstances reported to the President of the Ground Jury. Any treatment so administered must be indicated to the Veterinary Commission/Delegate by written certification. The Ground Jury must, on recommendation of the Veterinary Commission/Delegate, decide whether the horse may take part or continue in the event, having regard to the welfare of the horse and to the possibility that the competitor may obtain an unfair advantage.*

...

**CHAPTER IX THE LEGAL SYSTEM**

**Article 161      PREAMBLE**

3. *Any case of violation of the Statutes, Regulations and Rules, or of the common principles of behaviour, fairness, and accepted standards of sportsmanship, which occurs:*
  - 3.1 *During, or in direct connection with, an international event, shall be dealt with by the Ground Jury, the Appeal Committee, the Judicial Committee or the CAS, according to their competence as laid down in this Chapter.*

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<sup>1</sup> **Article 101 DEFINITIONS**

1. The term "Event" refers to the "Games" under the control of an OC i.e. organising committee.



**Article 165**      **JUDICIAL COMMITTEE**

1. *The Judicial Committee shall consider all cases submitted to it by the Secretary General and after considering the evidence (written and/or oral) it may impose the following penalties:*
  - 1.1 *A Warning;*
  - 1.2 *A fine up to a maximum of CHF 15,000.-;*
  - 1.3 *Disqualification with one or more horses from competitions or from events;*
  - 1.4 *Suspension of a body for any period (see Statutes Art. 007.3);*
  - 1.5 *Suspension of individuals and horses for any period up to suspension for life;*
  - 1.6 *Expulsion of NFs.*

**Article 166**      **COURT OF ARBITRATION FOR SPORT (CAS)**

1. *The CAS has the power to impose the same scale of penalties as the Judicial Committee.*
2. *In appropriate cases the CAS may impose more severe penalties (within the limits of the penalty jurisdiction of the body from which the appeal is brought) than those imposed in the first instance.*
- ...

**Article 174**      **PENALTIES**

- ...
4. *A fine is appropriate particularly in cases where the offender has objectively gained an unfair advantage or has disadvantaged another person, or has infringed the Statutes, Regulations or Rules by negligence.*
5. *Disqualification is appropriate when it is specified in the Regulations or Rules, or if the circumstances demand immediate action.*
  - 5.1 *Disqualification from a competition means that the competitor and horses concerned – even should they change ownership – is removed from the list of starters and the classification and includes the forfeiture of prize money won in that particular competition.*
  - 5.2 *Disqualification from an event means that the competitor and horse or horses concerned – even should they change ownership – may take no further part in that event and it may include the forfeiture of any prize money won in previous competitions at that event where this is provided for in the Regulations or Rules*
7. *Notwithstanding anything to the contrary indicated in paragraphs 3 to 6 above, the penalties listed below shall be imposed in the following cases:*
  - 7.1 *The finding on analysis of a Prohibited Substance as defined in Art. 145 will entail the disqualification of the competitor from the event and the forfeiture of any prize money won by that competitor in that same event and may entail a suspension of one month to life and/or a fine of CHF 1,000 to CHF 15,000.*
  - 7.2 *The finding on analysis of a Prohibited Substance as defined in Art. 146.2 will entail the disqualification of the horse from the event and the forfeiture of any prize money won by that*

*competitor on that horse in the same event. The competitor will be disqualified on that horse and may be disqualified altogether.*

*7.2.1 The finding on analysis of a Prohibited Substance as defined in Art. 146.2 is presumed to be a deliberate attempt of the Person Responsible to affect the performance of the horse and will entail the suspension of the Person Responsible from 3 to 24 months. A fine of CHF 1,000 to 15,000 can also be imposed.*

*7.2.2 In the case of repeated violations of Art. 146.2, Art 174.7.2. will always be applied.*

10. The Veterinary Regulations 9th edition, effective 1st January 2002, provided so far as is material, as follows<sup>2</sup>:

## **CHAPTER V – CONTROL OF PROHIBITED SUBSTANCES**

### **FOREWORD**

*The objective is to protect the integrity of equestrian sports through controlling the use of substances capable of giving a horse an advantage or disadvantage in an event, contrary to its natural abilities.*

### **Article 1013 – PROHIBITED SUBSTANCES**

1. ***Prohibited substances*** – *The finding of a prohibited substance means detecting the substance itself or a metabolite of the substances or an isomer of the substance or an isomer of a metabolite. The finding of any biological or scientific indicator of administration or other exposure to a substance is equivalent to detection of the substance itself.*
2. ***Threshold Substances*** - *Horses may compete with the presence of certain substances in their tissues, body fluids or excreta for which these Regulations have established threshold levels/ ratios as laid down in Annex IV, provided the concentration of the substance is not greater than the threshold level/ ratio indicated in this Annex. Thresholds can only be adopted for:*
  - substances endogenous to the horses*
  - substances arising from plants traditionally grazed or harvested as equine feed*
  - substances in equine feeds arising from contamination during cultivation, processing or treatment, storage or transportation.*

*For any finding of a Prohibited Substance of possible endogenous nature, the FEI (on the advice of the Medication Sub-Committee) may examine the horse further or subject the horse to additional tests. If carried out at the request of the Person Responsible, such further tests will be at his/ her expense.*
3. *It is a contravention of the Veterinary and the General Regulations if the analysis of a sample taken from a horse shows the presence in any one of its issues, body fluids or excreta of a Prohibited Substance (see also General Regulations Art 146). Sample means a sample from any part, or in contact with any part, of the horse.*

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<sup>2</sup> The FEI Regulations for Equestrian Events at the Olympic Games 21<sup>st</sup> edition, cross-referenced these Regulations at Article 615.

4. *The list of Prohibited Substances is submitted for annual approval to the General Assembly on the recommendation of the Bureau.*
5. *In view of the rapid development of new drugs and pharmacological agents and of the changes in the methods of preparing horses for competition, the Regulations regarding medication control may be amended at any time. The Veterinary Committee, at the recommendation of the Medication Sub Committee, may propose rule modifications to the Executive Board at any time (see Art. 1001.2).*
6. *Persons Responsible must be aware of the following:*
  - 6.1 *Labels on veterinary preparations, proprietary medicinal products, tonics, herbal remedies and manufactured compound feeds do not always list the constituents in full. They may therefore contain Prohibited Substances that would prevent their use in performance horses. (See Annex XIII).*
  - 6.2 *Many substances can be absorbed through horses' skin and be detected by an analytical laboratory.*
  - 6.3 *The Person Responsible is responsible for the supervision of his/ her horse at all times, irrespective of stable security.*
  - ...
7. *It must be emphasised that although the Person Responsible is responsible for the supervision of his/ her horse an important factor for the control of Prohibited Substances is the strictest practical stable security. However, reduced stable security or the absence thereof does not relieve the Person Responsible from any liability under these or the General Regulations.*

#### **ANNEX IV      PROHIBITED SUBSTANCES**

*Horses taking part in a competition must be healthy and compete on their inherent merits. The use of Prohibited Substance might influence a horse's performance or mask an underlying health problem and could falsely affect the outcome of a competition. The list of Prohibited Substances has been compiled to include all categories of pharmacological action.*

*The following are prohibited substances:*

*Substances capable at any time of acting on one or more of the following mammalian body systems:*

*the nervous system.*

*the cardiovascular system.*

*the respiratory system.*

*the digestive system other than certain specified substances.*

*for the oral treatment of gastric ulceration.*

*the urinary system.*

*The reproductive system.*

*the musculoskeletal system.*

*the skin (e.g. hypersensitising agents).*

*the blood system.*

*the immune system, other than those in licensed vaccines against infectious agents.  
the endocrine system.*

### **Thresholds**

*Thresholds can only be adopted for:*

*Substances endogenous to the horse*

*Substances arising from plants traditionally grazed or harvested as equine feed*

*Substances in equine feed arising from contamination during cultivation, processing or treatment,  
storage or transportation.*

*Thresholds shall be recommended by the Medication Sub Committee, after consultation with official analysts  
and veterinarians, and approved annually by the General Assembly.*

*Substances below the following thresholds are not actionable:*

...

***Hydrocortisone 1 microgram per millilitre in urine***

### **Analysis**

11. It was common ground at the hearing that there were, in the final analysis, two issues:
  - (i) whether there was any discretion vested in the FEIJC by the relevant FEI regulations not to disqualify the Appellant (and the German team) notwithstanding that a prohibited substance was found in the urine of Goldfever, and
  - (ii) if there *was* such a discretion, whether it should be exercised in the Appellant's favour.
12. Other arguments advanced on behalf of the Appellant in the appeal brief, namely that the anti-doping regulations of the FEI were too vague and uncertain to be relied by the FEI at all and that the *lex mitior* should be invoked in favour of the Appellant because of the forthcoming amendment of the FEI anti-doping regulations were not, in the event, pursued as independent heads of argument, but subsumed under the second issue.
13. The first issue pivoted on the proviso in Article 146.2 of the FEI General Regulations, apparently introduced in or about 2000<sup>3</sup>, but, in any event, effective both at the time of the Games, and at the present time, and which we repeat for convenience:

*“Any horse found to have a Prohibited Substances in any of its tissues, body fluids or excreta at an event as the result of a Medication Test, is automatically disqualified, together with the competitor with that horse, from all*

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<sup>3</sup> It was not present in the 20<sup>th</sup> edition effective from 1 January 2000

*competitions at that event and the classification adjusted accordingly, unless the Ground Jury has authorised the horse to participate or continue in the event or unless the Judicial Committee decides based on the evidence provided to terminate the proceedings of the case”.*

14. The crucial question is what is meant by the proviso “*unless the Judicial Committee decides based on the evidence provided to terminate the proceedings of the case*”? The rival contentions were clear and simple. The Appellant submitted that the proviso gave a general discretion to the FEIJC in the light of relevant evidence to absolve a rider from disqualification, notwithstanding the presence of a prohibited substance (“the broad construction”). The Respondent submitted that the proviso only allowed the FEIJC to do so if satisfied on the evidence that no prohibited substance was present (“the narrow construction”).
15. The broad construction of the Appellant rested on the following foundations:
  - (1) There was no equivalent exception in art. 145 (Medication control, anti-doping and protection of competitors) which dealt with humans.
  - (2) The rationale of having such an exception in art. 146 was precisely because medical treatment for genuine therapeutic reasons for horses with what were nonetheless prohibited substances was envisaged.
  - (3) Whereas the WADA Code (applicable to humans) contained a list of prohibited substances, by contrast, the FEI VRs contained only open textured principles which concentrated on the potential effect on various systems of certain substances. It is therefore appropriate to allow a measure of discretion to the FEIJC where, for example, it was clear that the effect of such substances in limited quantities was not conceivably performance enhancing.
  - (4) In so far as the proviso contained a discretion, it was not confined in any way e.g. by reference to exceptional circumstances.
  - (5) The various CAS cases based on FEI predecessor rules all concerned instruments in which the proviso was not present; and therefore were irrelevant to true interpretation.
  - (6) To counter an argument advanced in the FEI’s answer, the proviso was not concerned with cases where it found on a review of the evidence that there was no prohibited substance. On the contrary, the assumption for engaging the proviso was that a prohibited substance had indeed been found.
  - (7) The proviso was not limited to procedural errors by the FEI, whatever the previous jurisprudence might have indicated as its normal ambit.
  - (8) The proviso allowed in a general way, that which the intended amendments to the regulations provided more precisely, i.e. an ability to discriminate between doping agents and forms of medication.

- (9) It does not undermine the rule of strict liability which was concerned with offence and not with sanction.
16. The narrow construction of the FEI rested on the following foundations:
- (1) The wide ranging threshold that the Appellant contended for was inconsistent with fundamental principles of anti-doping law i.e.
    - (i) that the actual effect of the use of a prohibited substance was irrelevant to the commission of the offence and consequent disqualification;
    - (ii) that the quantity of the substance found was equally without relevance save in those circumstances where a specific threshold was provided for in the rules;
    - (iii) that notification of medical or therapeutic treatment must be notified or announced to the regulatory body's appropriate organs before any competition;
  - (2) Therefore the construction contended for by the Appellant undermined the principle of strict liability.
  - (3) The language of the proviso was in any event inept to provide for mitigation of what would otherwise be the consequences of automatic disqualification.
  - (4) The proviso was intended only to allow the FEIJC to bring proceedings to an end where there had been some procedural error on the part of the FEI, either in relation to authorisation purportedly given to use a prohibited substance or in relation to the testing in the laboratory, as was confirmed by the previous jurisprudence.
17. For our part, the Panel found art. 146(2) profoundly obscure. [Article 146(2) is, on any view, ripe for revision.] The concept of terminating the proceedings of a case is an unusual one, but suggests as a matter of ordinary language that proceedings somehow do not reach a conclusion e.g. where they are dismissed *in limine* or aborted midway, or because of an admission made by the FEI which is destructive of the entire case against the competitor. It is not a happy way of expressing (if that were its intent) that the FEIJC have a discretion (albeit one to be exercised to achieve justice) not to disqualify, notwithstanding the finding of a prohibited substance.
18. A formula such as "*any horse found to have a prohibited substance in any of its bodily fluids ... as a result of a medication test is automatically disqualified, unless the Judicial Committee decides on the evidence that such disqualification is inappropriate*" would far more precisely achieve the objective that the Appellant contends the actual formula has achieved.

19. The proviso is made no more intelligible in the subordinate French text<sup>4</sup>, which is simply a literal translation of the English “*au moins que la Commission Juridique décide basée sur l’évidence fourni de terminer le procès du cas*”. No relevant travaux préparatoires were drawn to our attention and the jurisprudence is of limited assistance since it shows only how judicial bodies, the FEIJC and the CAS itself, have applied the proviso to the facts of cases before them, and not how they have construed the proviso.
20. In CAS 2003/A/435, the Appellant’s horse was treated with phenylbutazon by the official treatment veterinarian at the relevant competition, who assured the appellant that he would present information about the given treatment to the FEI veterinary delegate. In fact he did not do so. The CAS Panel ruled,
- “in these very special circumstances, the Rider has relied, in good faith, on the guarantee issued by an official veterinarian of the Respondent, whose failure to communicate the proper information has prevented the Ground Jury from allowing the Appellant to take part in the event, regardless of the presence of a prohibited substance in the horse’s tissues. The conditions provided by art. 146GRs and 1027.s.s.2VRs are not met. Hence, there is no ground justifying the disqualification of the Appellant and of his horse and the appealed decision shall be annulled”.*
21. It should also be noted that in para. 6.19 the CAS Panel had concluded that in all likelihood the ground jury would have permitted the horse to compete. Although the CAS Panel did not expressly say that they were operating the proviso, they quoted art. 146.2. GR; and we conclude that is what they were doing.
22. In a decision of the FEIJC dated 6 January 2005 in the matter of *Mrs Bettina Hoy* (in which the FEIJC was constituted by the same persons who determined the present case and indeed did so on the same day) the rider’s horse tested positive for a prohibited substance contained in a lotion known as Benadryl which was applied to its skin for a skin rash. On the rider’s behalf the team veterinarian of the German eventing team sought to obtain the authorisation of Professor Leo Jeffcott, Chairman of the Veterinary Committee of the FEI and President of the Veterinary Commission at the Olympic Games. He was not available, but someone who wore the “official” veterinarian clothes and appeared to be knowledgeable said that the lotion could be used. The FEIJC referred to the CAS 2003/A/435 decision and said that the
- “same rationale can apply to the present case in which the (Rider) through her representatives may have been lead to believe that proper authorisation for the use of the Benadryl lotion had been granted”.*
- The FEIJC concluded, “*Based on the detailed analysis of the special facts evidenced in this case as described herein, the Judicial Committee concludes that it would make no finding against the Rider*”.
23. No reference at all was made in the decision to the proviso, but it appears to be agreed on all sides before us that unless the FEIJC were making use of it, they were acting *ultra vires*; there is indeed no reason to believe that they were acting otherwise than by reference to it. It should be

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<sup>4</sup> Under Article 053.6, the English text has priority over the French.

noted that they cited the reference from CAS 2003/A/435 to “*these very special circumstances*”, which appears to have influenced them to exercise their discretion in the Rider’s favour.

24. The decision of the same Committee on 28 April 2005 concerned the rider HH Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan (“Sheikh Hazza”), representing the United Arab Emirates in the FEI Endurance World Championship 2005, where his horse tested positive for an anti-inflammatory corticosteroid. In this instance, the FEIJC held that, “*the (Rider) clearly requested the opportunity to be represented at the B-sample analysis. Despite questioning the integrity of the A-sample analysis, he was nevertheless denied the ability to assess the integrity of the confirmatory sample*” (para. 22).

*As a result, the Judicial Committee finds that there has been a procedural error that is of the nature to compromise the limited rights of the (Rider) to such an extent that the results of the B-sample analysis and therefore the entire urine test, should be disregarded”* (para. 23).

It concluded,

*“The Judicial Committee decides to terminate the proceedings in this case pursuant to GR Art. 146.2”* (para. 24).

25. This is the only instance where (as far as has been brought to our attention) any Body has employed the precise vocabulary of the proviso. The termination of the proceedings was effected there on account of the procedural error, which the Committee felt entitled them to disregard the entire urine test.
26. To resolve the first issue, the Panel finds it necessary to revert to basic principles.
27. Firstly the Panel bears in mind:
- (i) the importance of the strict liability rule in the war against doping in sport;
  - (ii) the legal fact that disqualification (as distinct from long-term sanction) is the usual consequence of its breach, irrespective of whether or not the amount in question affected, could have affected or was intended to affect performance (CAS 94/126, Digest of CAS Awards II 1998-2000, p.137);
  - (iii) that where rules permit competitors to seek prior authorisation for medical treatment, those rules should be accorded due weight (CAS 98/184, Digest of CAS Awards II 1998-2000, p.197). See also: CAS OG 00/011, Digest of CAS Awards – Sydney, p.111; CAS 95/150 Digest of CAS Awards 1986-1988, p. 257; CAS 95/141, Digest of CAS Awards 1986-1988, p. 215.
28. The strict liability rule is set out in the FEI Rules at Article 146(1). We note that “potentially” as well as “actually” performance enhancing substances are prohibited. Article 146(2) deals with consequences. The passage before the proviso re-emphasises that the strict liability rule applies by attaching the conventional sanction of disqualification to a horse found to have such prohibited substance in its body fluids.



29. Against that background, to construe the proviso as allowing the FEIJC (or the CAS) to allow an appeal against disqualification on the grounds that it was proven that there was neither intent to gain competitive advantage nor success in so doing, would be contrary to those principles. See in particular CAS 2002/A/376: “*The disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels*”. To use a not inapt English metaphor, it would drive a coach and horses through those principles; and the Panel can see no reason why different considerations should apply to the doping of horses than to the doping of humans when in each instance the purpose of the strictly liability rule remains the same.
30. It is possible to envisage a set of rules which permit a competitor to avoid the ordinary sanction of disqualification by establishing that the prohibited substance had in his or her particular case, no performance enhancing effects, even though this would complicate the evidence admissible in doping cases: compare the objections to allowing a competitor to give evidence as to intent or lack of it (CAS 94/129 at para. 15). However, in the Panel’s view, clear and precise language would be required to create such an untypical regulation.
31. Secondly, it is a general principle not only of Swiss law – the complementary law in this instance – but of other civil and common law systems, that exceptions are to be restrictively construed. This is so whether this restriction derogates from rights or from liabilities. In the present case, the strict liability rule (and its conventional concomitant disqualifications) represents the general principle and the proviso represents the exception. This of itself favours the narrow over the broad construction.
32. Thirdly, the albeit awkward concept of termination of proceedings does, as we have already remarked, suggest the stopping of proceedings at a stage earlier than consideration of the overall merits of a case. The three cases which we have cited at para. 12.12 – 12.15 above, all provide instances where there was a form of procedural irregularity which made it unfair to accept the positive test results. Even in UEA there was a finding of a prohibited substance, albeit in consequence an imperfect and incomplete procedure. Unlike the present case, none of these cases were cases where no challenge could be made either to the positive finding itself or to the efficacy and/or fairness of the tests themselves or the procedures attendant upon them, and where the only arguments advanced were those of a mitigating nature vis-à-vis an unchallenged and unchallengeable positive finding.
33. Fourthly, the other gateway of Grand Jury authority is also an example where it would be unfair to take account of a positive finding; which is consistent with a narrow construction.
34. Fifthly, the Rules provide a means whereby a therapeutic use may be permitted (Article 146.3). To allow the possibility to a rider to bypass this means, would risk rendering that route with all its attendant safeguards redundant.
35. While giving full weight to the *contra proferentem* principle and to the requirement that strict rules must be clear rules (see CAS 94/129 cit. sup., para. 34), for the reasons set out above, we nevertheless prefer the narrow construction over the broad construction. That being so, the

second issue does not fall for consideration. To give the proviso the broad construction, would not be to give the Appellant (rightly) the benefit of an ambiguity but (wrongly) the benefit of an artificiality.

36. We reach this conclusion not without some measure of regret.

37. We remind ourselves of the findings of the FEIJC which are not under challenge.

*“The Judicial Committee is satisfied the evidence presented indicates that Goldfever received no specific competitive advantage as a result of the administration of the prohibited substance and that the administration of the prohibited substance was connected to a legitimate medical treatment (para. 24).*

*The Judicial Committee determines that in this case (the Appellant) has not acted in a manner intended to enhance the performance of the horse or to gain any unfair advantage in the competition and that the treatment is not likely to have jeopardised the welfare of Goldfever and was indeed intended to assist the horse’s health. (para. 25)*

*The Judicial Committee is of the opinion that this case highlights the possible need of the FEI to revisit its entire medication policy in order to distinguish between legitimate treatment used to assist the welfare of horses before and during competition and medication which is used in order to enhance performance and gain an unfair advantage in competition or treatments which endanger the horse’s welfare. In this case the Judicial Committee has found no evidence that (the Appellant) had either risked the horse’s welfare or gained any unfair advantage during the Olympic Games”.*

38. The evidence presented therefore indicates that:

- (i) Goldfever received no specific competitive advantage as a result of the administration of the prohibited substance;
- (ii) the administration of the prohibited substance was connected to a legitimate medical treatment;
- (iii) the Appellant did not act in a manner intended to enhance the performance of the horse or to gain any unfair advantage in the competition;
- (iv) on the contrary, the treatment is not likely to have jeopardised the welfare of Goldfever and was indeed intended to assist the horse’s health.

39. It may also be the case that as from 1<sup>st</sup> January 2006 the therapeutic use of Betamethasone will not constitute a doping offence. We are however spared the need to reconcile the somewhat inconsistent oral and written evidence from the FEI on this point.

40. The Appellant informed the Panel – and there is no reason at all to doubt this – that the teams who would be upgraded if the German team lost their gold medal i.e. the US and Swedish teams have no wish to gain a benefit which would not stem from their talents as equestrians.

41. The FEIJC themselves were clearly conscious of the potential injustice in the decision which they felt compelled to reach.
42. If we ask ourselves who, on the facts found by the FEIJC (and confirmed by us), truly “won” the event, from the perspective of the other participants, the spectators, or the interested public, the answer would surely be “*the Appellant and the German team*”. We would not willingly, unless compelled to do so, render a verdict which parted company with the legitimate perceptions of the sporting world.
43. Our sympathy is, however, mitigated by the indisputable consideration that the Appellant could and should have sought authorisation for the use of Soderm on Goldfever. He was, in the final analysis, the author of his own misfortune.
44. The interests of the sport overall must take precedence over the interests of any individual.
45. For these reasons we would dismiss the appeal.

**The Court of Arbitration for Sport rules:**

1. The appeal filed by Ludger Beerbaum on 3 February 2005 is dismissed.  
(...).