



Arbitration CAS 92/86 W. / Fédération Equestre Internationale (FEI), award of 19 April 1993

Panel: Prof. Gérard Rasquin (Luxembourg), President; Mr. Reiner Klimke (Germany); Mr. Hans-Ulrich Sutter (Switzerland)

Horse doping (clenbuterol)

Legal presumption

Necessity for the person responsible to produce concrete evidence

- 1. The fact for a person responsible for a horse to allege his good faith and his absence of any interest in administering a prohibited substance to the horse is not sufficient to establish that there is not a deliberate attempt to affect the performance of the horse.**
- 2. Such arguments cannot be considered as relevant from the point of view of the applicable texts. Purely and simply to admit such unproven allegations would result in making any fight against doping futile.**

W. took part with the horse J. in a CSI event on 11th July 1992. After the competition, the horse J. was selected for a medications control.

The urine analysis, which was performed by the Horseracing Forensic Laboratory Ltd (HFL) in Newmarket/GB, revealed that the urine contained clenbuterol. Clenbuterol is a substance which acts on the respiratory system.

It is not contested that W. is the person responsible for the horse J., in the sense of article 145 General Regulations (hereafter GR) of the FEI.

Initially, on 19th August 1992, the rider asked that a counter-analysis be performed, subsequently withdrawing this request on 25th August 1992.

Noting that the facts were no longer contested, the FEI Judicial Committee decided on 19th October 1992 to disqualify W. and the horse J. from the competition. It further imposed on him a three-month suspension, together with a CHF 1,000.– fine and payment of CHF 1,000.– towards the costs of the procedure.

The rider appealed within the stipulated time limit against the decision of the FEI Judicial Committee.

In a declaration addressed to the Court of Arbitration for Sport on 7th January 1993, the rider stated that he could not explain how clenbuterol could have been found in the urine, given that neither he, nor the owners, nor the veterinary, nor the grooms had ever given such a substance to the horse, nor given any instruction in this regard. He offered as the sole explanation – admitting that he was not in a position to prove this – that only a third party could have given this substance to the horse.

At the same time, W. explained that the owners had looked after horses as a hobby for more than eight years, and no prohibited substance had ever been detected in the – frequent – tests performed on their animals.

For its part, the FEI formally contested the relevance of these assertions.

LAW

1. The appeal was lodged and registered within the time period and in conformity with the provisions of the regulations (articles 173 and 174 of the FEI GR), so that it is admissible with regard to the form.
2. The competence of the CAS is provided for by the provisions of the regulations of the FEI (articles 051.6.2 and 053.1), of which article 173 GR provides, inter alia, that *“an Appeal may be lodged by any person or body which has been subject to a penalty or decision made by any person or body authorized under the Statutes, Regulations or Rules, provided it is admissible...”* this being (1.2) *“with the CAS ... against decisions of ... the Judicial Committee”*.
3. According to article 002.4 of the FEI Statutes, Persons Responsible and Competitors agree to comply with and be bound by the Statutes, Regulations and any decision by an authorized body of the FEI. In this case, the parties chose to apply the Statutes and Regulations of the FEI which are in conformity with Swiss law.
4. Under the terms of article 187 of the Swiss Federal Code on Private International Law (LDIP), the Court of Arbitration shall give judgement in accordance with the rules of law chosen by the parties which, in this particular case, chose to apply the federative law of the FEI which, in its turn, applies Swiss law (article 051 of the Statutes). The application of Swiss law follows, moreover, from articles 23 of the CAS Statute (in its amended version of 20th September 1990) and 29 of the CAS Regulations (in their amended version, again of 20th September 1990).
5. With the aim of bringing the regulations of the FEI into line with the doctrine of sports law upheld by the International Olympic Committee, at its meetings of 26th and 27th March 1992, the General Assembly of the FEI ratified the amendment of certain articles of the FEI GR. Articles 177.5.2 and 177.5.3 were thus modified as follows:

“Article 177.5.2: The finding on analysis of a Prohibited Substance as defined in Art. 149, paragraph 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 be also imposed”.

“Article 177.5.3: If the Person Responsible can prove that it was not a deliberate attempt to affect the performance of the horse or that the findings are the results of legitimate treatment of the horse or of one or more parts of his body, the sanction may entail a fine up to CHF 15,000.–, but a suspension from 1 to 3 months may also be imposed”.

6. Such modification therefore clearly states the fact that the finding on analysis of a prohibited substance presumes a deliberate attempt by the person responsible to affect the performance of the horse.

In other words, the strict liability of the person responsible being established in the case of prohibited substances being discovered, the burden of proof is reversed. It consequently rests with the person responsible to prove either that there was not a deliberate attempt to affect the performances of the horse, or that the horse has undergone legitimate treatment.

7. Articles 177.5.2 and 177.5.3 in their new form were published in FEI Bulletin No. 4 in April 1992; they came into force on 1st May 1992, so that these provisions are applicable to this particular case, since the competition took place on 11th July 1992.
8. The substance clenbuterol discovered in the urine of the horse J. acts on the respiratory passages so that it constitutes a prohibited substance pursuant to Annex IV. of the FEI VR.
9. At the CAS hearing on 19th April 1993, the appellant advanced the following arguments:
 - The rider waived the counter-analysis on the grounds that he had no reason to question the result of the HFL analysis.
 - The rider and the persons working with him at no time gave any prohibited substance to the horse. This was the subject of various items of written evidence.
 - W. had no financial reason for wanting to alter the performance of the horse, being only an employee receiving a monthly salary.
 - The owners of the horse would have taken all the necessary precautions to avoid the administration of prohibited substances, but is unfortunately not possible to watch horses day and night at international competitions.
 - The owners would have had no reason to administer clenbuterol to J. which is an average horse in jumping competitions. If they had wanted to improve performances, they would have chosen the horses A. or B. whose chances were greater.
 - Every weekend, the owners of the horse, who have been involved in equestrianism for over eight years, take part with 12-15 horses in national and international competitions without ever having been penalized for administering prohibited substances.

10. After hearing the parties and examining all the documents produced, the CAS noted first that the facts are not contested by the rider, so that the examination of this case should be limited to establishing whether the person responsible is able to provide proof that he did not make a deliberate attempt to affect the performance of the horse or that the discovery of prohibited substances resulted from legitimate treatment administered to the horse.

It is recalled that, in application of article 177.5.2 GR, a deliberate attempt to affect the performance is presumed.

11. In this case, the CAS was obliged to note that, apart from the various allegations summarized above, the appellant was not able to offer even the slightest evidence that there was not a deliberate attempt to affect the performance of the horse. Nor did he seek to direct the hearing towards the question of possible legitimate treatment which might have been administered to the horse.
12. Indeed, the appellant was content to allege that he was in good faith and that neither he nor the owners of the horse would have had any interest in administering a prohibited substance to the horse.

The CAS finds that, with questions of doping, such arguments are often advanced by the persons concerned, but that, in this case, they cannot be considered as relevant from the point of view of the uncontested facts and the applicable texts. Purely and simply to admit such (moreover unproven) allegations would amount to emptying articles 177.5.2 and 177.5.3 of their substance, which would result in making any fight against doping futile.

13. Taking note of this situation, the CAS cannot but confirm the decision of the FEI Judicial Committee and hence the application of article 177.5.2 of the FEI GR.

The Court of Arbitration for Sport:

1. For the form, receives the appeal lodged on 13th November 1992 by W. against the decision of the FEI Judicial Committee of 19th October 1992.
2. For the merits, confirms this decision on all points, including the costs of the first instance.
3. (...)