



Arbitration CAS 2012/A/2807 & 2808 Khaled Abdullaziz Al Eid & Abdullah Waleed Sharbatly v. Fédération Equestre Internationale (FEI), award of 17 July 2012 (operative part of 11 June 2012)

Panel: Mr Graeme Mew (Canada), Sole Arbitrator

Equestrian (jumping)

Disciplinary sanctions for the presence of controlled medication substances (phenylbutazone; oxyphenbutazone)

CAS' power of review and deference to the first-instance tribunal

No significant fault or negligence in the WADC Code and the ECM Rules

Exercise of sanctioning power by the CAS panel

1. While specialist tribunals of sport federations are entitled to considerable deference and, in particular, that the measure of the sanction imposed by a disciplinary body in the exercise of discretion given to it by the relevant rules should only be reviewed when the sanction is “*evidently and grossly disproportionate to the offence*”, such principles do not limit a CAS panel from correcting what it believes to have been an erroneous application of the rules or the imposition of a sanction which is unreasonable in all of the circumstances. Where the rules confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where a tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS panel, nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision.
2. Article 10.4 of the Equine Controlled Medication (ECM) Rules provides for the elimination or reduction of a period of ineligibility based on exceptional circumstances. The language of the Rule tracks, in large measure, the corresponding rule in Article 10.5 of the World Anti-Doping Code (WADC). A key difference is that Article 10.4.2 ECM Rules (No Significant Fault or Negligence) does not limit the reduction of the otherwise applicable sanction to 50% of that sanction (a requirement of Article 10.5.2 WADC). A key similarity, however, is that in order to engage the application of Article 10.4 ECM Rules, the Person Responsible must be able to establish how the controlled medication substance entered the horse's system in order to have the period of ineligibility and other sanctions eliminated or reduced.
3. Any exercise of sanctioning power is an interference with the rights of athletes. It is therefore necessary to weigh the objectives of the federation's rules against the consequences of infringement, including the impact on the offender. The correct approach is to start low and only move up the scale if it is necessary to do so to meet the overriding objectives of the federation's rules. “Fault” is not a specified yardstick to

be employed in undertaking this assessment (again, a distinguishing feature between Article 10.2 ECM Rules and Article 10.5 WADC).

1. INTRODUCTION

- 1.1 The two cases which form the subject of this appeal award engage consideration of the *Equine Controlled Medication Rules* (“ECM Rules”) of the Fédération Equestre Internationale (“FEI”).
- 1.2 At the outset is important to record that neither case involves anti-doping rule violations. The *ECM Rules* exist ‘to ensure horse welfare and the highest levels of professionalism’, by ensuring that medications (“Controlled Medication Substances”) and methods (“Controlled Medication Methods”) that are commonly (and appropriately) used to treat horses when they are not competing, are not used inappropriately in relation to horses that are in competition.
- 1.3 While doping and inappropriate use of medication are certainly related, and in some respects the way they are regulated is similar, the nature, scope and purposes of the *ECM Rules* are very different from the nature, scope and purposes of the anti-doping rules.
- 1.4 The Appellants are equestrian athletes. They were not accused of doping but, instead, were charged because of the presence of the medications, Phenylbutazone and Oxyphenbutazone (commonly known collectively, as “Bute”), in their competition horses’ systems without the required pre-authorisation.
- 1.5 Phenylbutazone is a non-steroidal anti-inflammatory and pain-relieving drug that is primarily used for musculoskeletal conditions; Oxyphenbutazone (a metabolite of Phenylbutazone) is also a non-steroidal anti-inflammatory and pain-relieving drug. Both substances are classified as *Controlled Medication Substances* in the *Equine Prohibited Substances List*.
- 1.6 To put things in context, in the course of submissions, counsel for the Appellants described Bute as “*ibuprofen for horses*”.
- 1.7 In many cases involving adverse analytical findings for controlled medication substances, such as Bute, a “Person Responsible” (which would include an Athlete who rides a Horse during an Event – see Appendix 1 – Definitions of the ECM Rules) can elect to have his or her case processed under the “Administrative Procedure” set out in Article 8.3 of the ECM Rules. Where this procedure applies, the following sanctions would apply:
 - a. *Disqualification of the Person Responsible and/ or member of the Support Personnel (where applicable) and the Horse from the whole Event and forfeiture of all prizes and prize money won at the Event;*
 - b. *A Fine of CHF 1,500; and*

c. Costs of CHF 1,000. However, if a B Sample analysis is requested and the administrative Sanction accepted after the B Sample Analysis, the costs shall be increased to CHF 2,000.

- 1.8 The Appellants were, for reasons explained more fully below, unable to elect to have the Administrative Procedure applied to their cases. Instead, the charges against the Appellants were heard by the FEI Tribunal (oral hearing on 18 and 19 April 2012; decision dated 23 May 2012).
- 1.9 The tribunal imposed a sanction of Ineligibility of eight months on each of the Appellants.
- 1.10 Due to the impending 2012 Olympic Games in which, but for the sanction imposed by the FEI Tribunal, both of the Appellants had hoped to participate as representatives of the Kingdom of Saudi Arabia, the parties agreed to an expedited appeal from the decisions of the FEI Tribunal.
- 1.11 This Panel's decision was announced on 11 June 2012 with reasons to follow.
- 1.12 For the reasons set out below, this CAS Panel concludes that the FEI Tribunal conflated the sanctioning principles set out in the *Equine Anti-Doping Rules* with those applicable under the *ECM Rules*, with the result that an excessive sanction was applied having regard to all of the circumstances of each case.
- 1.13 The sanction of 8 months Ineligibility imposed on each of the Appellants by the FEI Tribunal should therefore be set aside and replaced with a sanction of 2 months Ineligibility for each of the Appellants.

2. THE PARTIES

- 2.1 The Appellant Khaled Abdulaziz Al Eid ("Al Eid") is a competitor in the equestrian sport of jumping. He is a member of the Saudi Equestrian Team. He won a bronze medal at the 2000 Olympic Games in Sydney, an individual gold medal in the 2006 Asian Games in Doha and an individual bronze medal in the 2010 Asian Games in Guangzhou.
- 2.2 The Appellant Abdullah Waleed Sharbatly ("Sharbatly") is also a competitor in the equestrian sport of jumping. He is a member of the Saudi Equestrian Team. Sharbatly won an individual silver medal at the 2010 World Equestrian Games in Kentucky.
- 2.3 The FEI is the international governing body for equestrian sport. Its responsibilities include making and enforcing regulations that protect the integrity of the sport.
- 2.4 Al Eid and Sharbatly are each subject to the disciplinary jurisdiction of the FEI.

3. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

- 3.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

Al-Eid v. FEI

- 3.2 Al Eid rode VANHOEVE in the CSI 3* Event in Riyadh, Saudi Arabia between 30 November 2011 and 3 December 2012 (the 'Riyadh Event'). The horses competing in the Riyadh Event, including VANHOEVE, were stabled at the International Riding School, which was located next door to the showground for the Riyadh Event. Al Eid was placed in two competitions on VANHOEVE at the Riyadh Event on 3 December 2011.
- 3.3 At 5:00 p.m. on 3 December 2011, a blood Sample was taken from VANHOEVE for testing under the *FEI Equine Anti-Doping and Controlled Medication Regulations* ("EADCMR") and Veterinary Regulations. The EADCMR contains both the *Equine Anti-Doping Rules* and the *ECM Rules*. The Sample was divided into an A Sample and a B Sample in accordance with the EADCMR, and sent to the FEI approved Hong Kong Jockey Club Racing Laboratory (the "Hong Kong Laboratory") for analysis.
- 3.4 The Hong Kong Laboratory analyzed the A Sample of VANHOEVE's blood and found Phenylbutazone and Oxyphenbutazone to be present.
- 3.5 Both Phenylbutazone and Oxyphenbutazone are classified Controlled Medication Substances under the *Equine Prohibited Substances List*.
- 3.6 By a letter dated 2 February 2012, the FEI charged Al Eid with a violation of Article 2.1 of the *ECM Rules*, pursuant to which "[t]he presence of a Controlled Medication Substance or its Metabolites or Markers in a Horse's sample" constitutes an ECM Rule violation. Article 2.1.1. of the *ECM Rules* states that "[i]t is each Person Responsible's personal duty to ensure that no Controlled Medication Substance is present in the Horse's body. Persons Responsible are responsible for any Controlled Medication Substance found to be present in their Horse's Samples ...".
- 3.7 No request had been made for the use of Phenylbutazone and Oxyphenbutazone on the Horse, and no Equine Therapeutic Use Exemption ("ETUE") or medication form had been presented for the substances at the Riyadh Event.
- 3.8 On 22 February 2012, the B Sample was analysed at the FEI-approved HFL Sport Science Laboratory in England. The HFL Laboratory confirmed the analytical findings made by the Hong Kong Laboratory with respect to the A Sample.

- 3.9 By letter of 24 February 2012, Al Eid accepted a period of voluntary Provisional Suspension, effective as of 24 February 2012.
- 3.10 Al Eid does not challenge the results of the analysis of the Sample and accepts that the substances are Controlled Medication Substances for the purposes of the *ECM Rules*.
- 3.11 Before the FEI Tribunal and this Panel, however, Al Eid contended that Bute was found in VANHOEVE'S Sample as a result of "*inadvertent ingestion of powdered bute that was present at the [International Riding School] stables, and most probably in VANHOEVE's stable, because the stable and wall-mounted feed bucket had not been cleared prior to VANHOEVE's arrival and nor had the stable yard as a whole*".
- 3.12 Al Eid denies any deliberately knowing administration of Bute to VANHOEVE. VANHOEVE's medical records, corroborated by Dr. Philippe Benoit, the Saudi Equestrian team veterinarian, confirm that VANHOEVE was not prescribed with Bute (or any medication containing Bute) in the run up to the Riyadh Event.
- 3.13 The evidence of Al Eid and other individuals charged with the care of VANHOEVE and his preparation for the Riyadh Event, is that care was taken to prevent VANHOEVE from inadvertently coming into contact with prohibited substances prior to the Riyadh Event.
- 3.14 Al Eid expressed the belief that VANHOEVE must have come into contact with Bute while stabled at the International Riding School for the following reasons:
- (a) *Due to exceptional weather conditions including unprecedented rainfall and flooding, Al Eid found that the stables at the International Riding School had not been cleaned out before the horses competing at the Riyadh Event, including VANHOEVE, had to be put into them. It was not possible to properly clean VANHOEVE's stable until after the vet check had taken place;*
- (b) *When VANHOEVE was put into his stable, he nosed around in the old bedding and in the dirty wall-mounted feed bucket before the groom was able to clean the stable;*
- (c) *Dr. Mabrous Abdelkarim, one of the vets who treated the horses at the International Riding School, confirmed that Bute, in its powdered form, is regularly used by him and the other vets at the International Riding School, to treat the horses. They use Bute because it is cheap, reliable, and easy to administer in powder form into the food of the horses;*
- (d) *Dr. Mark Dunnett, an expert witness retained by Al Eid, confirmed in his report that contamination of the stable environment in which VANHOEVE was kept at the International Riding School would be a plausible explanation for the levels of P and O detected in the blood sample taken at the Riyadh Event.*
- 3.15 Under the *ECM Rules*, in the cases of Controlled Medication Substances, Al Eid would have been able to elect Administrative Procedure (also referred to as "Fast Track"), provided that the pre-requisites of Article 8.3.1 of the *ECM Rules* had been fulfilled. Al Eid would qualify for the Administrative Procedure if there had been no Controlled Medication violation by him in the previous eight years. However, Al Eid committed a first Controlled Medication rule

violation in January 2005, and could therefore not be considered a first time offender within the meaning of Article 8.3.1 (b) of the *ECM Rules*. Notwithstanding that, the current violation is only considered a first violation for sanctioning purposes under the *ECM Rules*, because to be considered a multiple violation, triggering increased sanctions, the previous violation would have to have occurred within four years of the current violation.

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- 3.16 Sharbatly rode LOBSTER in the CSI 3* Event held in Al Ain, UAE, from 9 – 11 February 2012 (the “Al Ain Event”). As a result of his and LOBSTER’S performance in the Grand Prix Qualifier Competition on 10 February 2012 at the Al Ain Event, they won that Competition.
- 3.17 Sharbatly further competed with LOBSTER on 9 February 2012 in the Two Phases Competition, and on 11 February 2012 in the Al Ain Grand Prix.
- 3.18 At 10:05 p.m. on 10 February 2012, a blood Sample was taken from LOBSTER for testing under the EADCMR and *FEI Veterinary Regulations*. The Sample was divided into an A Sample and a B Sample in accordance with the EADCMR, and sent to the HFL Laboratory for analysis.
- 3.19 The HFL Laboratory analysed the A Sample of LOBSTER’S blood and found Phenylbutazone and Oxyphenbutazone to be present.
- 3.20 By letter dated 24 February 2012, the FEI charged Sharbatly with a violation of Article 2.1 of the *ECM Rules* (see paragraph 3.6 above for the pertinent provisions of that rule).
- 3.21 No request had been made for the use of Phenylbutazone and/or Oxyphenbutazone on the Horse, and no ETUE or medication form had been presented for the substances at the Al Ain Event.
- 3.22 By letter dated 28 February 2012, Sharbatly accepted a period of voluntary Provisional Suspension, effective as of that date.
- 3.23 On 6 March 2012, the B Sample was analysed at the HFL Laboratory and was attended by Neville Dunnett on Sharbatly’s behalf. The HFL Laboratory confirmed the analytical findings that had been made by it with respect to the A Sample.
- 3.24 At the time of the hearing before this CAS Panel, Sharbatly had not competed since the Al Ain Event.
- 3.25 Sharbatly does not challenge the results of the analysis of the Sample and accepts that the substances are Controlled Medication Substances for the purposes of the *ECM Rules*. Accordingly, Sharbatly accepts the Adverse Analytical Findings of the HFL Laboratory, namely that Phenylbutazone and Oxyphenbutazone were present in the blood Sample collected from LOBSTER at the Al Ain Event on 10 February 2012.

- 3.26 Sharbatly further accepts that, for the purposes of Article 10.4.1 of the ECM Rules, he cannot establish how the substances entered into LOBSTER'S system.
- 3.27 Sharbatly nevertheless asserts that the substances were not, to his knowledge, administered to LOBSTER in the lead up to the Al Ain Event. Following extensive inquiries, the only possible explanation Sharbatly is able to offer for the presence of the substances are contamination or sabotage (although he acknowledges that sabotage is unlikely) and that both he and the Saudi Equestrian team exercised utmost caution in relation to compliance with the EADCMR and ensuring that LOBSTER did not come into contact with any Prohibited Substances. This evidence was corroborated by witness statements from other personnel affiliated with the Saudi Equestrian team including Dr. Philippe Benoit the team veterinarian. Dr. Benoit asserted that the only possible explanation for the presence of the substances was contamination.
- 3.28 An expert report from Dr. Mark Dunnett concluded, on the basis of the evidence presented to him, that *"[c]ontamination of the stable environment with residues of Phenylbutazone from the legitimate treatment of other horses prior to the event is a plausible explanation for the presence of the levels of Phenylbutazone and Oxyphenbutazone in the sample from Lobster"*.
- 3.29 Dr. Dunnett noted that the estimated level of Phenylbutazone in the A Sample from LOBSTER was only 12ng/ml (or 12%) above the FEI Reporting Level of 100ng/ml. Dr. Dunnett added that *"Given that the value reported is only an estimate which will have an inherent uncertainty it is conceivable that the true value may be below the reporting level"*. In any event, according to Dr. Dunnett, the estimated concentrations of Phenylbutazone and Oxyphenbutazone in the A Sample was very low in comparison with the levels more commonly encountered in positive post-competition and post-race drug surveillance samples.
- 3.30 Other than the expert report of Dr. Dunnett, there was no evidence demonstrating that the environment at the Al Ain Equestrian Club was contaminated.
- 3.31 Under the ECM Rules, in the case of Controlled Medication Substances, Sharbatly would have been able to elect Administrative Procedure (also referred to as "Fast Track"), provided that the pre-requisites of Article 8.3.1 of the *ECM Rules* had been fulfilled. Sharbatly would have qualified for the Administrative Procedure if this had been his first Controlled Medication Violation in eight years. However, Sharbatly committed a first Controlled Medication Rule Violation in January 2006, and therefore could not be considered a first time offender within the meaning of Article 8.3.1(b) of the ECM Rules. Notwithstanding that, the current violation is only considered a first violation for sanctioning purposes under the ECM Rules, because to be considered a multiple violation, triggering increased sanctions, the second violation would have to have occurred within four years of a first violation.

Sanctions Under the *ECM Rules*

3.32 The applicable sanctioning regime is set out in Article 10 of the *ECM Rules*.

3.33 Article 10.2 provides, in relevant part, as follows:

... the period of Ineligibility imposed for a violation of Article 2.1 (presence of a Controlled Medication Substance or its Metabolites or Markers) ... shall be:

First violation: Up to two (2) years of Ineligibility.

A Fine of up to CHF 15,000 and appropriate legal costs shall also be imposed for any Controlled Medication violation.

However, the Person Responsible ... shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating, reducing, or increasing, this Sanction as provided in Article 10.4.

3.34 Article 10.4, relied upon by El Aid, provides for the elimination or reduction of a period of Ineligibility based on “Exceptional Circumstances”:

10.4.1 No Fault or Negligence

If the Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Fault or Negligence for the ECM Rule violation, the otherwise applicable period of Ineligibility and other Sanctions may be eliminated in regard to such Person. When a Controlled Medication Substance or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 (presence of a Controlled Medication Substance), the Person Responsible and/or member of the Support Personnel (where applicable) must also establish how the Controlled Medication Substance entered the Horse's system in order to have the period of Ineligibility and other Sanctions eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable and other Sanctions are eliminated, the ECM Rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for Multiple Violations under Article 10.6 below.

10.4.2 No Significant Fault or Negligence

If a Person Responsible and/or member of the Support Personnel (where applicable) 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. When a Controlled Medication Substance or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 (presence of a Controlled Medication Substance or its Metabolites or Markers), the Person alleged to have committed the ECM Rule violation must also establish how the Controlled Medication Substance or its Metabolites or Markers entered the Horse's system in order to have the period of Ineligibility and other Sanctions reduced.

FEI Tribunal Decisions

- 3.35 Oral hearings concerning the infringements alleged by the FEI to have been committed by the Appellants took place before the FEI Tribunal in Lausanne on 18 and 19 April 2012.
- 3.36 In separate decisions each released on 23 May 2012, the FEI Tribunal ruled, in respect of each of the Appellants, that:
- (a) The FEI had established an Adverse Analytical Finding for the presence of Phenylbutazone and Oxyphenbutazone in the Samples taken from their respective Horses during in-competition testing;*
 - (b) Accordingly, an ECM Rule violation had been established;*
 - (c) While it was accepted that there had been no deliberate administration to the Horses concerned of Phenylbutazone and/or Oxyphenbutazone, the Appellants had not established on a balance of probabilities the source of the Phenylbutazone and Oxyphenbutazone found in the Samples taken from the Horses;*
 - (d) The Appellants and the Horses were disqualified from the Riyadh and Al Ain Events respectively, with all medals, points and prize money to be forfeited in accordance with Article 9 of the ECM Rules and that all other results obtained by the Appellants with the Horses at the Events would also be disqualified;*
 - (e) A period of suspension of eight months would be applied;*
 - (f) A fine of CHF 1,000 would be paid;*
 - (g) A contribution of CHF 3,000 towards the legal costs of the judicial procedure and the cost of the B-sample analysis would be made.*
- 3.37 In the case of Al Eid, the Athlete had taken the position that any otherwise applicable sanction should be reduced or eliminated in accordance with Articles 10.4.1 or 10.4.2 of the *ECM Rules* on the basis that there was “No Fault or Negligence” or “No Significant Fault or Negligence” on his part for the positive findings.
- 3.38 The FEI Tribunal rejected this position. Noting that in order to benefit from any elimination or reduction of the applicable sanction under Article 10.4 of the *ECM Rules*, an Athlete must first establish, on a balance of probabilities, how the Prohibited Substance entered the Horse’s system, the FEI Tribunal concluded that El Aid had failed to do so.
- 3.39 Each of the Athletes was given the full benefit of the voluntary Provisional Suspensions which they had taken, with the result that Al Eid’s period of Ineligibility was ordered to have commenced on 24 February 2012 (the date that he elected a period of Voluntary Provisional Suspension) and to expire on 23 October 2012 at midnight and that Sharbatly’s period of Ineligibility was ordered to have commenced on 10 February 2012 (the date of Sample collection) and to expire on 9 October 2012 at midnight.
- 3.40 No issue is taken on appeal with the commencement dates selected by the FEI Tribunal.

3.41 In determining the applicable sanctions, the FEI Tribunal took into consideration as mitigating factors:

(a) the fact that a professional team structure was in place with procedures for avoiding “anti-doing rule violations” [sic];

(b) that the Appellants’ team employed a professional veterinary team which the Athletes had access to both during and outside business hours;

(c) the prompt admission of the ECM Rule violation and the taking of Voluntary Provisional Suspensions.

3.42 The FEI Tribunal stated that it had taken into account that Al Eid’s 2005 ECM Rule violation had also involved a Controlled Medication and that Sharbatly’s 2006 violation had been a Doping offence.

3.43 The FEI Tribunal declined to take into account (for the purpose of sanctioning):

(a) The low levels of Phenylbutazone and Oxypphenbutazone detected on the basis that neither is a “Threshold Substance” as a result of which any quantity of those substances is considered a positive and that in any event, the screening levels of the substances had been exceeded;

(b) The upcoming London Olympic Games in which each of the Appellants hoped to compete and the alleged effect of the Appellants’ suspensions on the Saudi Arabian team.

4. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

4.1 On 24 May 2012, in accordance with Article 12 of the *ECM Rules* and Articles R47 and R48 of the *Code of Sports-related Arbitration* (the “Code”) 2010 edition, the Appellants each filed appeals from the decisions of the FEI Tribunal.

4.2 Pursuant to Article R52 of the Code, the CAS, with the agreement of the parties, proceeded in an expedited manner.

4.3 On 29 May 2012, in accordance with Article R51 of the Code and the procedural timetable agreed by the parties, the Appellants filed their appeal briefs.

4.4 On 4 June 2012, in accordance with Article R55 of the Code and the procedural timetable agreed by the parties, the Respondent filed its answers.

5. THE CONSTITUTION OF THE PANEL AND THE HEARING

- 5.1 By letter dated 30 May 2012, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: Mr Graeme Mew (Sole Arbitrator). The parties did not raise any objection as to the constitution and composition of the Panel then or at the hearing.
- 5.2 On 5 June 2012, Orders of Procedure were made in respect of each of the appeals.
- 5.3 The Orders of Procedure scheduled a hearing on 7 June 2012 in London, United Kingdom.
- 5.4 On 7 June 2012, a hearing was duly heard at the offices of Bird & Bird LLP in London.
- 5.5 The following persons attended the hearing:

For the Appellants:

Mr Jeremy Dickerson, Mr James Pheasant and Miss Georgina Shaw, counsel for the Appellants

Mr Khaled Abdulaziz Al Eid and Mr Abdullah Waleed Sharbatly, the Appellants

For the Respondent:

Mr Jonathan Taylor, Ms Anna-Marie Blakeley and Ms Lisa Lazarus, counsel for the Respondent

- 5.6 The Panel was assisted at the hearing by Ms. Louise Reilly, Counsel to the CAS.
- 5.7 At the hearing, the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

Sami Al Duhami, Team Director, Saudi Equestrian Team, who lives in Riyadh, described the unusually adverse weather conditions which prevailed immediately prior to the Riyadh Event. There was very heavy rain causing schools to shut down for two days because of flooding. He verified photographs taken by his secretary which purportedly showed conditions in the stall used by VANHOEVE. He noted that the International Riding School was one of the older riding schools. Its standards of upkeep are not as high as one would find in Europe. 15 shows each year take place at the riding school, however only one of them is an "International" show.

Rogier Van Iersel, Team Manager, Saudi Equestrian Team, who also described the weather in Riyadh at the time of the Riyadh Event. A combination of heavy rain and poor drainage led to flooding. The Riyadh event itself had to be delayed, initially for one, and then two days. The horses were put in the stables at the riding school. Dr Van Iersel also expressed the view that facilities at the International Riding School in Riyadh were not as good as those that would be found in Europe or the United States.

Mahros Abdelkarim, treating veterinarian at the Riyadh International Riding School, who was present at the Riyadh Event. At the time of the Riyadh Event, Dr Abdelkarim went to the riding school to treat some horses under his care. Because of the heavy rain there was a lot of mess. There was also a lot of movement between stables. Dr Abdelkarim said that Bute is used a lot in Saudi Arabia. It is available over the counter. It is a common, inexpensive treatment. Dr Abdelkarim estimates that 70% to 80% of the horses stabled at the International Riding School would use Bute. It can be administered by either veterinarians or by grooms. It can either be injected or be administered in powder form. At the International Riding School, the predominant application is by using powder. There are approximately 170 boxes at the International Riding School, approximately 140 of which are used by school horses and the other 30 or so by horses which are boarded at the school. 60 to 70 of the horses at the school are under the regular care of Dr Abdelkarim. He would also see some of the other horses from time to time. Although Dr Abdelkarim does not know which stall VANHOEVE was in, he does know the area. He could not say which horses had been in the stall before VANHOEVE and, specifically whether they were given Bute or not. He can say that there were horses in the area who were receiving Bute.

Khaled Abdullaziz Al Eid, one of the Appellants, who, in addition to confirming his witness statement, described the conditions at the International Riding School when his horse arrived. The stable was not clean. Feed, buckets and hay were all present in the stall. The shavings on the stall of the floor were dirty. However, because fresh shavings could not be provided until the next day, not all of the shavings were removed as it would have been inappropriate to put the horse on bare concrete. Ordinarily Al Eid would have withdrawn from competition under such circumstances. However, he felt it important that he continue because it was an international show taking place in his country and having regard to the interest and support of sponsors and the King. Al Eid also spoke to his Olympic ambitions and the number of events that he had missed as a result of accepting a voluntary temporary suspension.

Abdullah Waleed Sharbatly, one Appellant, described how before the Al Ain event, his horse, Lobster was coughing. Sharbatly had the horse checked by the event veterinarian. The reports he received referred to the medications used by the horse. Sharbatly said that if Bute had been given to the horse, then it would have been listed and an ETUE would have been requested. Ultimately, Sharbatly had no concerns about whether the horse should compete. Sharbatly said that he had been told at the time that he had Lobster checked by the event veterinarian, that Lobster would be tested. Accordingly, if Sharbatly had had any reason to believe that Lobster had Bute on board, he would not have entered him.

6. THE PARTIES' SUBMISSIONS

A. Appellant's Submissions and Requests for Relief

6.1 In summary, the Appellants submit the following in support of their appeals:

1. *Al Eid*

6.2 Al Eid argues that he has established, on the requisite balance of probabilities, that the explanation for the presences of the Controlled Medications in the Sample of VANHOEVE

is the ingestion of residual traces of the Controlled Medications through exposure to a contaminated stable environment at the Riyadh Event.

6.3 Having established the route of ingestion of the Bute found in VANHOEVE's sample, Al Eid bears No Fault or Negligence or, in the alternative, No Significant Fault or Negligence for the Presence of Controlled Medications in VANHOEVE's Sample.

6.4 The FEI Tribunal erred in finding that Al Eid had failed to establish, on a balance of probabilities, how the Controlled Medications entered VANHOEVE's system. Al Eid highlighted the following evidentiary points in support of this submission:

(a) Bute was regularly used at the stables where the Riyadh Event took place.

(b) Photographs of the stables at the time of the Riyadh Event reflect the poor state of cleanliness. The evidence of the witnesses was to similar effect.

(c) The weather conditions which prevailed at the Riyadh Event were exceptionally bad. This contributed to the lack of cleanliness and controls in place to prevent the risk of contamination.

(d) The movements of the horse explain how it came into contact with contaminated foraging and bedding.

(e) The risk of contamination in the stable environment posed by the use of Bute and the plausibility of the explanation put forward by Al Eid.

6.5 Al Eid notes that in the FEI tribunal in the case of *Tackera* (24 September 2009), the Athlete's groom provided a statement that she had either failed to wash the feed buckets properly or gave the wrong feed to the wrong horse, but she could not be absolutely certain. The Tribunal found that the evidence was sufficient to discharge the standard of proof by reference to its cumulative effect:

"The Tribunal finds that the cumulative effect of all evidence in this case is sufficient for the PR to establish under the balance of probability that the first prerequisite of EADMCR Article 10.5.2 was met. The PR's groom testified that it is more likely than not that the feed buckets had been mixed".

The FEI Tribunal continued:

"There was sufficient evidence regarding the special circumstances that caused the PR's groom to feed the Horse and the mare after a hectic journey and in a state of fatigue [the experts] all testified that it was scientifically plausible ... and an intentional application of the Prohibited Substance would not have served any purpose ...".

6.6 Al Eid points to the expert evidence of Dr Dunnett, who concluded that it was scientifically plausible that residual contamination at the stables at the Riyadh event led to the levels of the Controlled Medications that were detected in the Sample and, also, to the evidence from the Team Veterinarian, Dr. Philippe Benoit. Al Eid notes that Dr. Dunnett's evidence was not contested by any contrary views from another expert.

- 6.7 Al Eid argues that the cumulative effect of the evidence demonstrates, on a balance of probability, that the source of the positive finding was the contaminated environment at the Riding School where the Horse was stabled prior to and during the Riyadh Event.
- 6.8 When considering the totality of the circumstances of the case, Al Eid submits that the following factors are relevant to a determination of his Fault or Negligence (or lack thereof):
- (a) The truly exceptional circumstances which resulted in the contamination of the stables, including:*
 - (i) The unclean state of the stables at an FEI certified event; and*
 - (ii) The exceptional weather conditions at the Riyadh Event;*
 - (b) The extremely low levels of the Controlled Medications in the Sample and the fact that these could not have had any performance enhancing or therapeutic effect on the Horse at the time of the Riyadh event;*
 - (c) The inadvertent nature of the ingestion of the Controlled Medications;*
 - (d) The steps taken by Mr Al Eid to try and avoid the possibility of his horse ingesting any contaminated materials;*
 - (e) The importance of the Riyadh Event such that Mr Al Eid had to compete at it notwithstanding his concerns about the state of the facilities.*
- 6.9 The evaluation of No Fault or Negligence or No Significant Fault or Negligence should be guided by principles set out by the CAS in CAS 2005/A/830 and CAS 2006/A/1025, which require examination of all of the circumstances of the case, always having regard to the overarching doctrine of proportionality.
2. *Sharbatly*
- 6.10 Sharbatly carried out extensive investigations to try and identify the explanation for the presence of the Controlled Medications in the Sample. This included tests on the supplements given to the horse and investigations conducted alongside the FEI Integrity Unit into the use of Bute at the Al Ain Equestrian Club.
- 6.11 While these tests and investigations point strongly to the explanation being the ingestion of the Controlled Medications through traces of residual contamination at the Al Ain Event, Sharbatly accepts that in spite of his best efforts the evidence he has obtained in support of contamination being the explanation is not sufficient to demonstrate, on the balance of probabilities, that that explanation is the correct one.
- 6.12 Sharbatly submits that the Panel should take into account:
- (a) the steps taken by him to investigate the cause of the presence of the Controlled Medications in LOBSTER's Sample;*

(b) the evidence obtained by him as to possible explanations for the presence of the Controlled Medications in the Sample (in particular the expert evidence of Dr Dunnnett which that shows that the levels of the Controlled Medications in the Sample are consistent with contamination); and

(c) the evidence obtained by him which effectively rules out other possible explanations (including deliberate administration of the Controlled Medications)

6.13 Overall, Sharbatly contends that the circumstances of the case are such that it is wholly disproportionate and unjust to impose a penalty on him greater than two months. In addition to the matters referenced at above, these circumstances include:

(a) The nature of the substances in question being controlled medications rather than doping substances;

(b) The level of the Controlled Medications detected in the Sample being extremely low and incapable of having exerted any performance enhancing or therapeutic effect;

(c) The upcoming Olympic Games;

(d) The impact any greater period of suspension would have on the Saudi Equestrian Team;

(e) Sharbatly's professionalism and commitment to the ECM Rules and their objectives; and

(f) Sharbatly's apology.

3. Both Appellants

6.14 Sharbatly and Al Eid (further and in the alternative) submit that the sanctions imposed on them by the FEI tribunal were disproportionate, having regard to the particular circumstances of their respective cases.

6.15 Article 10.2 of the *ECM Rules* provides for a wide discretion in assessing the appropriate sanction as compared with the mandatory imposition of a two (2) year period of ineligibility under the FEI *Equine Anti-Doping Rules* (the "EAD Rules").

6.16 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).

6.17 The exercise of discretion as to the appropriate sanction is wide, but it must be exercised in accordance with the principle of proportionality. In this regard, the Appellants argue that the FEI Tribunal took an unduly restrictive approach to the exercise of discretion and by doing so failed to take into account a number of relevant considerations which would and should have yielded a different outcome.

B. Respondent's Submissions and Requests for Relief

- 6.18 In summary, Respondent submits the following in defence.
- 6.19 There is no material dispute about the basic facts. Rather, the parties disagree only about the findings that may properly be made based on those facts.
- 6.20 In El Aid's case, the parties disagree about whether facts establish that it is more likely than not that the Bute got into the VANHOEVE's system as a result of inadvertent contamination due to unclean conditions at the stables at Riyadh Event.
- 6.21 Otherwise, the only dispute is as to whether the FEI Tribunal was entitled, in the exercise of its sanctioning discretion under Article 10.2 of the ECM Rules, to impose a period of ineligibility on the Appellant of eight months.
- 6.22 The FEI Tribunal is a knowledgeable and experienced tribunal. The procedure it followed was full and fair, and it clearly made its decision carefully and in good faith. Therefore the CAS Sole Arbitrator should proceed on the basis that the decision is entitled to 'respect' and he should not 'easily tinker' with it (see CAS 2011/A/2518 at para 10.7).
- 6.23 According to the principles that govern the exercise of the Tribunal's sanctioning powers under Article 10.2, and taking into account all of the relevant facts and circumstances of this case, a four month sanction was warranted (the FEI made a similar submission to the FEI Tribunal). Counsel for the FEI noted that a four month sanction would be a "serious" sanction for a Bute violation.
- 6.24 A central and distinctive feature of equestrian sport is that it involves a partnership between two types of athlete, one human and one equine. One of those partners is unable to speak for itself, and therefore the FEI has assumed responsibility for speaking on its behalf, by taking every necessary step to ensure that, in every aspect of the sport, the welfare of the horse is paramount.
- 6.25 This responsibility is reflected in the ECM Rules, the purpose of which is not to preserve the integrity of the sport (which is the objective of anti-doping rules) but rather 'to ensure horse welfare and the highest levels of professionalism' [EADCMR, p.5], by ensuring that medications (Controlled Medication Substances) and methods (Controlled Medication Methods) that are commonly (and appropriately) used to treat horses when they are not competing, are not used inappropriately in relation to horses that are in competition.
- 6.26 According to the FEI Medication Code (EADMCR p.29):

All treatments must be given in the best health and welfare interests of the Horse. Therefore:

Every treatment must be fully justifiable by the medical condition of the Horse receiving the treatment.

Horses that cannot compete as a result of injury or disease must be given appropriate veterinary treatment. Persons Responsible and their Support Personnel must obtain advice from their treating Veterinarian or team Veterinarian prescribing a treatment and the necessary duration of treatment.

No Controlled Medication Substance shall be given to any Horse during or close to an event unless the appropriate FEI guidelines for medication authorization have been followed.

A complete and accurate record of all treatments during or close to an event should be maintained in the form of a Medication Logbook.

6.27 The distinction between anti-doping and Controlled Medication rules has important ramifications in the present cases, where the Appellants are not accused of doping but, instead, are being held to account for the presence of a medication, Bute, in their competition horses' systems without the required pre-authorisation. In particular:

(a) It means that when it comes to assessing (for the purposes of sanction) the fault of the Appellants and the harm that their actions have caused, the assessment is to be made not by reference to the anti-doping imperatives but rather by reference to the specific and distinct objectives of the ECM Rules and the particular mischief that they are aimed at avoiding.

(b) While the ECM Rules borrow some concepts from the World Anti-Doping Code ("WADC"), the primary imperative behind the WADC – the need to harmonise doping and sanctions for doping across all countries and sports – simply does not apply in the context of the ECM Rules. And that is reflected in the fact that the rigid system of sanctioning adopted in the WADC (fixed sanctions that cannot be departed from except in narrow circumstances where specific mitigating provisions are triggered) is not followed in the ECM Rules.

(c) For example, while the ECM Rules borrow the WADC concept of elimination of sanction in cases of 'No Fault or Negligence' and "No Significant Fault or Negligence", if such a plea is not available on the facts then (unlike the WADC) the ECM Rules do not mandate the application of a fixed sanction, but, instead, still confer a broad discretion on the FEI Tribunal to determine a sanction (including a ban in the range of 0-24 months) that is fair and proportionate in all the facts and circumstances of the case, measured against the underlying objectives of the ECM Rules, and the specific mischief it is designed to prevent.

6.28 With respect to Al Eid's defence of exceptional circumstances, pursuant to Article 10.4, the FEI Tribunal correctly rejected El Aid's plea.

6.29 El Aid has not satisfied the pre-condition to application of Article 10.4, i.e., he has not discharged his burden of proving, on the balance of probabilities, how the Bute got into VANHOEVE's system. In the regard:

(a) It is not enough merely to deny intentional administration and to assert that 'therefore' the explanation must be inadvertent ingestion. Nor is it enough to establish that inadvertent contamination is a possible explanation on the facts and the science. Instead, the Appellant has to establish by adducing specific, competent

and persuasive evidence that establishes the factual circumstances in which the Bute entered VANHOEVE's system, that inadvertent contamination is more likely than not to have occurred.

(b) El Aid's evidence shows (at most) that, as a general proposition, Bute was used therapeutically on horses stabled at the International Riding School where the Riyadh Event was held; and that some old bedding and old feed remnants were present in the stables when VANHOEVE arrived (although the Appellant got his groom to clean out VANHOEVE's stable and the feed bucket, and put fresh shavings on top of the dirty shavings shortly after arrival, i.e., four days before the sample was collected). There is no evidence that Bute was used in the particular stable housing VANHOEVE, or had been administered to any of the horses occupying that stable prior to VANHOEVE, or indeed generally that Bute was used at the International Riding School in a way that could have led to contamination of the feed or the bedding in that stable. There is no evidence of any such contamination before or after the Riyadh Event, and nor did either of the other horses tested at the Riyadh Event test positive for Bute.

(c) Dr. Dunnett opined that if some of the old shavings or old feed present in the stable when VANHOEVE arrived had been contaminated with Bute residue, and if VANHOEVE had ingested some of those shavings or old feed 'within a few hours of sampling', or if there had been 'sustained ingestion of phenylbutazone from the stall environment over the 3 to 4 day period immediately prior to the event', that could have caused the presence of Bute and its metabolite at the very low levels found in VANHOEVE's sample, making it 'a plausible explanation' for the laboratory's finding in this case. But that was speculation, not proof: 'proof that [it] is scientifically possible is not proof that it did actually occur.' (see Camiro, FEI Tribunal decision dated 22 December 2008 at para 72).

- 6.30 Even assuming that Al Eid had established it was more likely than not that the cause of the finding was inadvertent contamination in the stables at the Riyadh Event, to sustain his plea of No Fault or Negligence he would also have to show that he used 'utmost caution' to avoid such inadvertent contamination, he cannot do so, because there were a number of reasonable and practical steps that he could and should have taken to avoid inadvertent contamination, such as requesting a clean stable, or keeping VANHOEVE out of the stable until it had been thoroughly cleaned.
- 6.31 The starting point in the exercise of the Article 10.2 discretion is not a two year ban (as it would be under the *WADC*, with fault presumed and the Person Responsible having to justify any downward departure). Instead, under Article 10.2 of the *ECM Rules* there is no presumption of fault, so the starting-point is zero, and the tribunal has to decide to what extent (if at all) it should go up from there (to the maximum of 24 months) in all of the circumstances of the case.
- 6.32 The least serious sanction available should be considered first, and should only be rejected in favour of a more serious sanction if it is considered that the lesser sanction would be insufficient in the circumstances.
- 6.33 Furthermore, the discretion as to what length of ban (if any) to impose should be exercised 'in the round', i.e., in conjunction with any other discretion as to sanction conferred by the *ECM Rules*, 'so as to arrive at a result that meets the justice of the case overall'. Thus, the

tribunal also has discretion under Article 10.2 as to whether to impose a fine, and (if so) how much (up to CHF 15,000), whether to order the Appellant to contribute to the costs of the proceedings, and (if so) in what amount, and (under Article 10.1) whether to disqualify the other results obtained by the Appellant in the event in question. All of these factors must be considered, individually and collectively, in order to weigh up what is the least serious sanction necessary to vindicate the objectives underlying the *ECM Rules*, in all of the circumstances of the case at hand.

6.34 As a general principle the assessment of proportionality includes taking into account the impact of the proposed sanction on the athlete concerned, eg missing the Olympic Games. The commentary to the *WADC* (which specifically precludes consideration of what events will be missed in determining the proper sanction for a doping offence) does not apply directly in this case. Accordingly, if the conduct at issue was not so culpable, and the mischief caused was slight, that that would have to be weighed against the serious prejudice to the Appellants in missing the Olympic Games.

6.35 Any alleged prejudice to the Saudi Equestrian team would not be a relevant factor in the exercise of discretion under Article 10.2.

6.36 Other relevant considerations would include the FEI Tribunal's findings that:

(a) Neither the Appellants nor anyone else on their team had knowingly administered Bute to their respective Horses.

(b) A professional team structure was in place with clear procedures for avoiding anti-doping rule violations. The Saudi Team employed a professional veterinary staff whom the Athletes had access to both during and outside of business hours

(c) Because the Bute was not deliberately administered to the Horses by the Appellants or any of their team, this is not a case where the horses were given a treatment that their medical conditions did not justify, nor was they given Bute in order to compete when they were not fit to do so, nor was there a failure to follow the guidelines for obtaining medication pre-authorisation. In other words, these cases do not involve the key mischiefs that the ECM Rules are designed to prevent.

(d) The violations raise no issues as to the welfare of the horses.

(e) The estimated levels detected in the Samples were very low and that these levels were consistent with a lack of performance-enhancing or therapeutic effect.

(f) When given notice of their respective violations the Appellants showed a responsible attitude and attempted to limit the adverse consequences for the sport (a) by promptly admitting the violation; and (b) by voluntarily suspending themselves from competition pending resolution.

7. JURISDICTION OF THE CAS AND ADMISSIBILITY

7.1 Article R47 of the Code provides as follows:

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

7.2 CAS jurisdiction to hear this appeal is derived from ECM Rule 12.2.1 which provides that in cases arising from participation in an International Event or in cases involving FEI-registered Horses the decision may be appealed exclusively to CAS. An appeal must be filed 30 days from the date of Receipt of the Hearing Panel decision by the appealing party. Furthermore, each party confirmed CAS jurisdiction by signing the Order of Procedure.

7.3 The FEI Tribunal rendered its decisions on 23 May 2012. The Appellants filed their appeals on 24 May 2012 and are therefore admissible

8. APPLICABLE LAW

8.1 Article R58 of the Code provides as follows:

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 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

8.2 Pursuant to Article 36.3 of the *Statutes* of the FEI (23rd Edition, effective 6 May 2011), all disputes shall be settled by Swiss law.

9. ISSUES

9.1 The standard of review on appeal and, in particular, whether there should be any deference to the FEI Tribunal's decisions.

9.2 In the case of El Aid, whether:

(a) He has established on a balance of probabilities how the Bute entered VANHOEVE's system; and, if so

(b) Whether he bears No Fault or Negligence or No Significant Fault or Negligence therefor.

9.3 Whether a reasonable application of the discretion afforded under ECM Rule 10.2 merits a reduction or change in the sanctions imposed on the Appellants by the FEI Tribunal.

10. MERITS OF THE APPEAL

A. The Scope of a Panel's Powers in an Appeal Procedure

10.1 The source of the Panel's powers under Article R57 of the *CAS Code* accords to the Panel "full power to review the facts and the law". The Panel "*may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*". The Panel can, as it did in this case, hear the key witnesses and even receive testimony that was not provided to the FEI Tribunal.

10.2 While CAS decisions such as CAS 2009/A/1870 and CAS 2009/A/1918 are cited for the proposition that the specialist tribunals of sport federations are entitled to considerable deference and, in particular, that the measure of the sanction imposed by a disciplinary body in the exercise of discretion given to it by the relevant rules should only be reviewed when the sanction is "evidently and grossly disproportionate to the offence", such principles do not limit a CAS Panel from correcting what it believes to have been an erroneous application of the rules or the imposition of a sanction which is unreasonable in all of the circumstances. As the Panel in CAS 2011/A/2518 said (at para. 10.6):

"Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where a tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS Panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision".

10.3 The comments of the CAS Panel in CAS 2010/A/2283 at para. 13.46 are also apposite:

"The Panel would be prepared to accept that it would not easily "tinker" with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so".

10.4 The foregoing jurisprudence has, therefore, guided this Panel in the task at hand.

B. Whether Al Eid has Established the Existence of Exceptional Circumstances

10.5 Article 10.4 of the *ECM Rules* provides for the elimination or reduction of a period of Ineligibility based on exceptional circumstances. The language of the Rule tracks, in large measure, the corresponding rule in Article 10.5 of the *WADC*. A key difference is that Article 10.4.2 (No Significant Fault or Negligence) does not limit the reduction of the otherwise applicable sanction to 50% of that sanction (a requirement of *WADC* Article 10.5.2). A key similarity, however, is that in order to engage the application of Article 10.4 of the *ECM Rules*,

the Person Responsible (in this case, Al Eid) must be able to establish how the Controlled Medication Substance entered the Horse's system in order to have the period of Ineligibility and other Sanctions eliminated or reduced.

10.6 In the Panel's view, Al Eid has not met this burden.

10.7 The evidence of Dr. Abdelkarim, the treating veterinarian at the Riyadh International Riding School, provided an explanation for the fairly wide availability of Bute at the facility. It was argued that this evidence, when taken with all of the other evidence adduced by Al Eid, should have the cumulative effect of enabling Al Eid to meet his burden. The problem with this approach is that it would enable someone in the position of Al Eid to discharge his burden by putting forward a theory of inadvertent contamination and requiring that the theory be accepted, by default, because of the absence of any other explanation or evidence. As a CAS Panel observed in CAS 2010/A/2230, which was an anti-doping case involving a Specified Substance, at paragraph 11.5:

"An athlete cannot by asserting even with what purports to be corroborative testimony to the same effect, that he did not intend to enhance sport performance thereby alone establishing how the substance entered his body. Seeking to eliminate by such an approach 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 his reasoning impermissible for a judicial officer or body".

10.8 While there is no suggestion of any improper behaviour on the part of Al Eid or members of his team, that is not the issue. Explanations as to the possible cause of the positive test, however plausible, will, as noted above, not be enough absent more than tangible evidence. This Panel therefore agrees with the FEI Tribunal which concluded (at paragraph 47):

"... The Tribunal is however not persuaded by the explanation provided by Dr Dunnnett that there was ingestion by contamination. The Tribunal finds that in the first place, insufficient evidence was offered by the PR regarding the alleged contamination. The Tribunal further considers that the PR's groom had cleaned the stable shortly after the arrival, and thereby further reduced the risk of contamination. Furthermore, the Tribunal holds that insufficient evidence has been adduced to establish the causal link between the alleged contamination and the positive test result. It is therefore the opinion of the Tribunal that the PR has failed to prove that ingestion by means of exposure to a contaminated stable environment was more likely than not to be the source of the Phenylbutazone and Oxypbenbutazone ...".

C. The Sanction under Article 10.2 of the ECM Rules

10.9 The Panel is in substantial agreement with the submissions made by counsel for the FEI.

10.10 The starting point of this discussion is, once again, to emphasise a key difference between Article 10.2 of the *ECM Rules* and its relative, Article 10.4 of the WADC (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances).

- 10.11 Whereas under the WADC, the task is to determine by how much the presumptive sanction of 24 months should be reduced, having regard to the athlete's degree of fault, the reverse process is followed under Article 10.2 of the *ECM Rules*. Instead, a first violation, in most circumstances, is dealt with through the Administrative Procedure, which would almost inevitably result in no period of Ineligibility being imposed on the Athlete at all.
- 10.12 Both of the appellants had previous infractions. However, those incidents were sufficiently long ago that they are regarded as having been "spent" for sanctioning purposes (i.e. the current charges were regarded as first offences) in the context of whether the Appellants should be sanctioned for multiple *ECM Rule* violations. For administrative purposes, however, the existence of the previous infractions remains relevant because it precludes the Appellants from electing to be dealt with in accordance with the Administrative Procedure.
- 10.13 A key element of the sanctioning regime provided by Article 10.2 of the *ECM Rules* is there is no presumption of fault. This stands in direct contrast to WADC Article 10.4. So the starting point is zero.
- 10.14 In CAS 2007/A/1370 & 1376 it was noted that any exercise of sanctioning power is an interference with the rights of athletes. It is therefore necessary to weigh the objectives of the *ECM Rules* against the consequences of infringement, including the impact on the offender. The correct approach is to start low and only move up the scale if it is necessary to do so to meet the overriding objectives of the *ECM Rules*. "Fault" is not a specified yardstick to be employed in undertaking this assessment (again, a distinguishing feature between Article 10.2 and WADC Article 10.5).
- 10.15 Having regard to the two appeals before this Panel, the following factors are supportive of the conclusion that the culpability of the Appellants is at the low end of the scale:
- (a) *The FEI Tribunal's finding of professionalism (the Saudi professional team structure is at a very high end of the spectrum);*
 - (b) *The finding that there was no deliberate taking or administration of medication;*
 - (c) *The fact that when other medications were administered to the horses, ETUEs were routinely applied for;*
 - (d) *The lack of any evidence of harmful impact on the horses concerned;*
 - (e) *The lack of any welfare concerns relating to the horses;*
 - (f) *The lack of any reasonable explanation for the Athletes not to have sought an ETUE had they wished to use Bute on their horses;*
 - (g) *The levels of Bute detected in the horses' systems were consistent with a lack of any possible enhancement of performance or therapeutic effect;*

(b) The extensive investigation by the Athletes and their teams, their prompt admission to the charges and their acceptance of voluntary suspensions.

- 10.16 Although the FEI Tribunal made reference to a number of “comparable” cases in coming to a conclusion that eight month sanctions were appropriate, upon closer examination these cases cannot be regarded as appropriate comparables. In these cases horses had either been given a cocktail of medications and/or there were few mitigating factors.
- 10.17 By way of example, in *Cameo Renazar* (FEI Tribunal, 21 November 2011), after repeated attempts on the part of the FEI to obtain an explanation from the Person Responsible, the Person Responsible stated that he had given his horse a paste containing Bute prior to the Event in question, since the horse had shown signs of colic. When a questionnaire, completed by the Person Responsible, was eventually obtained, it indicated that prior to the competition in question, the horse had been treated by different veterinarians, but that specific information concerning the horse’s treatments was not available. The Person Responsible apparently attempted to resile from his previous admission by suggesting that the Bute detected in the horse’s Sample must have been given to the horse by a veterinarian working at a particular stable. The FEI Tribunal concluded (at paragraph 25):
- “In the opinion of the Tribunal, however, the degree of fault or negligence of the PR is difficult to assess [sic] given the information provided. The PR has shown very little knowledge of the rules of the FEI, and shows even less signs of a determination to achieve regulatory compliance in the future”.*
- 10.18 While the foregoing comments were made in the context of an Article 10.4 analysis, they would presumably have informed the Tribunal’s subsequent evaluation of fault under Article 10.2. The result: a period of ineligibility of eight months.
- 10.19 In *Tiburón* (FEI Tribunal, 2 December 2011) a case involving the controlled medications Bute and Flunixin, the horse had been medicated for colic a few days before the event at which the horse was tested. The Person Responsible explained that he did not know that this treatment would be detectable as long as six days after administration. No ETUE had been applied for and there appears to have been non-compliance with the requirement to maintain an FEI medication log book, a record of who had administered medications to the horse and a lack of steps being taken by the Person Responsible to educate himself about the consequences of the treatment received by the horse. Again, while all of these comments were made in relation to the plea of exceptional circumstances, they no doubt informed that FEI Tribunal’s decision to impose a term of ineligibility of eight months.
- 10.20 Simply comparing the facts and circumstances of the instant appeals from those considered in the *Cameo Renazar* and *Tiburón* matters, it is readily apparent that the Appellants’ infractions were far less serious than those described in the other cases.
- 10.21 More fundamentally, however, the reasons of the FEI Tribunal leave the impression that the Tribunal approached the exercise of its discretion in the Appellants’ Controlled Medication

cases in much the same way as a tribunal would look at sanctioning in a Specified Substance case under *WADC* Article 10.4.

- 10.22 Although the FEI Tribunal recites, in paragraphs 48 (Al Eid) and 55 (Sharbatly) of its decisions that the presumptive starting point of two years provided for in *EAD Rules* does not apply in cases of Controlled Medication substances, the FEI Tribunal goes on to say that because the Appellants failed to prove how the Controlled Medications entered their Horses' systems, it was not possible for the Tribunal to assess the appellants' "Fault or Negligence" for the *ECM Rule* violation.
- 10.23 Having stated that it was unable to assess "Fault or Negligence", the FEI Tribunal goes on to say that it "*is forced to take into account other, more objective factors in order to determine the period of Ineligibility*" (emphasis added).
- 10.24 It is worth repeating at this juncture that 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 *ECM Rules* and the mischief they are aimed at preventing. Or, in more formal terms, (i) the objectives being pursued must be sufficiently important to justify taking away an offender's right to pursue his or her profession, (ii) the sanction imposed must be rationally connected to the pursuit of those objectives, and (iii) it must go no further than is necessary to meet those objectives.
- 10.25 There is therefore a balancing exercise to be done. The Panel must assess (1) the culpability of the offender; and (2) the harm caused or risked by his offence, measured in each case by reference to the objectives of the rules in question and in particular the mischief that they are aimed at preventing. Against that, the Panel should weigh the impact of the sanction on the offender, and any mitigating factors.
- 10.26 Although the FEI Tribunal made reference to many of the factors which the parties on these appeals submit were relevant and correct, the Panel is of the view the FEI Tribunal erred by failing to take into account the effect of the eight month sanction (in particular that it would exclude both Appellants from the Olympic Games). Consistent with its general approach of considering these Controlled Medication cases in much the same way as an anti-doping case, the FEI Tribunal found that the reasoning behind the commentary in the *WADC* that the effect of the suspensions should not influence the period of Ineligibility selected was persuasive in an Article 10.2 case. By doing so the FEI Tribunal deprived itself of the opportunity to weigh the effect of a relevant factor.
- 10.27 Further, the FEI Tribunal appears to have applied little if any weight to the fact that under the Administrative Procedure, the Appellants' offences would not have generated any period of Ineligibility at all.
- 10.28 This Panel agrees with the FEI's submission that in deciding what is a necessary and proportionate sanction in these cases, it is fair to take account of the fact (which reflects the

nature and purpose of the *ECM Rules*) that if the Appellants' previous offences had taken place more than eight years prior to the current offences, they would have been entitled to accept an administrative sanction for this present violation of a fine, costs and no period of Ineligibility. Specifically, the question would be: what makes this case different from an offence that would have attracted an administrative sanction only, and what greater sanction does that difference justify?

- 10.29 The fact is that the Appellants have infringed the *ECM Rules* previously, albeit seven years (in the case of Al Eid) and six years (in the case of Sharbatly). Having decided that those infractions should be taken into account when considering the exercise of discretion under Article 10.2, it would be reasonable to impose some period of Ineligibility, in addition to the fines and costs awards that were imposed by the FEI Tribunal. The *ECM Rules* and, in particular, the principle of strict liability contained in those *Rules*, need to be respected and vindicated. The sanction imposed must therefore be meaningful and stand as a deterrent, particularly where, as here, the Administrative Procedure would not apply.
- 10.30 That said, even the four month period of Ineligibility which was suggested by the FEI would be a tough sanction, particularly having regard to the fines, costs, a period of voluntary suspension served and disqualification of results.
- 10.31 While there is inevitably an element of arbitrariness in selecting an appropriate sanction, the Panel has concluded that two months would be an appropriate period of Ineligibility in all of the circumstances of this case.

CONCLUSION

- 10.32 This Panel would allow the appeals of Al Eid and Sharbatly to the extent that the eight month period of Ineligibility imposed on each of them by the FEI Tribunal should be reduced to two months. The starting date for the term of Ineligibility is 24 February 2012 in the case of Al Eid and 10 February 2012 in the case of Sharbatly.
- 10.33 The remainder of the FEI Tribunal's decisions dated 23 May 2012 are continued.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Abdullah Waleed Sharbatly on 24 May 2012 against the decision of the Fédération Equestre Internationale Tribunal (“FEI Tribunal”) dated 23 May 2012 is partially upheld.
2. Paragraph 61(1) of the decision of the FEI Tribunal dated 23 May 2012 is set aside and replaced with the following:

Abdullah Waleed Sharbatly is sanctioned with a period of Ineligibility of two months, commencing on 10 February 2012.
3. The remainder of the FEI Tribunal’s decision dated 23 May 2012 is confirmed.
5. (...).
6. (...).
7. All other or further claims are dismissed.