Gray Area: Court of Arbitration for Sport Says Neigh to Reconsidering Strict Liability for Equestrian Sport

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Casenote

GRAY AREA: COURT OF ARBITRATION FOR SPORT SAYS NEIGH TO RECONSIDERING STRICT LIABILITY IN EQUESTRIAN SPORT

I. INTRODUCTION

Lance Armstrong, Alex Rodriguez, Marion Jones, and Barry Bonds are some of the most famous names in sport; however, their notoriety is partially due to a willingness to dope to win. Yet, doping is not limited to human athletes. The 2008 Summer Games in Beijing, China showcased incredible athletic talent. In the equestrian world, six equine doping cases and the revocation of one medal tarnished the achievements of 2008 Summer Games. Each incident warranted a Fédération Equestre Internationale (FEI) Tribunal Decision, and several were appealed to the Court of Arbitration for Sport (CAS).

Capsaicin was at the center of the debate, associated with four of the six disciplinary proceedings. Capsaicin is “a chili pepper extract with analgesic properties” but it is used topically for pain relief. The popular product, Equi-Block introduced the substance to the equestrian world.


4. See id. (noting that decisions involving horses Camiro, Cöster, Lantinus 3, Chupa Chup and Rufus were appealed to CAS).

5. See id. (listing Capsaicin as “substance(s)”).


7. See John T. Wendt, The Crisis of Doping in Equestrian Sport, 27 ENT. & SPORTS LAW. 10, 11 (2009) (“Capsaicin cases’ all have similar attributes—the use of Equi-Block, a topical pain reliever that contains Capsaicin.”).
The FEI is the international governing body for equestrian sport. Following the infractions at the 2008 Olympic Games, the FEI launched the Clean Sport Campaign “in response to the high-profile doping cases from the Beijing 2008 Olympic Games . . . .” Aimed at education, the FEI endeavored to “establish the best possible system to prevent the use of methods or substances that influence the performance of a competition horse, while ensuring horse welfare at all times.”

Section II of this Note establishes the relevant facts of Deutsche Reiterliche Vereinigung e.V. v. FEI & Christian Ahlmann and Christian Ahlmann v. FEI, beginning with a summary of the initial infraction, subsequent FEI Tribunal decision, and finally the CAS decision. Section III provides a background of law and governing bodies relevant to the decision, starting in sub-part (A) with an overview of doping in American thoroughbred racing and its regulatory scheme. Sub-section (B) delivers a review of the significant governing bodies in international equestrian sport. Section IV summarizes the reasoning of the Tribunal Decision in Sub-part (A), and Ahlmann’s legal reasoning in Sub-part (B). Section V discusses the inconsistency of the Tribunal’s holding with established FEI rules. It then examines the ambiguities of the FEI Prohibited Substance List (“List”) and its relation to the strict liability standard. Finally, it compares the legal consequences of equine dop-
ing in American thoroughbred horse racing and the international FEI context. Lastly, Section VI predicts the impact of the CAS ruling in Ahlmann and comments on the durability of the strict liability standard for equine doping in the world of equestrian sport.

II. FACTS: HORSEING AROUND HAS CONSEQUENCES

The original rule violation dispute arose at the 2008 Summer Games in Beijing, China. Mr. Christian Ahlmann competed in the Show Jumping competition with his horse, Cöster. One of Germany’s top riders, Mr. Ahlmann was to represent Germany in both the team and individual show jumping competitions. Following Mr. Ahlmann’s disqualification, the German team’s fifth place finish was deemed ineligible. Additionally, Mr. Ahlmann was scheduled to compete in the individual final the following week before the positive test and subsequent disqualification.

Under FEI rules, Mr. Ahlmann was the person responsible (PR) for Cöster during competition. On August 17, 2008 Cöster was

17. For a continued critical analysis of the Tribunal Decision and Ahlmann’s legal reasoning, see infra notes 157–167 and accompanying text.
18. For a discussion of the impact of the decision in Ahlmann, see infra notes 168–190.
19. See Ahlmann, supra note 8 at para. 2 (recounting equestrian competition took place in Hong Kong).
20. See id. (acknowledging Mr. Ahlmann was member of 2004 German Show Jumping team in Athens whose medals were revoked due to prohibited substance violation).
23. See Doped Horses Mar Olympic Equestrian Competition, supra note 21 (noting Mr. Ahlmann’s ineligibility for individual final).
24. See Ahlmann, supra note 8, para. 2. See also Fédération Equestre Internationale, Decision of the FEI Tribunal – Cöster, at 2, 2008 [hereinafter Tribunal Decision], available at http://www.fei.org/system/files/20%20-%20COSTER%20-%20Tribunal%20Decision%20-%20October%202008.pdf (explaining Mr. Ahlmann was person responsible (“PR”) because he was rider at event); Fédération Equestre Internationale, Equine Anti-Doping and Controlled Medication Regulations, Preface, 1 (2d ed. 2016) [hereinafter EADCM Regulations], available at https://www.fei.org/sites/default/files/2016%20EADCMRs%20-%20Effective%20January%202016%20-%20Clean%20Version_0.pdf (indicating persons responsible “remain[ ] ultimately . . . liable, for EADCM violations”). The person responsible is “responsible for any [b]anned [s]ubstance found to be present in their [sic] [h]orse’s [s]amples.” Fédération Equestre Internationale, Equine Controlled Medication Rules, art. 2.1, at 4 (2d ed. 2016) [hereinafter ECM Rules] (emphasis omitted).
tested by FEI officials after the Team Final. The laboratory tested Cöster’s blood and urine the following day; both tested positive for Capsaicin. The FEI prohibits Capsaicin because of its pain relieving and hypersensitizing effects. The FEI “provisionally suspended” Mr. Ahlmann following the notification of a positive test. Provisional suspensions are temporary bans from competition following an Equine Anti-Doping and Controlled Medication (“EADCM”) Regulation violation. On August 21, 2008, a preliminary panel of the FEI Tribunal found the positive test results sufficient in light of Mr. Ahlmann’s inability to explain the presence of the prohibited substance and did not alter his suspension. The FEI then tested the B sample to confirm results. On August 22, 2008, the B sample test confirmed the existence of Capsaicin in Cöster’s samples. On August 24, 2008, Mr. Ahlmann explained in a press release that he had been treating Cöster’s back pain by applying Equi-Block during the summer. Mr. Ahlmann treated Cöster without researching the product or consulting the team.

25. See Ahlmann, supra note 8, para. 2 (reporting test).
26. See id. (reporting results). Cöster’s veterinarian submitted two forms requesting authorization for use of saline and emergency treatments with prohibited substances, both of which were granted. Id. Capsaicin was not mentioned on either of these forms. Id. at paras. 3–4.
27. See id. para. 21 (explaining ban). Capsaicin has both pain relieving and hypersensitizing properties, which make it subject to FEI regulation. Id.
28. See id. para. 3 (suspending Mr. Ahlmann for prohibited substance in Cöster’s A sample).
29. See EADCM Regulations, supra note 24, Preface, at 1 (defining provisional suspension). A provisional suspension is a consequence of an EADCM Regulation violation or admission whereby the [p]erson [r]esponsible and/or member of the [s]upport [p]ersonnel and/or a [h]orse is barred temporarily from participating in any capacity in a [c]ompetition or activity or being present at an [e]vent (other than as a spectator) that is authorised or organised by the FEI or any National Federation or at [c]ompetitions authorised or organised by any international- or national-level [e]vent organisation prior to the final [d]ecision at a hearing conducted under Article 8 (Right to a Fair Hearing). Id. See also id. art. 7.4.1, at 12 (detailing when provisional suspensions are warranted).
30. See Ahlmann, supra note 8, para. 3 (reporting sufficiency of test and refusing to lift provisional suspension).
31. See EADCM Regulations, supra note 24, art. 2.1, at 1 (explaining procedure for B sample analysis).
32. See Ahlmann, supra note 8, para. 3 (reporting sample B positive test). See also EADCM Regulations, supra note 24, art 2.1, at 2 (explaining the person responsible may request to have B sample analyzed).
33. See Ahlmann, supra note 8, at para. 6 (describing Mr. Ahlmann’s explanation). See also Tribunal Decision, supra note 24, at 12 (describing press release).
Equi-Block’s packaging explicitly warns that the product contains Capsaicin. Equi-Block is a topical pain reliever widely used in the competitive equestrian world despite its prohibited status.

Following a hearing on September 26, 2008, the FEI Tribunal found that Mr. Ahlmann committed a Medication Class A offense. First, the Tribunal accepted the positive results reported by the Hong Kong Jockey Club Racing Laboratory. Finding sufficient proof of an offense under the EADCM Regulations in Article 3, the Tribunal next considered whether the offense was an anti-doping or medication control violation. In finding a medication control violation, the Tribunal rejected the FEI’s contention that the violation was both an anti-doping and a medication control violation. The Tribunal reasoned that the language of the rules stipulated that only one of the violations may occur in a single incident. Additionally, the FEI must prove that the substance was used to “influence performance” beyond its “mere existence.” However, “Dr. Farrington clearly stated that there was no proof of a hypersensitization of the [h]orse’s legs . . . .”

Next, the Tribunal explained that the strict liability standard applicable to medication control rule violations, citing fairness as a
key consideration for strict liability in equestrian sport. Finally, the Tribunal suspended Mr. Ahlmann for four months, fined him CHF (“Swiss Franc”) 2,000, and ordered his contribution of 1,500 Swiss Franc for “legal costs.” Mr. Ahlmann completed his four-month suspension from competition on December 19, 2008.

On November 13, 2008, the Deutsche Reiterliche Vereinigung (German National Federation) appealed to the CAS seeking to increase Mr. Ahlmann’s penalty. Ultimately, the CAS found that Mr. Ahlmann committed an anti-doping rule violation. The CAS imposed an eight-month period of ineligibility and a fine of 2,000 Swiss Franc.

III. BACKGROUND: HORSE SENSE IN GOVERNING EQUINE SPORT

A. A Horse of a Different Color: Doping in Thoroughbred Racing

According to a New York Times report, twenty-four horses die on racetracks every week in America. In an investigative series, enti...
tled “Breakdown: Death and Disarray at America’s Racetracks,” the Times chronicled the declining thoroughbred racing industry in the United States, revealing shocking facts about equine drugging, lax enforcement, and deadly consequences. Scholarly articles have echoed similar concerns, blaming widespread equine doping in thoroughbred racing on inconsistent regulation and skewed economic incentives. Legal inconsistency and careless enforcement characterize the regulatory scheme. Governed by individual states, trainers and others tasked with the well-being of equine athletes are subject to a dizzying array of laws and enforcement policies.

The media spotlight beamed directly on the issues of equine safety and doping on the racetrack in 2008 when a filly, Eight Sheds Light in Use of Legal Medications in Horses, N.Y. Times (Oct. 5, 2009), http://www.nytimes.com/2009/10/06/sports/06horse.html (“The United States has the world’s worst mortality rate for thoroughbreds.”).


53. See Kluesner, supra note 52, at 302 (noting “lax enforcement” and inconsistent penalties). See also Alexandra D. Logsdon, Unbridled “Spirits”: An Integrated Analysis of the Law, the Science, and the Future of Thoroughbred Medication, 6 KY. J. EQUINE, AGRIC. & NAT. RES. L. 141, 149 (2014) (pinpointing lack of centralized regulatory body as “major source of the doping problem in the United States”).

54. See Gasparon, supra note 52, at 204 (considering second offenses where a Kentucky trainer could receive three to five year suspensions, while Maryland trainer could receive number of potential sanctions based on discretion). See also supra note 55 and accompanying text.
Belles, had to be euthanized on live television after sustaining two broken legs in the Kentucky Derby. Shortly after the tragedy, the trainer of the winning horse bragged about administering steroids to his horse before the race to enhance his performance. In response to recent media attention from high profile equine deaths, various stakeholders have gathered to prioritize equine health.

In the legal realm, courts have consistently held that trainers are responsible for any positive drug test, applying strict liability. Also called the absolute insurer rule, the trainer responsibility rule has been consistently upheld as constitutional, barring one exception. However, at least one commenter has argued the rule is not just "occasionally . . . harsh and unfair . . . [but it] is very under inclusive [sic]." Accordingly, the commenter advocates for a more flexible rebuttable presumption rule, implemented in several states, that allows trainers to present evidence of innocence after a positive test.

55. See Friedman, supra note 52, at 123 (detailing horrific incident which highlighted devastating effects of doping in horseracing).
56. See id. at 123 (describing trainer’s claim). See also Jennifer M. Jabroski, Reining in the Horse Racing Industry: A Proposal for Federal Regulation of Steroid Use in Racehorses, 1 Ky. J. Equine, Agric. & Nat. Res. L. 67, 67–68 (2009) (noting steroid use was legal). This finding promoted public discussion on safety and medication use in horseracing. Id.
57. See Kluesner, supra note 52, at 306 (identifying genetics and over-medication as oversight priorities). The Welfare and Safety of the Racehorse Summit, held in 2008, recommended eight improvements including “establish uniform regulation,” “reduce catastrophic injuries,” and “encourage responsible thoroughbred ownership.” Id. See also Breslin, supra note 52, at 317–18 (arguing concern for equine health and safety should be paramount).
59. See Liebman, supra note 58, at 10–21 (detailing cases challenging absolute insurer rule’s constitutionality). Only one court found the rule unconstitutional, holding that the rule was “arbitrary and unreasonable.” Id. at 19. However, Hudson v. Tex. Racing Comm’n declined to follow the reasoning of this court. Id. at 4.
60. See Liebman, supra note 58, at 36 (arguing that rule should be eliminated). For further discussion of this argument, see infra note 61 and accompanying text.
61. See Liebman, supra note 58, at 21 (detailing several cases applying rule). Courts in New York, Kentucky, Colorado, Oklahoma, Pennsylvania and Illinois have upheld the rebuttable presumption rule as constitutional. Id. at 21–23. This rule would place the burden of proof upon the trainers, however he or she would remain liable if the evidence is not sufficient. Id. Additionally, this rule allows the possibility of finding of innocence, unlike the imposition of strict liability. Id. at 24. See also Barchi v. Sarafan, 436 F. Supp. 775, 783–85 (S.D.N.Y. 1977), rev’d in part sub nom. Barry v. Barchi, 443 U.S. 55 (1978) (holding New York rebuttable presumption rule constitutional); Wetzel v. N.Y. State Racing & Wagering Bd., 487
Additionally, it seems the endorsement of strict liability for horse trainers is inconsistent with traditional applications of strict liability.62

B. Unbridled Authority: Regulation of International Equestrian Sport

The European Sports model is based on a pyramid structure.63 The International Olympic Committee (“IOC”) is the governing body of the Olympic games pursuant to the Olympic Charter.64 International Federations (“IFs”) regulate individual sports under Olympic Committee standards.65 The FEI is the international governing body of equestrian sport.66 Operating under the IFs are the National Federations (“NFs”), which regulate a particular sport within one country.67 In the world of equestrian sport, the FEI exercises complete authority over its national federations.68 The FEI

62. See Liebman, supra note 58, at 24–33 (detailing areas of law where courts have embraced strict liability). Strict liability is applied in tort law under ultra-hazardous activities, strict product liability, and “dram shop laws,” or laws imposing strict liability on tavern keepers for serving alcohol to minors or the over imbibed. Id. at 27–30. Additionally, courts have endorsed strict liability in limited criminal cases such as public welfare offenses or morality crimes. Id. at 30–33. However, these endorsements lack commonality with the absolute insurer rule. Id. at 33. The absolute insurer rule does not broadly protect safety like the tort laws nor does it protect public morals like the criminal laws. Id.


66. See Ahlmann, supra note 8, at paras. 2, 4 (recognizing FEI as chief governing body). See also Structure, supra note 8 (describing FEI as “sole controlling authority for all international events in Dressage & Para-Equestrian Dressage, Jumping, Eventing, Driving & Para-Equestrian Driving, Endurance, Vaulting and Reining”) (emphasis omitted).

67. See Nafziger, supra note 63, at 91 (describing international sports model).

Tribunal decides cases involving violations of FEI rules. Following a Tribunal decision, disputes may be appealed to the CAS.

1. **The CAS**

   The CAS is an independent arbitration body exclusively devoted to resolving disputes in sport. Established by the International Olympic Committee in 1983, CAS has since become a completely independent organization. As a result of the World Anti-Doping Agency (“WADA”) Code, the CAS has become the premier venue for resolving doping disputes. The CAS is subject to review by the Swiss Federal Tribunal, but only in limited circumstances. The

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[a]thletes, team officials and other individuals and bodies involved in FEI Events.

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69. See Statutes, supra note 68, art. 38.1 (explaining Tribunal decision-making factors). The Tribunal decides cases on:
   (i) [a]ny infringement of the Statutes, General Regulations, Sport Rules, or Procedural Regulations of a General Assembly or of violation of the common principles of behavior, fairness, and accepted standards of sportsmanship, whether or not arising during an FEI meeting or [e]vent;
   (ii) [a]ny issue of interpretation of the Statutes, General Regulations, and Sport Rules . . . .

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70. See Statutes, supra note 68, art. 39.1 (“The Court of Arbitration for Sport (CAS) shall judge all [a]ppals properly submitted to it against [d]ecisions of the FEI Tribunal, as provided in the Statutes and General Regulations.”).


72. See id. at 32–33 (explaining independence of CAS). The Tribunal held that the CAS was sufficiently independent and impartial to meet Swiss Arbitration standards. *Id.* This landmark case initiated reform in the CAS, including the creation of the International Council for the Arbitration of Sport (ICAS) to organize the financial and administrative obligations of the CAS. *Id.* The case solidified the independence of the CAS from its founding sponsor, the IOC. *Id.* See also *History of the CAS, TAS/CAS*, http://www.tas-cas.org/en/general-information/history-of-the-cas.html (last visited Mar. 29, 2016) (describing Gundel’s appeal as impetus for change causing CAS reform).

73. See McLaren, supra note 71, at 34 n.11 (“WADA Code makes CAS the appeals body for all international doping relegated disputes.”).

74. See id. at 34 (stating CAS is “subject only to the oversight of the Swiss Federal Tribunal under Switzerland’s Federal Code on Private International Law”). See also *Frequently Asked Questions, TAS/CAS*, http://www.tas-cas.org/en/general-information/frequently-asked-questions.html (last visited Oct. 9, 2015) (“Judicial recourse to the Swiss Federal Tribunal is allowed on a very limited number of grounds, such as lack of jurisdiction, violation of elementary procedural rules (e.g. violation of the right to a fair hearing) or incompatibility with public policy.”).
Swiss Tribunal has only overturned a handful of CAS decisions since it began hearing cases in 1984.\textsuperscript{75}

The CAS Code, which governs the Tribunal, explains the CAS has jurisdiction where “parties have agreed to refer a sports-related dispute to CAS . . . [which] may arise out of an arbitration clause contained in a contract[,] . . . ordinary arbitration proceedings . . . [or] an appeal against a decision rendered by a federation . . . .”\textsuperscript{76} In addition to offering both ordinary arbitration and appeals arbitration, the CAS also issues advisory opinions and offers mediation.\textsuperscript{77}

2. FEI’s Clean Sport Campaign

The FEI launched the Clean Sport Campaign in November 2008 in response to a number of doping cases at the Beijing Olympics.\textsuperscript{78} In an attempt to clarify and harmonize doping rules, the Clean Sport Commission (“Commission”) and later, the Stevens Commission, focused on specific and broad doping issues respectively.\textsuperscript{79} The Commission chaired by Arne Ljungqvist, the sitting Vice President of the WADA, produced Prohibited Substance Lists for human and equine athletes as well as EADCM Regulations.\textsuperscript{80} Under Ljungqvist’s leadership, the Clean Sport campaign sought to bring the FEI “in line with the WADA Code.”\textsuperscript{81} Launched as an educational campaign, the Commission “represented a united effort of all stakeholders . . . to clarify doping protocols in equestrian sport.”\textsuperscript{82}

\footnotesize
\textsuperscript{75} See McLaren, supra note 71, at 38 n.42 (reporting first overturned CAS decision). See also Mark James, Sports Law 63-66 (2d ed. 2013) (detailing cases where CAS was overturned).


\textsuperscript{77} See McLaren, supra note 71, at 39.


\textsuperscript{79} See id. (describing Clean Sport Campaign history). Several working groups were created: Laboratory, Legal, List, and Communications & Education. See id.

\textsuperscript{80} See id. (noting Commission was set up in November 2008 and reporting documents produced).


\textsuperscript{82} See Wendt, supra note 7, at 12 (discussing FEI response to Beijing doping cases).
IV. NARRATIVE ANALYSIS: THE MANE EVENT

A. FEI Tribunal

In the FEI Tribunal Hearing, the panel underwent a three-step analysis when sanctioning Mr. Ahlmann. The Tribunal spent a significant portion of the opinion discussing the legitimacy of the strict liability standard. The following subsections will focus on the three steps addressed by the panel: positive findings, type of rule violation, and sanctions.

1. Positive Findings

Both Coster’s A-sample and B-sample tested positive for Capsaicin, satisfying the panel’s proof standard. Mr. Ahlmann argued that the laboratory’s Capsaicin sample, used as a reference point, was expired and therefore void. Despite the laboratory methodology protests from Mr. Ahlmann, the panel ultimately accepted the test results.

2. Type of Rule Violation

Next, the panel analyzed whether Mr. Ahlmann committed a doping or medication rule violation. First, it determined that Capsaicin...
cin is “not a normal nutrient for the horse” and thus may have been used medicinally. The Veterinarian Report offered three hypotheses for how Capsaicin could be used topically, two of which would have resulted in a medication rule violation and one that would result in a doping violation. The FEI argued that the use of Capsaicin constituted both a doping violation and a prohibited substance violation. The panel rejected the doping violation argument, stating that “[t]here is no indication [in the rules] that the presence of the substance already implies the use as a hypersensitizing agent.” The Panel focused on the wording of the EADCM Regulations, arguing that regulatory language limited FEI to establishing a doping violation or a medication control violation, not both. Further, a doping substance is defined as a substance “likely to have been applied to body parts or to tack to influence performance.”

The Tribunal dismissed the possibility of categorizing Capsaicin as a medication class B substance without significant explanation.

89. See id. at 8 (describing reasons why Capsaicin would appear in equine drug test).
90. See id. at 8–9 (explaining Capsaicin use theories). The three theories of Capsaicin use offered by the Veterinarian Report were:

[1] may be used medicinally by topical application in three ways: 1) to reduce the pain of arthritic joints and soft tissues; 2) on the digital nerves into the foot to desensitize those nerves in horses with foot pain; 3) to the front of the legs, “to produce a burning sensation to unduly sensitize the limb(s) to touching poles to make the horse more careful in its jumping efforts thus improving performance.” Id. at 8. Under use one or two, the person responsible could have requested permission to continue application with a medication form. If the proper form were not filed, either of these uses would be under Prohibited Substances Medication Class A. Under use three, this application would constitute an anti-doping offense. Id.
91. See id. at 9 (explaining Capsaicin may qualify as either type of offense because it has both hypersensitizing and pain relieving properties).
92. Id. at 10 (explaining rejection of doping violation argument). The FEI was not able to prove hypersensitization. See id. The panel noted that “there was no proof of a hypersensitization of the [h]orse’s legs, even though the legs of all horses including the [h]orse [Göster] had been checked by the [e]vent officials after each competition round.” Id.
93. See id. at 9–10 (determining EADCM Regulations Article 3.1 only permits establishment of one violation). EADCM Regulations Article 3.1 provides that “[t]he FEI shall have the burden of establishing that an anti-doping rule violation or medication control violation has occurred.” Id. at 9 (emphasis added) (internal quotation marks omitted).
94. Id. at 10 (defining doping substance).
95. See id. (stating Tribunal could not “accept that Capsaicin can also be considered as a medication B substance.”). The Tribunal did not elaborate. See id.
Thus, the violation constituted a Medication Class A violation because the FEI was unable to prove a doping offense. 96

3. Sanctions

The panel considered a variety of factors when sanctioning Mr. Ahlmann. 97 In an effort to maintain fairness, the FEI considered both mitigating and aggravating factors. 98 Although Mr. Ahlmann had no prior rule violations and had already been punished by disqualification from the event, the Tribunal in contrast evaluated his status at the top of the sport and the nature of the substance. 99 Ultimately, the panel sanctioned Mr. Ahlmann for four months and imposed two fines. 100

B. The CAS

In Ahlmann, 101 the CAS upheld the appeal of the German NF against the FEI Tribunal and modified Mr. Ahlmann’s sanctions, increasing his period of ineligibility. 102 The CAS spent a significant portion of the opinion on explaining and evaluating the merits of the violation. 103 The following subsections will focus on the CAS decision-making process: procedural matters, merits, and sanctions.

1. Procedural Matters

First, the CAS established jurisdiction under the FEI Statutes. 104 The German NF has standing to file an appeal under both the EADCM Regulations and the FEI General Regulations by explicit endorsement. 105 Next, the CAS approved the standing of the Ger-

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96. See id. at 12 (describing violation type). Medication class A is a class of Prohibited Substances on the Equine Prohibited Substances List. See id.
97. See id. at 16–17 (discussing fairness, welfare, event profile, nature of substance, negligence, hardship, and no prior violations).
98. See id. (citing both types as crucial to sanctioning decisions).
99. See id. at 16–17 (describing factors weighed by Tribunal).
100. See id. at 17 (detailing fines). Mr. Ahlmann was fined CHF 2,000 and was ordered to pay CHF 1,500 for the costs of the legal proceedings. Id.
101. See Ahlmann, supra note 8, para. 2 (explaining results of CAS decision).
102. See Ahlmann, supra note 8, para. 24 (upholding NF appeal and increasing Mr. Ahlmann’s period of ineligibility).
103. For a discussion of the merits of the CAS decision, see infra notes 114–29.
104. See Ahlmann, supra note 8, at para. 10 (noting jurisdiction is justified by Article 35 of FEI Statutes, Article 170.1.3 of FEI General Regulations, Article 12.2 of EADCM Regulations, Article R47 of CAS Code, and “order of procedure . . . signed by parties”).
105. See id. para. 12 (explaining standing). See also EADCM Regulations, supra note 24, art. 12.2, at 26-27 (specifying what parties may appeal decisions to CAS, including National Federation of athlete whose decision is being appealed); FÉDÉR.
man NF, citing protection of German NF’s public image and its inability to participate in Tribunal proceedings as supplemental grounds for a legitimate appeal.106

The CAS next consolidated the two appeals, CAS 2008/A/1700, the German NF v. FEI & Christian Ahlmann and CAS 2008/A/1710, Christian Ahlmann v. FEI.107 The first appeal before the CAS, filed by the German NF, requested an extended period of ineligibility for Mr. Ahlmann and the shift of cost to the FEI and Mr. Ahlmann equally.108 The second appeal, filed by Mr. Ahlmann, requested a reduced suspension and the burden of arbitration costs wholly on the German NF.109

Additionally, the CAS considered the admissibility of new evidence and new arguments by Mr. Ahlmann.110 First, the CAS rejected Mr. Ahlmann’s claim that the CAS may not consider evidence not presented to the Tribunal.111 Likewise, the CAS rejected the FEI’s argument that Mr. Ahlmann’s answer was inadmissible because it contained novel arguments.112 Having established jurisdiction, standing, and other procedural matters, the CAS proceeded to the merits of the case.113

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106. See Ahlmann, supra note 8, para. 13 (finding German NF standing).
107. See id. para. 14 (noting parties’ unanimous consent and rendering of single award).
108. See id. para. 5 (requesting relief of increased suspension).
109. See id. para. 6 (requesting relief of decreased suspension and shifting of costs).
110. See id. paras. 14–15 (discussing two procedural motions).
112. See Ahlmann, supra note 8, para. 15–16 (explaining CAS Code does not provide limitations on substance of answers). Further, the Panel determined that “Mr. Christian Ahlmann had the right to file an [a]nswer to the [a]ppeal [b]rief of the German NF containing new argument.” Id. para. 15.
113. See id. paras. 10–16 (discussing jurisdiction, applicable law, admissibility, standing, joinder, and procedural motions).
2. **Merits**

The parties stipulated that Cöster’s blood and urine tested positive for Capsaicin.\(^{114}\) The CAS sought to determine whether the violation by Mr. Ahlmann was a doping violation or a Medication Class A violation under EADCM Regulations.\(^{115}\) The German NF and the FEI argued that the presence of Capsaicin constitutes an anti-doping violation.\(^{116}\) However, Mr. Ahlmann contended the positive test is not a violation at all, but rather a Medication Class A offense.\(^{117}\)

a. **Strict Liability**

First, the CAS determined that FEI Rules and the disciplinary system prohibiting particular substances comport with Swiss Law because strict liability is appropriate in equestrian sport.\(^{118}\) The FEI Rules support a system in which “the mere presence of a prohibited substance in the horse’s body constitutes a rule violation regardless of its concentration . . . .”\(^{119}\) The CAS determined that the “FEI disciplinary system is indeed compatible with the principles and statutes of Swiss law” because strict liability promotes objectives “unanimously recognised by sports organisations and government institutions.”\(^{120}\)

\(^{114}\) See id. para. 16 (reporting “undisputed” positive test).

\(^{115}\) See id. (describing three classes of substances under EADCM Regulations: Doping, Medication class A, and Medication class B). Medication class B was not at issue here. Id.

\(^{116}\) See id. (reporting contention of German NF and FEI).

\(^{117}\) See id. (arguing low concentration of Capsaicin in Equi-Block dilutes any therapeutic effect).

\(^{118}\) See id. paras. 16–18 (citing interests such as fairness, health, breeding quality, and integrity). The Panel examined FEI General Regulations and EADCM Regulations. Id. Mr. Ahlmann argues FEI regulations run afoul of Swiss Cartel Law; however, this was promptly discredited. Id. para. 18.


b. Capsaicin Effect

Next, the CAS concluded that Capsaicin, a prohibited substance, has a hypersensitizing effect and thus must be considered a doping substance.121 Expert witness testimony by professors and veterinarians explained the two-fold effect of Capsaicin when applied topically: 1) burning sensation (hypersensitization), and 2) desensitization (analgesic).122 The Panel stressed that these steps occur consecutively and are inseparable.123 Accordingly, the Panel found that the presence of Capsaicin in Cöster’s system proves hypersensitization occurred at some point, constituting a doping violation under FEI rules.124

Furthermore, the CAS panel disagreed with the FEI Tribunal finding that “the FEI has to prove more than the mere existence of the substance” because this would impose a heavy burden on the FEI.125 This burden would be exceedingly difficult for the FEI, considering topical Capsaicin is practically untraceable on the skin.126 Subsequently, the CAS found the following issues irrelevant under the strict liability standard: state law, common usage, concentration, and drug alternatives.127 However, the CAS engaged in a brief discussion of the less contentious issues, including the conflicting expert opinions concerning Capsaicin’s benign nature in low concentrations and its common usage by equestrians.128 Concluding its deliberation, the CAS dismissed these issues but encouraged the FEI to harmonize its List of prohibited substances in light of this discussion of Capsaicin.129

121. See Ahlmann, supra note 8, paras. 18–20 (deciding hypersensitizing effect of Capsaicin meets doping standard under FEI Rules). The panel dismissed the argument that Capsaicin also has a pain relieving effect when applied topically. Id.
122. See id. paras. 18–19 (explaining dual effects of topical Capsaicin application). For a full list of expert witnesses, see Ahlmann, supra note 8, paras. 9–10.
123. See id. para. 19 (describing Capsaicin’s hypersensitizing and subsequent analgesic effects).
124. See id. (determining doping offense has “effectively occurred”).
125. See id. (quoting FEI Tribunal Decision that would create practically impossible standard requiring FEI to prove intent). See also id. (agreeing with FEI that effect would “make the fight against doping illusory” because competitors could claim alternative use to avoid violation).
126. See id. (considering practical difficulties of evidentiary burden). The Panel also notes the Swedish National Equestrian Team adopted a strict no-competition rule within ninety-six hours of topical Capsaicin application. Id.
127. See id. para. 20 (determining issues irrelevant in light of strict liability standard).
128. See id. (considering low concentration of Capsaicin in Equi-Block and common usage of Capsaicin).
129. See id. (deciding issues irrelevant but expressing concern for harmonization of FEI rules regarding Capsaicin).
3. Sanctions

Finally, the CAS determined the sanction for Mr. Ahlmann’s anti-doping rule violation.130 Pursuant to the FEI General Regulations,

[t]he CAS has the power to impose the same scale of penalties as the FEI Tribunal . . . . The CAS may impose more severe penalties than those imposed in the first instance, provided they are within the limits of the penalty jurisdiction of the body from which the [a]ppeal to the CAS is brought.131

The CAS considered a number of aggravating and mitigating factors when determining Mr. Ahlmann’s sanction.132 Ultimately, the CAS imposed an eight-month period of ineligibility and a fine.133

V. Critical Analysis: Strict Liability Is No Dark Horse

In upholding the appeal of the German NF, the CAS focused on the burden of proof under the List.134 Under FEI rules, there is a strict liability standard for doping.135 The Tribunal’s determination that the FEI had to prove “more than the mere existence” of the substance ultimately prevented the Tribunal from finding a more serious rule violation.136 In light of the established strict liability standard in equine sport, the CAS decision illuminates why the Tribunal’s holding was misguided.137 The List requires that a prohibited substance must be “used to hypersensitise or desensitise the

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130. See id. at 21 (finding Mr. Ahlmann “guilty of an anti-doping rule violation”).
131. See FEI Gen. Regulations, supra note 105, art. 162 (outlining authority of CAS to sanction and impose penalties).
132. See Ahlmann, supra note 8, paras. 21–22 (aggravating: level of competition, 2004 team medal revocation, image of German NF damage, German NF general warnings, lack of consultation) (mitigating: general definitions on prohibited substances list, admission of mistake).
133. See Ahlmann, supra note 8, paras. 22–23 (explaining eight-month period of ineligibility is one third of maximum for a doping offense).
134. See id. para. 18–19 (explaining FEI should not have to “demonstrate the wrongful act itself”). Id. para. 19.
135. See id. para. 18 (confirming strict liability standard). Strict liability is integral to protecting integrity in sport. See id. See also supra notes 118–120 and accompanying text.
136. See Ahlmann, supra note 8, paras. 10–12 (discussing strict liability and deciding proper rule category).
137. See generally Ahlmann, supra note 8, paras. 104–34 (detailing CAS decision regarding Mr. Ahlmann); Id. at 19 (rejecting FEI contention that FEI must prove intent along with presence of prohibited substance).
limbs or body parts” to constitute a violation.138 The FEI Tribunal stressed the importance of the List’s wording, emphasizing that the language gives “no indication . . . that the presence of the substance already implies the use as a hypersensitizing agent.”139 However, the Tribunal neglected to consider the practical fact that the mere presence of the prohibited substance in the horse’s body produces a hypersensitizing effect (hypersensitization), constituting a rule violation.140

Likewise, the CAS found that “at some phase, some part of the horse’s body had necessarily been hypersensitised . . . .”141 Reading FEI Rules in light of the strict liability standard, the CAS also indicated a myriad of practical issues with proving intent—concerns unanswered by the Tribunal.142 Unlike the FEI Tribunal’s standard requiring proof beyond mere existence, the CAS questioned the practicability of proving the intent to dope and determined presence of a prohibited substance is equivalent to a violation.143 As such, the CAS correctly classified Mr. Ahlmann’s rule violation as doping by noting that presence of a prohibited substance is indicative of a performance enhancing effect, regardless of intent.144

Further, a key argument of Mr. Ahlmann that was largely ignored by the CAS argues that the FEI List is “unclear, misleading and has not been adapted to scientific and technical progress.”145 Mr. Ahlmann argued that the illustrative rather than specific nature of the List creates ambiguity.146 This ambiguity is relevant to the fairness of the application of the strict liability standard to equestrian

138. See Tribunal Decision, supra note 24, at 10 (reporting Equine Prohibited List wording).
139. See id. (describing reasoning).
140. See Ahlmann, supra note 8, para 17–18 (explaining presence constitutes violation). See also supra notes 122–24 and accompanying text (describing inseparable, two-fold effect of Capsaicin).
141. Ahlmann, supra note 8, para. 17–18.
142. See supra notes 125–26 and accompanying text (detailing practical issues of proving intent). But see Tribunal Decision, supra note 24, at 10 (neglecting to address practical issues of proving intent).
143. See Ahlmann, supra note 8, para. 19 (noting hypersensitization occurred at some point). “[S]uch an evidentiary burden would be nearly impossible to meet.” Id.
144. See id. para. 19 (explaining presence of substance means hypersensitization occurred). See also supra notes 121–29 and accompanying text (describing effect of Capsaicin).
145. See Ahlmann, supra note 8, para. 7 (arguing List is “misleading”). See also id. para. 16 (calling List “ambiguous and unclear”).
146. See id. (contending List does not properly define doping).
athletes. Unlike the United States Equestrian Federation (USEF), which “expressly mention[s] Capsaicin among the ‘Forbidden substances,’” the FEI List is merely “illustrative.” Strengthening Mr. Ahlmann’s argument, Capsaicin is “not expressly mentioned on the FEI Prohibited Substances List.”

However, the CAS swiftly rejected this argument by confirming the endorsement of strict liability in equestrian sport. The CAS found Mr. Ahlmann’s argument unconvincing because the illustrative List focuses on the effect of prohibited substances rather than providing an inventory of every individual illegal substance. While Mr. Ahlmann argued that the List “leave[s] gray areas between medication and doping and between medication and between legal and illegal practices,” the CAS properly invoked the strict liability standard to reject Mr. Ahlmann’s argument. If the CAS had accepted Mr. Ahlmann’s argument that the List was fundamentally unfair, the violation would likely have been reduced to a minor sanction.

Overall, the CAS made a proper decision to sanction Mr. Ahlmann for the doping violation. The reasoning reflects proper application of the strict liability standard required under FEI regulations. However, the CAS erred in ignoring Mr. Ahlmann’s argument regarding the vagueness of the List. The American horseracing industry, handling its own doping issues, has implemented a disorderly and disjointed regulatory scheme in the

147. See id. (arguing List is unclear and merely illustrative). See also infra notes 148–49 and accompanying text (describing List).
148. See Tribunal Decision, supra note 24, at 15 (describing Drugs and Medications Guidelines of USEF). See also Ahlmann, supra note 8, para. 7 (suggesting illustrative nature of List is detrimental to athlete’s ability to comply).
149. See Ahlmann, supra note 8, para. 8 (reporting Capsaicin does not appear on List).
150. See id. para. 18 (confirming strict liability standard). See also supra notes 118–20 (describing strict liability standard).
151. See Ahlmann, supra note 8, para. 7 (citing EADCM Regulations providing “and other substances with a similar chemical structure or similar biological effect(s)”).
152. Id. para. 8 (describing gray area); id. para. 18 (supporting strict liability).
153. See id. (describing Mr. Ahlmann’s position that gray areas in rules should be interpreted in favor of competitor).
154. See supra notes 101–33 and accompanying text (detailing reasons why CAS made proper decision to sanction Mr. Ahlmann).
155. See supra notes 118–20 and accompanying text (describing strict liability standard).
156. See supra notes 145–55 and accompanying text (explaining Mr. Ahlmann’s argument and reasoning for CAS dismissal).
United States.\textsuperscript{157} In contrast to the orderly, consistent endorsement of strict liability implemented by the FEI, horseracing is struggling to control doping under its disorderly regulatory scheme.\textsuperscript{158}

Despite divergent strategies in the fight against doping, both Olympic equestrian sport and horseracing apply a version of strict liability.\textsuperscript{159} However, the CAS failed to acknowledge any alternative to strict liability, such as a rebuttable presumption rule that exists in the United States.\textsuperscript{160} Although the Tribunal waivered momentarily, it eventually gave proper deference to the strict liability standard set by the FEI.\textsuperscript{161}

Unfortunately, neither the Tribunal nor the CAS considered an alternative to strict liability.\textsuperscript{162} This approach disregards consideration of an alternative—the rebuttable presumption rule.\textsuperscript{163} This rule provides an opportunity for presentation of evidence to refute a positive test.\textsuperscript{164} However, in the defending strict liability standard, the CAS example is illustrative: “any PR could simply declare that he used the substance for its original—e.g. therapeutic—purposes to escape any charge of doping.”\textsuperscript{165} This argument also relates to application of the rebuttable presumption rule in doping because the rebuttable presumption rule would likely allow the person responsible to escape liability if the substance has multiple effects (doping and therapeutic).\textsuperscript{166} The Tribunal and the CAS appropriately declined to consider this rule, or other strict liability alternatives, be-

\begin{itemize}
  \item \textsuperscript{157} See supra note 52 and accompanying text (detailing thoughts on regulatory system). See also supra notes 50–62 and accompanying text for a further discussion of doping and regulatory scheme in the American horseracing arena.
  \item \textsuperscript{158} See supra notes 118–20 and accompanying text (describing strict liability standard in equestrian sport).
  \item \textsuperscript{159} See supra notes 58–62, 118–20 and accompanying text (detailing strict liability in horseracing and Olympic equestrian sport).
  \item \textsuperscript{160} See Ahlmann, supra note 8, para. 18 (upholding strict liability and ignoring “unfairness” argument).
  \item \textsuperscript{161} See Tribunal Decision, supra note 24, at 10–12 (describing strict liability standard in Olympic equestrian sport).
  \item \textsuperscript{162} See supra notes 83–133 and accompanying text (detailing the reasoning of each decision-making body).
  \item \textsuperscript{163} See supra note 61 and accompanying text (describing rebuttable presumption rule in horseracing). The rebuttable presumption is supported by those who disfavor the harshness of strict liability. See id.
  \item \textsuperscript{164} See supra note 61 and accompanying text (describing application of rule).
  \item \textsuperscript{165} See Ahlmann, supra note 8, para. 19 (cautioning against danger of greater burden than mere existence).
  \item \textsuperscript{166} See id. (arguing any standard less than strict liability is unacceptable). The CAS argues that the evidentiary burden proving intent to dope is too high. See id. In light of this and the need to protect the integrity of sport, strict liability is appropriate. See id.
\end{itemize}
cause any standard other than strict liability could impose an impossible evidentiary burden on the FEI. 167

VI. IMPACT: STRICT LIABILITY CONFIRMED WITH STABLE PRECEDENT

The CAS decision in Ahlmann created additional precedent for upholding the strict liability standard in equestrian sport. 168 Much has changed in the equestrian world since the six doping cases at the 2008 Summer Games. 169 The Clean Sport campaign and its working committees, launched after the confusion and scandals of 2008, have produced numerous publications, including updated prohibited substance Lists, EADCM Regulations, and Anti-Doping Rules for Human and Equine Athletes. 170 In the fall of 2010, the FEI launched both iPhone and Android applications that provide easy access to the Equine Prohibited Substance List. 171

The FEI praised its Clean Sport campaign in August 2012 after a clean London Games that summer. 172 FEI President, Princess Haya, remarked that the clean games “demonstrate[d] the success of the FEI Clean Sport campaign, which has resulted in a major reduction in the number of positives in the Olympic disciplines over the past two and a half years.” 173 Additionally, the FEI boasted that the 2012 London games were subject to the most testing of “any previous Olympic Games.” 174

In a 2014 decision, Sheikh Hazza Bin Sultan Zayed Al Nahyan v. FEI, 175 the CAS struck down a direct challenge to the strict liability evidence burden by the Tribunal and the CAS, see supra notes 91–94, 125–126 and accompanying text.

167. See id. at 19 (explaining evidentiary burden). For a further discussion of the evidentiary burden by the Tribunal and the CAS, see supra notes 91–94, 125–126 and accompanying text.

168. See Ahlmann, supra note 8, para. 18 (upholding strict liability). See also Wendt, supra note 7, at 11–12 (arguing CAS support of strict liability spurred FEI action).

169. See supra note 3 and accompanying text (listing 2008 doping cases).


173. See supra note 172 (reporting fewer positives).

174. See supra note 172 (describing frequency of testing).

standard in equine sport. Rejecting the argument that strict liability is fundamentally unfair, the CAS affirmed that the standard is “justified by the public interest against doping in the sport.” Moreover, the CAS concluded imposing strict liability is “well within the margin of appreciation permitted to the FEI in making rules for the sport.”

The recent precedent of Al Nahyan demonstrates the continued commitment to the strict liability standard in equestrian sport. Looking forward, the FEI has announced a January 2016 launch of a global Anti-Doping and Controlled Medication Programme. Aiming to promote education and awareness, the FEI hopes to “protect horse welfare and maintain a level playing field.” However, the regime is not without critics. Strict liability in equestrian sport has been challenged in Tribunal hearings and before the CAS without significant headway.

In contrast, one equine sports law practitioner supports flexibility because of the unique relationship between horse and rider in equestrian sport. Unlike human athletes who have total control over their own bodies, a rider cannot practically exercise complete


176. See id. para. 31 (finding strict liability “justified” to prevent doping). It should be noted the CAS partially amended the Tribunal’s decision on other grounds. Id. paras. 32–34.

177. See id. at 30–31 (affirming strict liability). See also Sheikh challenges standing of FEI’s strict liability principle in anti-doping cases, HORSE TALK.COM (June 24, 2015, 5:38 PM), http://horsetalk.co.nz/2015/06/24/sheikh-fei-strict-liability-principle-anti-doping/#axzz5SrRqPRUpX (“The strict liability principle had been a cornerstone of the FEI’s regulatory framework since 1982.”).

178. See Al Nahyan, supra note 175, para. 31 (describing reasoning).

179. See supra notes 175–78 and accompanying text (describing CAS upholding strict liability).


181. See id. (justifying new, updated rules).


183. See supra notes 83–133 and accompanying text (detailing one particular challenge to standard). See also supra notes 175–78 and accompanying text (describing another failed challenge).

184. See Clarkson, supra note 182 (describing difference between human doping and equine doping).
control over his or her mount. Accordingly, the attorney advocates a subjective test for inadvertent doping. However, riders would need to prove contamination to utilize this more subjective and flexible standard of review.

Despite occasional protests from equestrian athletes, it seems strict liability in equine sport is here to stay. Although commenters and competitors alike have criticized the strict liability standard, no CAS decision has reconsidered strict liability for doping in international equestrian sport. FEI communication and educational campaigns have had positive impact in decreasing violations, with the FEI reporting steady decreases in positive tests under EADCM Regulations with a yearly increase of horses being tested.

With strict liability as the cornerstone of doping regulation, accountability, health, and safety will remain top priorities. This system encourages disclosure by veterinarians, athletes, grooms, and others involved in the care of equine athletes. Even putting aside health and safety issues, doping in sport compromises the integrity of the game. The FEI should be lauded for its efforts to eradicate equine doping through its Clean Sport campaign and its endorsement of a strict liability standard. Ultimately, the combination of a strict liability standard coupled with a rigorous educational campaign is the best way to maintain the integrity of equestrian sport while protecting both human and equine athletes.

Mary Zoeller*

185. See id. (explaining difference between human doping and equine doping).
186. See id. (arguing for flexibility in inadvertent doping cases).
187. See id. (advocating for “sliding scale”).
188. See EADCM Regulations, supra note 24, art. 2.1.1 at 1 (containing language that creates strict liability standard). See also supra note 44 (describing strict liability standard for Equine Anti-Doping offenses).
189. For a discussion of the most recent challenge to strict liability in the CAS, see supra notes 175–82 and accompanying text.

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