



Arbitration Newsletter Switzerland

Federal Supreme Court annuls CAS Award for lack of jurisdiction

On December 24, 2009, the Federal Supreme Court made available on its website its decision of November 6, 2009, between Florian Busch, a German ice hockey player, and the World Anti-Doping Agency ("WADA")¹, annulling a CAS Award of June 23, 2009.²

1 Facts of the Case

On March 26, 2008, 12.30 an agent of the German National Anti-Doping Agency ("NADA") visited Florian Busch at his domicile for an out-of-competition sample collection ("*Trainingsprobe*"). Florian Busch refused to participate and, therefore, the agent left Florian Busch's apartment at 12.50. Four minutes later Florian Busch contacted NADA by phone, which he did, again, at 14.16 where he explicitly declared his willingness to submit now to such sample collection. NADA, however, informed him first that such sample collection would no longer be possible but, nevertheless, at 17.00 of the same date a sample collection did still take place which was then subsequently analysed and did not reveal any doping related substances.

The German Ice Hockey Federation then issued a warning against Florian Busch, together with a fine of EUR 5'000 to a non-profit organization and the duty to provide 56 hours of community work as youth coach. Then, two different proceedings were started.³ In

essence, WADA appealed to the CAS requesting for a two years ban for Florian Busch as he deliberately avoided the sample collection. CAS accepted jurisdiction over this case, based on a so called "Player Entry Form" signed by Florian Busch and sanctioned Florian Busch with a two-years period of ineligibility as player. Florian Busch then requested at the Federal Supreme Court annulment of this CAS Award.

2 Arguments of the Federal Supreme Court

The Federal Supreme Court first analysed the wording contained in the Player Entry Form of the International Ice Hockey Federation ("IIHF"), which was every year signed by Florian Busch as player of the German National Hockey Team participating in the Ice Hockey World Championships in the years of 2003 - 2008 and in the Olympic Games of Turin in the year of 2006. In view of the Federal Supreme Court the following wording does in general qualify as an arbitration agreement under Article 178 PILA:

*"I, the undersigned, declare, on my honour that
a) I am under the jurisdiction of the National Association I represent.*

...

1) I agree to abide by and observe the IIHF Statutes, By-laws and Regulations (including those related to Medical Doping Control) and the decision by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in

¹ 4A_358/2009.

² CAS 2008/A/1564.

³ The facts as to those two proceedings are somehow sketchy in the factual summary of the Federal Supreme Court and, therefore, not further summarized here as they seem to be irrelevant to the outcome of the Federal Supreme Court decision. A more detailed, comprehensive summary is to be found in the CAS Award, N 31 to 61.



Lausanne, Switzerland, for definitive and final resolution."

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But, in a second step the Federal Supreme Court then turned to the wording "in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto" and concluded that Florian Busch, in signing regularly the Player Entry Form for the World Championships, did not have to expect that he accepted jurisdiction of the CAS for any other matters beyond the World Championships and relating to his sporting activities as ice hockey player. Therefore, the Federal Supreme Court concluded - in applying the good faith principle - that Florian Busch, while signing the Player Entry Form, could not reasonably anticipate that sanctions against his preliminary refusal to participate in the sample collection would be covered by this arbitration agreement as well.

In a last step the Federal Supreme Court analysed also whether jurisdiction of the CAS could be established by construing the wording contained in the Player Entry Form as a general reference to the IIHF statutes and the arbitration clause contained therein but then denied such general reference. In doing so, it distinguished the present case in particular from the case of Ricardo Lucas Dodo vs. FIFA and WADA.⁴

3 Conclusions

In a first analyse the decision of the Federal Supreme Court seems to be surprising since the Federal Supreme Court has in previous cases been rather generous in confirming awards on jurisdiction by the CAS. In particular, it is difficult to understand in how far the Dodo-Case referred to by the Federal Supreme Court should be resolved differently than the case of Florian Busch.

January 5, 2010

Hansjörg Stutzer

Attachments:

- Federal Supreme Court decision 4A_358/2009 of November 6, 2009.
- CAS Award 2008/A/1564 of June 23, 2009.

⁴ 4A_460/2008 of January 9, 2009, confirming the CAS Awards 2007/A/1370 and 1376.

Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

{T 0/2}
4A_358/2009

Urteil vom 6. November 2009
I. zivilrechtliche Abteilung

Besetzung
Bundesrichterin Klett, Präsidentin,
Bundesrichter Corboz,
Bundesrichterin Rottenberg Liatowitsch,
Bundesrichter Kolly, Bundesrichterin Kiss,
Gerichtsschreiber Leemann.

Parteien
A. _____,
Beschwerdeführer,
vertreten durch Rechtsanwälte Dr. Maurice Courvoisier und Dr. Philippe Nordmann,

gegen

World Anti-Doping Agency (WADA),
Beschwerdegegnerin,
vertreten durch Maîtres François Kaiser et Yvan Henzer.

Gegenstand
Internationales Schiedsgericht,

Beschwerde gegen den Schiedsspruch des Tribunal Arbitral du Sport (TAS) vom 23. Juni 2009.
Sachverhalt:

A.
A.a A. _____ (Beschwerdeführer) mit Wohnsitz in D. _____ ist professioneller Eishockeyspieler. Er nahm mit der deutschen Eishockey-Nationalmannschaft an verschiedenen internationalen Wettkämpfen teil, so unter anderem an den Eishockey-Weltmeisterschaften in den Jahren 2003, 2004, 2006, 2007 und 2008 sowie an den Olympischen Winterspielen in Turin im Jahr 2006.

Die Welt-Anti-Doping-Agentur (WADA) (Beschwerdegegnerin) ist eine Stiftung schweizerischen Rechts mit Sitz in Lausanne. Ihr Zweck ist der weltweite Kampf gegen Doping im Sport.

Die International Ice Hockey Federation (IIHF) ist der internationale Eishockeyverband mit Sitz in Zürich.

A.b Am 6. März 2008 um 12.30 Uhr erschien Herr B. _____ im Auftrag der deutschen Nationalen Anti-Doping-Agentur (NADA) am Wohnsitz des Beschwerdeführers, um eine unangemeldete Probe ("out-of-competition sample collection"; "Trainingsprobe") vorzunehmen. Nach Darstellung der Beschwerdegegnerin weigerte sich der Beschwerdeführer, auch nachdem er vom Dopingkontrolleur auf die schwerwiegenden disziplinarischen Sanktionen hingewiesen worden sei, die Kontrolle durchzuführen. Unstreitig ist, dass der Dopingkontrolleur die Wohnung des Beschwerdeführers um 12.50 Uhr unverrichteter Dinge verliess.

Vier Minuten später meldete sich der Beschwerdeführer telefonisch bei der NADA und informierte sie über den Vorfall. Um 14.16 Uhr rief er nochmals bei der NADA an und erklärte, er wolle sich einer Probenahme unterziehen, worauf ihm die NADA mitteilte, eine Wiederholung der Kontrolle sei nicht möglich. In der Folge fand auf seine Initiative hin noch am gleichen Tag um 17.00 Uhr eine Dopingkontrolle statt, die vom Deutschen Eishockey-Bund (DEB) organisiert und von Herrn B._____ durchgeführt wurde. Die Probe wurde vom Institut für Dopinganalytik und Sportbiochemie Dresden analysiert; dabei liessen sich keine verbotenen Wirkstoffe oder unzulässigen Methoden nachweisen.

A.c Am 7. März 2008 informierte die NADA den Deutschen Eishockey-Bund über den Vorfall. Am 19. März 2008 teilte dieser der NADA seine Absicht mit, den Beschwerdeführer öffentlich zu verwarnen. Die NADA wiederum wies den DEB darauf hin, dass die Verweigerung einer Probenahme einen Verstoß gegen Artikel 2.3 des NADA Code (NADC) bedeute, der mit Artikel 2.3 des WADA Code (WADC) übereinstimmt, und entsprechend zu sanktionieren sei.

Der DEB informierte die NADA, dass die im NADC bzw. WADC vorgesehenen Sanktionen übermässig seien und angesichts der Umstände des konkreten Falls eine öffentliche Verwarnung ausreiche. Entsprechend sprach er am 15. April 2008 eine öffentliche Verwarnung gegen den Spieler aus und bestrafte ihn mit einer Busse von EUR 5'000.-- sowie 56 Stunden gemeinnützige Arbeit. NADA nahm vom Entscheid des DEB über die Medien Kenntnis und erfuhr dabei auch, dass die IIHF diesen unterstützte und den Spieler an der Eishockey-Weltmeisterschaft in Kanada vom 2. - 11. Mai 2008 würde spielen lassen. Die NADA informierte daher am 21. April 2008 die Beschwerdegegnerin, damit diese Massnahmen ergreifen konnte.

Mit Schreiben vom 6. Mai 2008 ersuchte die Beschwerdegegnerin gestützt auf Artikel 3.1 der IIHF-Disziplinarordnung 2004 (Disciplinary Regulations) einerseits das Direktorium der IIHF-Weltmeisterschaften, den Beschwerdeführer ab 6. Mai 2008 einstweilig zu suspendieren und andererseits die IIHF, innert 48 Stunden einen Entscheid über die vorläufige Suspendierung zu fällen. Im Weiteren forderte die Beschwerdegegnerin die IIHF-Disziplinarkommission (Disciplinary Committee) auf, ein Disziplinarverfahren gegen den Beschwerdeführer einzuleiten und ihn mit einer zweijährigen Spielsperre zu belegen.

Das Präsidium der IIHF teilte der Beschwerdegegnerin mit E-Mail vom 7. Mai 2008 mit, dass sie nicht in der Lage sei, dem Antrag entsprechend tätig zu werden. Die IIHF wies unter anderem darauf hin, dass die vom Deutschen Eishockey-Bund eingesetzte interne Disziplinarkommission am 15. April 2008 einen Entscheid in der Sache gefällt habe und die Rechtsmittelfrist noch laufe.

Die Beschwerdegegnerin schrieb der IIHF gleichentags, sie gehe davon aus, dass es sich beim Schreiben vom 7. Mai 2008 um eine Entscheidung im Sinne der IIHF-Disziplinarordnung handle, die einem Weiterzug an das Tribunal Arbitral du Sport (TAS) unterliege.

A.d Am 9. Mai 2008 focht die Beschwerdegegnerin den Entscheid des DEB vom 15. April 2008 beim Ad-hoc-Schiedsgericht des Deutschen Olympischen Sportbundes an und beantragte, der Entscheid sei aufzuheben und es sei gegen den Spieler eine zweijährige Spielsperre zu verhängen. Das Ad-hoc-Schiedsgericht wies die Beschwerde mit Entscheid vom 3. Dezember 2008 ab, da es für die von der Beschwerdegegnerin beantragte Sanktion an einer rechtlichen Grundlage fehle.

B.

Am 27. Mai 2008 appellierte die Beschwerdegegnerin beim TAS gegen das Schreiben der IIHF vom 7. Mai 2008 und beantragte, es sei eine zweijährige Spielsperre zu verhängen (Verfahren CAS 2008/A/1564). Sie wies darauf hin, dass die Schiedsklage zur Wahrung ihrer Rechte erfolge, insbesondere für den Fall, dass die beim deutschen Ad-hoc-Schiedsgericht eingereichte Klage nicht zugelassen würde. Das Verfahren wurde daraufhin bis zum Entscheid des deutschen Schiedsgerichts sistiert.

In der Folge focht die Beschwerdegegnerin auch den Entscheid des Ad-hoc-Schiedsgerichts des Deutschen Olympischen Sportbundes beim TAS an (Verfahren CAS 2008/A/1738). Das TAS trat darauf jedoch mit Entscheid vom 23. Juni 2009 mangels Zuständigkeit nicht ein.

Die IIHF verzichtete auf eine Teilnahme am Schiedsverfahren. Der Beschwerdeführer erhob unter

anderem die Einrede der Unzuständigkeit, da es an einer Schiedsvereinbarung fehle.

C.

Das TAS erachtete sich hinsichtlich des zuerst erhobenen Appeal (Verfahren CAS 2008/A/1564) gestützt auf das vom Beschwerdeführer jeweils im Hinblick auf die Weltmeisterschaft unterzeichnete "Player Entry Form" für zuständig und sah das E-Mail des IIHF vom 7. Mai 2008 als anfechtbaren Entscheid an. Es hob den Entscheid der IIHF mit Schiedsspruch vom 23. Juni 2009 auf und verhängte gegen den Beschwerdeführer eine zweijährige Spielsperre.

D.

Mit Beschwerde in Zivilsachen beantragt der Beschwerdeführer dem Bundesgericht, der Schiedsspruch des TAS vom 23. Juni 2009 (Verfahren CAS 2008/A/1564) sei aufzuheben. Sowohl die Beschwerdegegnerin als auch die Vorinstanz schliessen auf Abweisung der Beschwerde. Der Beschwerdeführer hat dem Bundesgericht eine Replik eingereicht.

E.

Mit Verfügung vom 7. September 2009 hat das Bundesgericht der Beschwerde die aufschiebende Wirkung erteilt.

Erwägungen:

1.

Nach Art. 54 Abs. 1 BGG ergeht der Entscheid des Bundesgerichts in einer Amtssprache, in der Regel derjenigen des angefochtenen Entscheids. Wurde dieser Entscheid in einer anderen Sprache abgefasst, bedient sich das Bundesgericht der von den Parteien verwendeten Amtssprache. Der angefochtene Entscheid ist in englischer Sprache abgefasst. Da es sich dabei nicht um eine Amtssprache handelt und sich die Parteien vor Bundesgericht verschiedener Sprachen bedienen, ergeht der Entscheid des Bundesgerichts praxisgemäss in der Sprache der Beschwerde.

2.

Im Bereich der internationalen Schiedsgerichtsbarkeit ist die Beschwerde in Zivilsachen unter den Voraussetzungen der Art. 190-192 IPRG (SR 291) zulässig (Art. 77 Abs. 1 BGG).

2.1 Der Sitz des Schiedsgerichts befindet sich vorliegend in Lausanne. Der Beschwerdeführer hatte im relevanten Zeitpunkt weder seinen Wohnsitz noch seinen gewöhnlichen Aufenthalt in der Schweiz. Da die Parteien die Bestimmungen des 12. Kapitels des IPRG nicht schriftlich ausgeschlossen haben, gelangen diese zur Anwendung (Art. 176 Abs. 1 und 2 IPRG).

2.2 Zulässig sind allein die Rügen, die in Art. 190 Abs. 2 IPRG abschliessend aufgezählt sind (BGE 134 III 186 E. 5 S. 187; 128 III 50 E. 1a S. 53; 127 III 279 E. 1a S. 282). Nach Art. 77 Abs. 3 BGG prüft das Bundesgericht nur die Rügen, die in der Beschwerde vorgebracht und begründet worden sind; dies entspricht der in Art. 106 Abs. 2 BGG für die Verletzung von Grundrechten und von kantonalem und interkantonalem Recht vorgesehenen Rügepflicht (BGE 134 III 186 E. 5 mit Hinweis).

2.3 Das Bundesgericht legt seinem Urteil den Sachverhalt zugrunde, den das Schiedsgericht festgestellt hat (Art. 105 Abs. 1 BGG). Es kann die Sachverhaltsfeststellung des Schiedsgerichts weder berichtigen noch ergänzen, selbst wenn diese offensichtlich unrichtig ist oder auf einer Rechtsverletzung im Sinne von Art. 95 BGG beruht (vgl. Art. 77 Abs. 2 BGG, der die Anwendbarkeit von Art. 105 Abs. 2 sowie Art. 97 BGG ausschliesst). Allerdings kann das Bundesgericht die tatsächlichen Feststellungen des angefochtenen Schiedsentscheids überprüfen, wenn gegenüber diesen Sachverhaltsfeststellungen zulässige Rügen im Sinne von Art. 190 Abs. 2 IPRG vorgebracht

oder ausnahmsweise Noven berücksichtigt werden (BGE 133 III 139 E. 5 S. 141; 129 III 727 E. 5.2.2 S. 733; je mit Hinweisen). Neue Tatsachen und Beweismittel dürfen zudem nur insoweit vorgebracht werden, als erst der Entscheid der Vorinstanz dazu Anlass gibt (Art. 99 Abs. 1 BGG).

Der Beschwerdeführer stellt seinen rechtlichen Ausführungen eine ausführliche Sachverhaltsdarstellung voran, in der er den Ablauf der Ereignisse sowie des Verfahrens aus seiner Sicht darlegt. Wie die Beschwerdegegnerin zu Recht einwendet, weicht er darin in verschiedenen Punkten von den tatsächlichen Feststellungen der Vorinstanz ab oder erweitert diese, ohne Ausnahmen von der Sachverhaltsbindung gemäss Art. 105 Abs. 2 und Art. 97 Abs. 1 BGG geltend zu machen. Seine Vorbringen haben insoweit unbeachtet zu bleiben. Unbeachtlich sind auch die verschiedenen vom Beschwerdeführer neu eingereichten Beweismittel.

3.

Der Beschwerdeführer macht unter Berufung auf Art. 190 Abs. 2 lit. b IPRG geltend, die Vorinstanz habe sich zu Unrecht für zuständig erklärt.

3.1 Die Vorinstanz hat zunächst unter Verweis auf die von der IIHF eingegangene Verpflichtung zur Einhaltung und Umsetzung des WADC, die breite Zweckbestimmung der damals geltenden IIHF-Statuten, die über die Verantwortlichkeit für die IIHF-Meisterschaften hinausgingen, sowie die Mitgliedschaft des DEB bei der IIHF festgehalten, dass der Beschwerdeführer - aus Sicht der Statuten der IIHF - als Spieler zu betrachten sei, der vom DEB für die Teilnahme an einer IIHF-Meisterschaft bzw. Veranstaltung aufgestellt worden und als solcher durch die IIHF-Statuten und Reglemente gebunden sei und die endgültige und verbindliche Entscheidungsbefugnis der IIHF zu anerkennen habe. Infolgedessen verlange die IIHF anlässlich einer IIHF-Meisterschaft oder IIHF-Veranstaltung von den Spielern die Unterzeichnung eines Anmeldeformulars ("Player Entry Form"), das unter anderem wie folgt lautet:

"I, the undersigned, declare, on my honour that

a) I am under the jurisdiction of the National Association I represent.

...

l) I agree to abide by and observe the IIHF Statutes, By-laws and Regulations (including those related to Medical Doping Control) and the decisions by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution."

Die Vorinstanz hat zutreffend festgehalten, dass die erwähnte Schiedsvereinbarung den Voraussetzungen von Art. 178 IPRG zu genügen habe und im Übrigen - was von keiner Partei in Frage gestellt wird - schweizerisches Recht für anwendbar erklärt. Sie hat die Erklärung des Beschwerdeführers sodann in Anwendung des Vertrauensprinzips ausgelegt und erwogen, dass die Spieler sich ganz allgemein an die IIHF-Statuten und Reglemente sowie insbesondere die von der IIHF getroffenen Entscheidungen (einschliesslich Disziplinar massnahmen) gebunden erklärt hätten. Die Verpflichtung, nach Ausschöpfung der internen Rechtsmittel an das TAS zu gelangen, beziehe sich nicht nur auf Streitigkeiten im Zusammenhang mit der IIHF-Meisterschaft, sondern auch auf solche, die nicht notwendigerweise in Verbindung mit der IIHF-Meisterschaft und den damit zusammenhängenden Aspekten der IIHF-Statuten und Reglemente stünden. Dies ergebe sich aus der Verwendung des Wortpaares "and/or" im Text von lit. l sowie aus der allgemeinen Formulierung des Eingangssatzes dieser Klausel. Es bestehe daher kein Anhaltspunkt, der für einen Ausschluss der Zuständigkeit des TAS sprechen würde.

Die Vorinstanz befand zudem, der Umstand, dass der Beschwerdeführer die besagten Anmeldeformulare seit 2003 beinahe jedes Jahr unterzeichnet habe, bedeute nicht, dass die Gültigkeit des Dokuments auf ein Jahr beschränkt sei. Zudem verlange die IIHF dessen wiederholte

Unterzeichnung aus administrativen Gründen anlässlich jeder IIHF-Meisterschaft auch von Spielern, die bereits ein solches Formular unterzeichnet hätten, um sicherzustellen, dass alle an der aktuellen IIHF-Meisterschaft das Formular unterzeichnet hätten. Da die IIHF nie wissen könne, ob ein für eine IIHF-Meisterschaft aufgestellter Spieler auch an der folgenden Meisterschaft oder - wegen einer Verletzung oder Leistungsschwäche - erst an einer späteren Meisterschaft teilnehmen werde, könne die IIHF ihrer Verpflichtung zur Vornahme von Trainingskontrollen und Kontrollen ausserhalb der Saison gegenüber der WADA nur nachkommen, wenn einmal für eine IIHF-Meisterschaft aufgestellte Spieler so lange im rechtlichen Zuständigkeitsbereich der IIHF verblieben, als sie für zukünftige Wettkämpfe bzw. Veranstaltungen in Frage kämen.

Nach Ansicht der Vorinstanz erfüllt das vom Beschwerdeführer unterzeichnete Anmeldeformular damit die Anforderungen an eine gültige Schiedsklausel. Das Schreiben der IIHF vom 7. Mai 2008 sei zudem als Entscheidung der IIHF-Disziplinarkommission zu betrachten, weshalb die angerufene Vorinstanz gestützt auf Artikel 3.9 der IIHF-Disziplinarordnung 2004 in Verbindung mit Artikel 47 - 49 der damals geltenden IIHF-Statuten, die eine Beschwerdemöglichkeit an das TAS vorsehen, zur Beurteilung des von der Beschwerdegegnerin erhobenen Appeal zuständig sei. Indem der Beschwerdeführer das Anmeldeformular unterzeichnet habe, insbesondere am 26. April 2007 sowie am 1. Mai 2008, sei er an diese Bestimmungen gebunden.

3.2

3.2.1 Das Bundesgericht prüft die Zuständigkeitsrüge nach Art. 190 Abs. 2 lit. b IPRG einschliesslich materieller Vorfragen, von deren Beantwortung die Zuständigkeit abhängt, in rechtlicher Hinsicht frei. Demgegenüber überprüft es die tatsächlichen Feststellungen des angefochtenen Schiedsentscheids auch im Rahmen der Zuständigkeitsrüge nur, wenn gegenüber diesen Sachverhaltsfeststellungen zulässige Rügen im Sinne von Art. 190 Abs. 2 IPRG vorgebracht oder ausnahmsweise Noven berücksichtigt werden (BGE 134 III 565 E. 3.1 S. 567; 133 III 139 E. 5 S. 141; 129 III 727 E. 5.2.2 S. 733).

3.2.2 Nachdem die Vorinstanz einen wirklichen Willen der Parteien nicht hat feststellen können, hat sie den Inhalt der im unterzeichneten Anmeldeformular enthaltenen Willenserklärung zutreffend nach dem Vertrauensprinzip beurteilt (vgl. BGE 132 III 268 E. 2.3.2 S. 274 mit Hinweisen). Die Erklärung ist danach so auszulegen, wie sie nach ihrem Wortlaut und Zusammenhang sowie den gesamten Umständen nach Treu und Glauben verstanden werden durfte und musste (BGE 133 III 61 E. 2.2.1 S. 67; 132 III 268 E. 2.3.2 S. 274 f.; 130 III 417 E. 3.2 S. 424, 686 E. 4.3.1 S. 689; je mit Hinweisen).

Nach lit. I des Anmeldeformulars unterwirft sich der Spieler für bestimmte Streitigkeiten ("such dispute") der Zuständigkeit des TAS. Auf welche Auseinandersetzungen sich diese Verpflichtung bezieht, wird im vorangehenden Teilsatz umschrieben, nämlich auf jegliche Streitigkeit, die im Zusammenhang mit der IIHF-Meisterschaft und/oder den Statuten, By-laws und Reglementen sowie Entscheidungen der IIHF diesbezüglich entsteht ("the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto"). Ausgehend vom Wortlaut spricht die Verwendung des Wortpaars "und/oder", wie die Vorinstanz grundsätzlich zutreffend erkannt hat, zwar dafür, dass die Statuten und Reglemente betreffenden Streitigkeiten auch ohne Zusammenhang mit der jeweiligen IIHF-Meisterschaft dem TAS zu unterbreiten wären. Andererseits ist auch der Einwand des Beschwerdeführers nicht von der Hand zu weisen, dass der Zusatz "relating thereto" als Eingrenzung in dem Sinne verstanden werden kann, dass auch Streitigkeiten betreffend die Statuten, Reglemente und Entscheidungen der IIHF nur dann von der Schiedsklausel erfasst sind, wenn sie mit der IIHF-Meisterschaft im Zusammenhang stehen. Die Frage braucht jedoch nicht vertieft zu werden, da sich die Bedeutung der Erklärung nach Treu und Glauben vorliegend aus dem Zusammenhang erschliesst.

3.2.3 Der Beschwerdeführer hat das Anmeldeformular jeweils im Hinblick auf eine Teilnahme an der IIHF-Weltmeisterschaft unterzeichnet. Das "Player Entry Form" bestand aus einem einseitigen Formular, auf dem zunächst der betreffende IIHF-Wettkampf, dessen Austragungsort und -datum sowie die Mannschaft des Spielers aufgeführt wurden. Teilweise erschien die Bezeichnung des

Wettkampfs zudem bereits im Briefkopf (z.B. in den Jahren 2006 und 2007: "IIHF World Championship, MEN") einmal auch mit dem entsprechenden Logo der Weltmeisterschaft (im Jahr 2007: "World Championship Russia"). Im Hauptteil des Formulars sind die persönlichen Daten des Spielers eingetragen, während im Anschluss daran in deutlich verkleinerter und daher nur noch schwer lesbarer Schrift verschiedene Erklärungen, so unter anderem die erwähnte Schiedsklausel, aufgeführt sind.

Unabhängig vom Wortlaut der Klausel durfte der Spieler, der das Anmeldeformular grundsätzlich jährlich wiederkehrend in unregelmässigen Abständen auszufüllen und zu unterzeichnen hatte, davon ausgehen, dass sich seine Erklärungen, wie auch die eingangs aufgeführten Angaben, auf einen bestimmten Wettkampf beziehen. Er musste bei der Unterzeichnung im Hinblick auf eine zeitlich und örtlich genau umschriebene Sportveranstaltung nicht damit rechnen, sich im Kleingedruckten gleichzeitig ganz generell und ohne Zusammenhang mit der konkreten Meisterschaft für jegliche Streitigkeit der Zuständigkeit eines Schiedsgerichts zu unterwerfen. Der Einwand der Beschwerdegegnerin sowie die Begründung der Vorinstanz, eine jährlich wiederkehrende Unterzeichnung sei lediglich aus verwaltungstechnischen Gründen erfolgt, ändere jedoch nichts an der zeitlich und gegenständlich unbeschränkten Geltung, vermögen zudem nicht zu überzeugen. Wesentlich plausibler ist die Auffassung, wonach das Anmeldeformular seinem Zweck, der Bezeichnung als "Player Entry Form" und der Ausrichtung auf ein konkretes Turnier entsprechend, von den jeweils für die Nationalmannschaften aufgestellten Spielern jährlich gerade und ausschliesslich im Hinblick auf die kommende Weltmeisterschaft auszufüllen und zu unterzeichnen war.

Einen Zusammenhang der konkret angeordneten Probeentnahme vom 6. März 2008 sowie der beantragten generellen Spielsperre von zwei Jahren mit der vom 2. - 11. Mai 2008 in Kanada stattfindenden IIHF-Weltmeisterschaft hat die Beschwerdegegnerin nicht aufgezeigt. Nach den Feststellungen im angefochtenen Entscheid war die Kontrolle weder von der WADA noch der IIHF angeordnet worden, wobei sich Letztere in der fraglichen Angelegenheit im Gegenteil für unzuständig erklärt hatte. Die Kontrolle wurde nicht von der WADA, sondern von der NADA durchgeführt und für die Beurteilung des Testresultats war in erster Linie der Deutsche Eishockey-Bund zuständig. Auch der Hinweis der Vorinstanz auf die Verpflichtung der IIHF zur Vornahme von Trainingskontrollen und Kontrollen ausserhalb der Saison gegenüber der WADA vermag daher keinen Zusammenhang mit einem IIHF-Wettkampf zu begründen. Der Beschwerdeführer musste nach Treu und Glauben nicht davon ausgehen, mit der Unterzeichnung des Anmeldeformulars vom 1. Mai 2008 eine Schiedsvereinbarung abzuschliessen, welche die Sanktionierung seines Verhaltens anlässlich der Dopingkontrolle vom 6. März 2008 umfasste, das bereits zur Eröffnung eines Disziplinarverfahrens beim nationalen Verband geführt hatte.

Die vorliegende Streitigkeit über die von der Beschwerdegegnerin beantragte zweijährige Spielsperre im Zusammenhang mit der am 6. März 2008 vorgenommenen Dopingkontrolle der NADA wird von der in lit. 1 des Anmeldeformulars ("Player Entry Form") enthaltenen Schiedsvereinbarung nicht erfasst. Entgegen dem angefochtenen Entscheid lässt sich die Zuständigkeit der Vorinstanz nicht auf das vom Beschwerdeführer unterzeichnete Anmeldeformular stützen.

3.2.4 Ausser dem Anmeldeformular für die Weltmeisterschaften, das sich unter dem Gesichtspunkt von Art. 178 IPRG als unzureichend erwiesen hat, lassen sich den Feststellungen des angefochtenen Entscheids keine Hinweise auf eine im Sinne dieser Bestimmung wirksame Schiedsklausel entnehmen. Die Beschwerdegegnerin bringt in ihrer Antwort in pauschaler Weise vor, der Beschwerdeführer habe mit Unterzeichnung des Anmeldeformulars lediglich einen vorbestehenden Zustand bestätigt, da er dem an der Weltmeisterschaft teilnehmenden nationalen Verband angehöre, der selbst Mitglied des internationalen Verbands IIHF sei. Die Vorinstanz hat jedoch die Bindung des Beschwerdeführers an ihre Entscheidungsbefugnis auf die Unterzeichnung der IIHF-Anmeldeformulare, insbesondere der Jahre 2007 und 2008, gestützt. Sie hält zwar in ihrer Vernehmlassung fest, dass die IIHF-Statuten und sonstigen IIHF-Regeln, insbesondere Artikel 3.1 der IIHF-Disziplinarordnung 2004 eine weitere Rechtsgrundlage für ihre Zuständigkeit bildeten, stellt für die Bindung des Spielers an diese Bestimmungen jedoch wiederum auf die Unterzeichnung der Anmeldeformulare ab, indem

sie dafür hält, dass sich diese zweite Rechtsgrundlage "kaskadenförmig" aus der ersten ableite. Weder die Vorinstanz noch die Beschwerdegegnerin zeigen konkret auf, inwiefern sich der Beschwerdeführer formgültig und in allgemeiner Weise den IIHF-Statuten und sonstigen Vorschriften, so insbesondere der IIHF-Disziplinarordnung 2004, unterworfen hätte. Zwar ist die Rechtsprechung hinsichtlich der Gültigkeit von Schiedsvereinbarungen im Bereich der internationalen Schiedsgerichtsbarkeit von Grosszügigkeit geprägt, was sich auch in der Beurteilung der Wirksamkeit von Schiedsvereinbarungen mittels Verweisungen zeigt (BGE 133 III 235 E. 4.3.2.3 S. 244 f. mit Hinweisen). Entsprechend hat das Bundesgericht einen globalen Verweis auf eine in Verbandsstatuten enthaltene Schiedsklausel verschiedentlich als gültig erachtet (Urteile 4A_460/2008 vom 9. Januar 2009 E. 6.2; 4P.253/2003 vom 25. März 2004 E. 5.4; 4P.230/2000 vom 7. Februar 2001 E. 2a; 4C.44/1996 vom 31. Oktober 1996 E. 3c; vgl. auch BGE 133 III 235 E. 4.3.2.3 S. 245; 129 III 727 E. 5.3.1 S. 735; je mit Hinweisen). So hat es etwa im Fall eines Fussballspielers, der Mitglied des nationalen Verbands war, die in den Statuten enthaltene Bestimmung, wonach die dem Verband angehörenden Sportler die Regeln der FIFA beachten müssten, als rechtswirksamen Verweis auf die in den FIFA-Statuten enthaltene Schiedsklausel erachtet (Urteil 4A_460/2008 vom 9. Januar 2009 E. 6.2). Den Sachverhaltsfeststellungen des angefochtenen Entscheids lässt sich jedoch nicht entnehmen, dass im zu beurteilenden Fall entsprechende Verhältnisse vorliegen würden. Eine nach Art. 178 IPRG wirksame Schiedsvereinbarung ist entgegen dem angefochtenen Entscheid nicht dargetan. Die Vorinstanz hat sich zur Beurteilung der vorliegenden Streitigkeit daher zu Unrecht gestützt auf das "Player Entry Form" für zuständig erklärt. Es bleibt jedoch offen, ob sich eine Zuständigkeit anhand der im Schiedsverfahren zu berücksichtigenden Vorbringen der Parteien gegebenenfalls auf einen vom Spieler akzeptierten Verweis auf eine in den Verbandsregeln enthaltene Schiedsklausel stützen liesse.

4.

Die Beschwerde in Zivilsachen gegen internationale Schiedsentscheide ist - abgesehen von Ausnahmen, deren Voraussetzungen vorliegend nicht erfüllt sind (vgl. BGE 127 III 279 E. 1b S. 282; 117 II 94 E. 4 S. 95 f.) - rein kassatorischer Natur (vgl. Art. 77 Abs. 2 BGG, der die Anwendbarkeit von Art. 107 Abs. 2 BGG ausschliesst). Der Entscheid der Vorinstanz vom 23. Juni 2009 ist demnach in Gutheissung der Beschwerde aufzuheben.

Dem Ausgang des Verfahrens entsprechend wird die Beschwerdegegnerin kosten- und entschädigungspflichtig (Art. 66 Abs. 1 und Art. 68 Abs. 2 BGG).

Demnach erkennt das Bundesgericht:

1.

Die Beschwerde wird gutgeheissen und der Entscheid der Vorinstanz vom 23. Juni 2009 wird aufgehoben.

2.

Die Gerichtskosten von Fr. 5'000.-- werden der Beschwerdegegnerin auferlegt.

3.

Die Beschwerdegegnerin hat den Beschwerdeführer für das bundesgerichtliche Verfahren mit Fr. 6'000.-- zu entschädigen.

4.

Dieses Urteil wird den Parteien und dem Tribunal Arbitral du Sport (TAS) schriftlich mitgeteilt.

Lausanne, 6. November 2009

Im Namen der I. zivilrechtlichen Abteilung
des Schweizerischen Bundesgerichts

Die Präsidentin: Der Gerichtsschreiber:

Klett Leemann

CAS 2008/A/1700 Deutsche Reiterliche Vereinigung e.V. v/FEI & Christian Ahlmann
CAS 2008/A/1710 Christian Ahlmann v/FEI

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Professor Massimo **Coccia**, Attorney-at-law, Rome, Italy
Arbitrators: Mr John A. **Faylor**, Attorney-at-law, Frankfurt am Main, Germany
Professor Michael **Geistlinger**, Salzburg, Austria
Ad hoc Clerk: Mr Patrick **Grandjean**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

Deutsche Reiterliche Vereinigung e.V., Warendorf, Germany

Represented by Mr Stephan **Netzle**, Attorney-at-law, Zurich, Switzerland

As Appellant 1

and

Mr Christian Ahlmann,

Represented by Ms Monika **Gattiker**, Attorney-at-law, Zurich, and Mr Ulf **Walz**, Attorney-at-law, Basel, Switzerland

As Appellant 2 and Respondent 1

and

Fédération Equestre Internationale, Lausanne, Switzerland

Represented by Mr Xavier **Favre-Bulle** and Ms Marjolaine **Viret**, Attorneys-at-law, Geneva, Switzerland

As Respondent 2

I. THE PARTIES

1. The Deutsche Reiterliche Vereinigung e.V. (hereinafter also referred to as the “**German NF**”) is the national federation governing equestrian sports in Germany. It has its registered seat in Warendorf, Germany and is affiliated to the Fédération Equestre Internationale.
2. Mr Christian Ahlmann, born on 17 December 1974, is an experienced international-level show jumping rider of German nationality. He is a member of the German NF and was selected to compete for the German national team in the 2008 Summer Olympic Games held in China (hereinafter referred to as the “**2008 Summer Games**”). He is the Person Responsible for the horse Cöster.
3. The Fédération Equestre Internationale (hereinafter also referred to as the “**FEI**”) is the worldwide governing body for equestrian sports. It has its seat in Lausanne, Switzerland.

II. BACKGROUND; FACTS

4. The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion (see below section IV).

II.1 THE INCIDENT IN THE 2004 ATHENS SUMMER OLYMPIC GAMES

5. Mr Christian Ahlmann was a member of the German show jumping team, which won the team gold medal at the 2004 Athens Summer Olympic Games. The medal was revoked after Goldfever, a German horse ridden by Mr Ludger Beerbaum, tested positive for a prohibited substance.

II.2 THE ADVERSE ANALYTICAL FINDINGS OF THE HORSE CÖSTER AND THE PRELIMINARY DECISION MADE BY THE FEI PRELIMINARY PANEL

6. Whilst the 2008 Summer Games were held in Beijing, China, all equestrian events took place in Hong Kong between 8 and 21 August 2008. Mr Christian Ahlmann competed in the Olympic show jumping with the horse Cöster.
7. The fact that Mr Christian Ahlmann is, according to FEI rules, the Person Responsible for the horse Cöster is not put into question.
8. On 9 and 17 August 2008, with regard to the horse Cöster, the authorised Veterinary Commission/Delegate completed a medication form 3 (Authorisation for the Use of Medication not listed as prohibited under FEI Regulations, namely saline) and a medication form 1 (authorisation for Emergency Treatment, i.e. involving medication with prohibited substances, namely mepivacaine and gentamicine), respectively. On

both documents, the horse Cöster was declared fit to compete. No request had been made to the relevant authority for the use of Capsaicin and no medication form had been supplied for this substance.

9. On 17 August 2008, following the Team Jumping Final – Round 2/Individual 2nd Qualifier, the horse Cöster was selected for sampling. On the FEI Medication Control Form, no statement was provided indicating that a Capsaicin-based substance had been used on the animal.
10. On 18 August 2008, the analysis of the blood and urine of the A-samples collected from the horse Cöster was performed by the FEI approved laboratory, the Hong Kong Jockey Club Racing Laboratory (hereafter referred to as “HKJC”). It is undisputed that both the blood and urine samples tested positive for Capsaicin, i.e. a molecule which is the active component of red peppers.
11. By fax dated 20 August 2008, Mr Christian Ahlmann was notified of the fact that the analysis conducted on the samples of the horse Cöster revealed the presence of the prohibited substance Capsaicin. He was provisionally suspended with immediate effect.
12. On 21 August 2008, a preliminary hearing was held before the Preliminary Panel of the FEI Tribunal, which considered that the positive findings were satisfactorily established and held that Mr Christian Ahlmann had not been able to explain the presence of the prohibited substance Capsaicin in the samples of his horse. This authority decided not to lift Mr Christian Ahlmann’s provisional suspension, which was to remain in effect until the final decision of the FEI Tribunal. The decision of the FEI Preliminary Panel was notified to the rider on the same day.
13. On 22 August 2008, a confirmatory analysis was carried out on the B-samples of the horse Cöster. The test report issued on 24 August 2008 by the HKJC confirmed the presence of Capsaicin.
14. In a press release dated 24 August 2008, Mr Christian Ahlmann explained that the horse Cöster suffered from chronic back pain since it participated in the Cannes International Show Jumping Festival, which took place in June 2008. Since then and on a daily basis, he had been treating the lumbago of the horse by applying on its back an ointment called Equi-block. It is undisputed that this product contains Capsaicin.

II.3 THE FINAL DECISION OF THE FEI TRIBUNAL DATED 22 OCTOBER 2008

15. On 26 September 2008, a hearing was held before the FEI Tribunal. The parties to the proceedings were the FEI and Mr Christian Ahlmann.
16. On 22 October 2008, the FEI Tribunal reached a decision, in which it concluded that the FEI had sufficiently established the objective elements of a violation of the applicable FEI Equine Anti-Doping and Medication Control Rules, 1st edition, effective 1 June 2007 (hereinafter referred to as the “EADMC Rules”).
17. The FEI Tribunal accepted that Mr Christian Ahlmann met his burden of proof “to

establish that the positive finding is the result of the use of Equi-Block”, but held that he was “negligent to a material extent in using Equi-Block on the Horse’s back – indeed in using it apparently without seeking veterinary advice”.

18. Based notably on the report dated 20 August 2008 of the FEI Veterinarian, Mr Paul Farrington, the FEI Tribunal held that, in regard to its particular properties, Capsaicin could qualify
 - either as a doping substance because it falls into the category of hypersensitising agents (for instance when applied to the front of the legs, in order to produce a burning sensation to unduly sensitise the limb(s) to touching poles to make the horse more responsive to pain in its jumping efforts);
 - or as a prohibited substance “Medication Class A”, due to its possible improvement in the performance of the horse resulting from the pain relief.
19. In the presence of such a substance with hypersensitising as well as pain relieving qualities, the FEI Tribunal considered that *“the FEI has to prove more than the mere existence of the substance. The Tribunal is of the opinion that this is particular so when the same substance has, based on the evidence of the FEI itself, legitimate therapeutic qualities and constitutes also a medication A substance. As the ‘prosecutor’, the FEI has to be specific in the claims and prove all required elements of the violation”.*
20. Based on the evaluation of the evidence offered, the FEI Tribunal found that there had been no proof of an actual hypersensitisation of the legs of the horse Cöster and therefore that only a “Medication Class A” offence had been established.
21. Therefore, the FEI Tribunal ruled as follows:
 - “1) The PR shall be suspended for a period of four (4) months (namely, 120 days) which period has commenced on the date of the application of the provisional suspension, 21 August 2008;*
 - 2) The PR is fined CHF 2,000.-, and*
 - 3) The PR shall contribute CHF 1,500.- towards the legal costs of the judicial procedure. This takes into account the fact that the proceedings in this case were assisted by the PR’s counsel acceptance of procedures that speeded up the hearing and finalization of this case”.*
22. The same day, the FEI Tribunal’s decision (hereinafter referred to as the “**Appealed Decision**”) was notified to the German NF, to Mr Christian Ahlmann and his counsel and to the International Olympic Committee.
23. Mr Christian Ahlmann served the suspension imposed upon him by the FEI Tribunal and returned to competition as of 19 December 2008.

III. PROCEEDINGS BEFORE THE CAS

III.1 THE APPEAL OF THE GERMAN NF – APPEAL PROCEDURE CAS 2008/A/1700

24. On 13 November 2008, the German NF filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”). It challenged the Appealed Decision, submitting the following request for relief:

“The Decision subject to appeal shall be amended as follows:

- (1) The PR shall be declared ineligible for a period which the Panel deems appropriate for Doping Prohibited Substances but no less than eight (8) months, which period shall commence on the date of the application of the provisional suspension, 21 August 2008;*
 - (2) The PR shall be fined CHF 2000; and*
 - (3) The PR shall contribute CHF 1500 towards the legal costs of the judicial procedure (of the FEI Tribunal).*
 - (4) The FEI and the PR shall jointly and severally bear the costs of this arbitral proceeding and contribute an amount to the legal costs of the FN according to article R64.5 of the Code of Sports-related Arbitration”.*
25. Pursuant to article R51 of the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”), the German NF was granted a 10-day extension from the expiration of its initial deadline to file its Appeal Brief, which it did on 10 December 2008, by registered mail. This document contains a statement of the facts and legal arguments accompanied by supporting documents.
26. On 2 February 2009, Mr Christian Ahlmann filed an Answer, with the following motions and requests for relief:

“Procedural Motions

- 1. That the Appeal of the “Deutsche Reiterliche Vereinigung” (German NF) be deemed withdrawn due to failure to file the Appeal Brief timely;*
- 2. Secondly, that the Appeal of the German NF be dismissed due to lack of legitimate interest.*
- 3. Should none of the procedural motions 1-2 be granted, that all evidence not presented and all witnesses not heard before the FEI Tribunal be declared inadmissible evidence based on articles 170.6 and 170.7 FEI General Regulations.*

Requests for Relief

- 1. That the Appeal of the German NF be dismissed on the merits;*
- 2. That the costs of the arbitration and the legal costs of Mr. Ahlmann be borne jointly by the German NF and the FEF”.*

III.2 THE APPEAL OF MR CHRISTIAN AHLMANN – APPEAL PROCEDURE CAS 2008/A/1710

27. On 19 November 2008, Mr Christian Ahlmann filed a Statement of Appeal with the CAS. He challenged the Appealed Decision submitting the following request for relief:

“The Decision subject to appeal shall be amended as follows:

The PR shall be suspended for a period of Three (3) months, which period has commenced on the date of the application of the provisional suspension, 21 August 2008.

Alternatively:

In case the suspension of 4 months has already run off in the moment the Arbitration Panel takes its decisions it is requested to state that a suspension of more than 3 months was contrary to law.

In both cases we request:

The Respondent shall bear the costs of this arbitral proceeding and contribute an amount to the legal costs of the Appellant according to R 64.5 of the Code of Sports-related Arbitration”.

28. On 25 December 2008, Mr Christian Ahlmann filed his Appeal Brief, containing a statement of the facts and legal arguments accompanied by supporting documents.
29. On 2 February 2009, the German NF filed an Answer and maintained “*its Request for Relief as formulated in its Appeal dated 13 November 2008 (Statement of Appeal) and 10 December 2008 (Appeal Brief) also for the purpose of this Answer*”.

III.3 THE ANSWER OF THE FEI TO BOTH APPEALS

30. On 24 February 2009, the FEI submitted an Answer to both appeals containing the following prayers for relief:

“The Fédération Equestre Internationale respectfully requests the CAS Panel to make an Award to:

- dismiss the appeal filed by the PR in its entirety;*
- decide in its discretion on the appeal brought by the GER-NF and as to whether (and, if so, how) the PR should be sanctioned for a rule violation Class ‘Doping’ in accordance with Article 10.1 EADCMR;*
- order the Appellants to pay any and all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the Fédération Equestre Internationale;*
- dismiss any other relief sought by the Appellants”.*

III.4 THE PARTIES' SUBMISSIONS

a) The German NF

31. The submissions of the German NF, in essence, may be summarized as follows:

- The appeal of the German NF is admissible and was filed in a timely manner.
- The application by Mr Christian Ahlmann of Equi-Block on the horse Cöster and the presence of Capsaicin in its A and B samples constitute an anti-doping rule violation prohibited by the EADMC Rules.
- In the case at hand, *"the definition of doping in the FEI Prohibited List has been met in at least three respects, because (a) Capsaicin has the potential to affect the performance of a horse, (b) it has no generally accepted use in competition horses, and (c) it has actually been used to hypersensitise or desensitise body parts of the Horse"*.
- Contrary to the findings of the FEI Tribunal and in order to establish an anti-doping rule violation, the EADMC Rules do not place the burden of proof upon the FEI to demonstrate an actual hypersensitisation of the legs of the horse Cöster.
- The *"fact that this is an anti-doping rule violation and not a medication rule violation must lead to an accentuation of the sanction as provided in article 10.1 of the EADMC"*.

b) Mr Christian Ahlmann

32. Mr Christian Ahlmann's submissions, in essence, may be summarized as follows:

- The Appeal Brief of the German NF was not filed in a timely manner and, therefore, must be dismissed.
- The German NF has no legitimate interest to lodge an appeal.
- The evidence not presented before the FEI Tribunal must be disregarded.
- The FEI Equine Prohibited List is unclear, misleading and has not been adapted to scientific and technical progresses. Furthermore, it does not comply with general legal principles or Swiss law. Notably, because it only provides an illustrative list of doping substances, the FEI Equine Prohibited List falls short of providing a precise definition of "doping". *"Therefore, according to the applicable Swiss civil law the FEI's Equine Prohibited list must be interpreted in favour of Mr. Ahlmann meaning that:*
 - *in case of doubts about the therapeutic effect of Capsaicin the violation under the Equine Prohibited List must be denied;*
 - *in case of uncertainty about the applicable category of the offence (doping, medication class A or medication Class B), the category with the mildest sanction has to be chosen"*.
- Capsaicin is a very common substance that can be found in many authorised herbal products, feed supplements and care-products for horses such as Equi-block, which

can be bought in many countries and at some FEI Sporting events. Capsaicin is commonly used in horse training. Under such circumstances, Mr Christian Ahlmann could not be expected to have known that he was doing something wrong when using a Capsaicin-based product. That is particularly true since Capsaicin is not expressly mentioned on the FEI Equine Prohibited List and since many experienced veterinarians ignored that this substance was prohibited until the 2008 Summer Games. *“It would grossly contravene the principles of justice to sanction Mr. Ahlmann based on arbitrary rules that can only be understood by a small group of insiders and that leave grey areas between medication and doping and between legal and illegal practises. Further, such grey areas have to be interpreted in favour of Mr. Ahlmann, meaning that in case of doubts (grey area) a practice must be considered legal.*

- Capsaicin concentration in Equi-block is too low for a therapeutic effect. It exclusively serves the purpose of enhancing the effectiveness of a manual massage and, hence, must be regarded as a care-product. *“According to article 3.1 EADMC-R, the German NF has to establish the doping or medication rule violation with a standard of proof that is greater than a mere balance of probability but less than proof beyond a reasonable doubt. The proof presented by Mr. Ahlmann establishes that the concentration found in Equi-Block is too low for any therapeutic effect. Hence, not only the German NF failed to establish a medication offence, but Mr. Ahlmann has proven the contrary”.*
- If Capsaicin is a prohibited substance, it would only constitute a “Medication Class A” case, as it was not applied to the front of the legs of the animal, to unduly sensitise its limb(s).
- Should Mr Christian Ahlmann be held responsible for an anti-doping rule violation, a four-month suspension is a severe penalty, inconsistent with sanctions imposed in the past under similar circumstances.

c) FEI

33. The submissions of the FEI, in essence, may be summarized as follows:

- *“The FEI Prohibited List refers to the substance’s ‘potential’ for a certain use, and not the ‘probability’ of such use in each concrete case. This is supported by the wording of Article 146 FEI GR ‘use of any substance or method that has the potential to harm the Horse or to enhance its performance is forbidden’ (emphasis added) and the French wording of the FEI Prohibited List ‘susceptibles’. When a substance is defined through its potential effects there is no possibility to argue that the substance did not have those effects in a particular case”.*
- *“It was the very purpose of the introduction by all sports-governing bodies of the so-called ‘analytical offence’ to allow for a finding of a rule violation on the sole basis of the detection of a substance in an athlete’s – or horse’s – system. Unless the FEI has introduced a threshold for a particular substance – which it has not done for Capsaicin, being neither an endogenous substance nor a common environmental contaminant, the mere presence of the substance constitutes a rule*

violation, regardless of its concentration, its performance-enhancing effects or its origin in the particular”.

- The FEI Tribunal erred in its approach when it decided that in the presence of a substance with hypersensitising as well as pain-relieving qualities, the FEI must prove more than the mere existence of the substance.
- Capsaicin is a substance that can be used for hypersensitisation and is therefore a hypersensitising or sensitising agent under the FEI Prohibited List. Those properties are *per se* sufficient to characterise Capsaicin as a doping substance.
- The use of Capsaicin as a pain-reliever seems unlikely, as there are better alternatives for horses.
- Regarding the sanction, Mr Christian Ahlmann has not discharged his burden of proof that he bore no fault or negligence for the violation of the EADMC Rules.

III.5 THE HEARING

34. A hearing was held on 5 March 2009 at the CAS premises in Lausanne. All the members of the Panel were present. The parties raised no objection regarding the constitution of the Panel.
35. The following persons attended the hearing:
 - For the German NF, its legal director, Mr Joachim Wann, assisted by its attorney, Mr Stephan Netzle.
 - Mr Christian Ahlmann accompanied by his attorneys, Ms Monika Gattiker and Mr Ulf Walz.
 - For the FEI, its legal counsel, Ms Carolin Fischer, assisted by its attorneys Mr Xavier Favre-Bulle and Ms Marjolaine Viret.
 - Mr Georg Ahlmann, Mr Christian Ahlmann’s father, who was admitted by the parties as an observer to the hearing.
36. With the consent of the parties, the Panel decided to hear the various expert witnesses summoned by the parties in conferencing format, at the same time allowing the parties the possibility to examine and cross-examine them. The Panel heard evidence from the following expert witnesses:
 - Mr Manfred Kietzmann, Professor of Toxicology and Pharmacology at the Institute for Pharmacology, Toxicology and Pharmacy School of Veterinary Medicine, in Hanover, Germany.
 - Mr Björn Nolting, the team veterinarian of the German NF.
 - Mr Paul Farrington, the FEI Veterinarian.
 - Mr Peter Cronau, veterinarian for horses, specialist in equine surgery.

- Mr Marc Gogny, head of the Department of Pharmacology and Toxicology, National Veterinary School, in Nantes, France.
 - Mr Richard Corde, veterinarian at the Clinique Vétérinaire du Domaine de Grosbois.
 - Mr Jonas Tornell, the show jumping team veterinarian of the Swedish national team.
37. Messrs Gogny, Corde and Tornell were heard, with the agreement of the parties and the Panel via teleconference pursuant to article R44.2, para. 4, of the Code.
38. Each expert witness heard by the Panel was instructed by the President of the Panel regarding his obligation to testify truthfully subject to the consequences provided by the law. Each expert witness was examined and cross-examined by the parties as well as questioned by the Panel. The parties were then given opportunity to present their cases, submit their arguments and answer the questions posed by the Panel. After the parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties even if they have not been summarized herein. Upon closure, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

IV. DISCUSSION

IV.1 CAS JURISDICTION

39. The jurisdiction of the CAS, which is not disputed, derives from article 35 of the FEI Statutes, 22nd edition, effective 15 April 2007 (hereinafter referred to as the "**FEI Statutes**"), article 170.1.3 of the FEI General Regulations, 22nd edition, effective 1 June 2007 (hereinafter referred to as the "**FEI GR**"), article 12.2 of the EADMC Rules and article R47 of the Code. The jurisdiction of the Panel is further confirmed by the order of procedure duly signed by the parties.
40. It follows that the CAS has jurisdiction to decide the present dispute.

IV.2 APPLICABLE LAW

41. Article R58 of the Code provides the following:

"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."

42. Pursuant to article 35.3 of the FEI Statutes "*The parties concerned acknowledge and agree that the seat of the CAS is in Lausanne, Switzerland, and that proceedings before the CAS are governed by Swiss Law.*"

43. It follows that the FEI Regulations and Swiss law are applicable to the present case.

IV.3 ADMISSIBILITY

44. Mr Christian Ahlmann submits that the appeal of the German NF should be dismissed because a) it was not filed in a timely manner and b) because the German NF has no legitimate interest to appeal before the CAS.

A) The Timely Appeal of the German NF

45. Pursuant to article 12.3 of the EADMC Rules, "*The time to file an appeal to CAS shall be thirty (30) days from the date of dispatch of the decision to the appealing party*". The decision of the FEI Tribunal was issued on 22 October 2008.

46. The statements of appeal of the German NF and of Mr Christian Ahlmann were filed respectively on 13 and 19 November 2008, i.e., before expiration of the deadline. Both parties submitted their Appeal Brief within the time extension granted to them by the Deputy President of the CAS Appeals Arbitration Division.

47. However, Mr Christian Ahlmann is of the opinion that the appeal of the German NF should be dismissed as it was filed by registered mail only, and not by "*courier or facsimile*", as provided under article R31, para. 3, first sentence, of the CAS Code. This provision states as follows: "*All communications from the parties intended for CAS or the Panel shall be sent by courier or facsimile to the CAS, failing which they shall be declared inadmissible.*" The French version of this provision reads as follows: "*Les communications émanant des parties et destinées au TAS ou à la Formation sont adressées par courrier et/ou par télécopie au Greffe du TAS, sous peine d'irrecevabilité.*"

48. The Code exists in a French and in an English version. According to its articles S24 and R68, in the event of any divergence, the French text shall prevail. In English, the word "courier" primarily refers to an express messenger which forwards shipments of documents on an expedited basis to their designated addressees. However, the French term "courier" may encompass a full range of postal services, including "registered mails".

49. Considering that the German NF is represented by a Swiss lawyer, with his office in Switzerland, that all its submissions were made from Switzerland, that it filed its Statement of Appeal well before the end of the 30-day deadline allotted by the EADMC Rules, that its Appeal Brief was sent before midnight on the last day on which such time limits expired (in conformity with article R32 of the Code), that its Appeal Brief was received on 12 December 2008 by the CAS Court Office (i.e., less than 48 hours after dispatch), the Panel takes the position that the term "courier"/"courier" must not be interpreted restrictively and can indeed – at the very least – include the "registered mail" service of the Swiss Post Office. This service of the Swiss Post Office is just as speedy and offers the same traceability as private companies. This position is consistent with the established practice of CAS and with the principles laid down in the jurisprudence of the Swiss Federal Court with regard to the formal conditions required for submitting

an appeal in Switzerland (See ATF 121 II 252). Any other approach would lead to excessive formalism, incompatible with the German NF's right to be heard and would be unjustified in the view of the circumstances of the present case.

50. It follows that the German NF filed its appeal in a proper and timely manner. Accordingly, the appeal is deemed by the Panel to be admissible.

B) The Standing of the German NF to file an Appeal

51. Mr Christian Ahlmann claims that the German NF has no right to appeal as it has no tangible interest of a financial or sporting nature at stake and is not affected by the Appealed Decision issued on 22 October by the FEI Tribunal. Therefore, he asserts that the German NF has no legitimate interest to file an appeal which hence renders it inadmissible as a consequence.
52. According to article 170, para. 1 of the FEI GR, "*An Appeal may be lodged by any person or body with a legitimate interest against any Decision made by any person or body authorised under the Statutes, GRs or Sport Rules, provided it is admissible.*"
53. Article 12.2 of the EADMC Rules relating to "*Appeals from Decisions Regarding Anti-Doping and Medication Control Rule Violations, Consequences, and Provisional Suspensions*" provides notably the following:

"12.2.1 In cases arising from competition in an International Event the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court (...)

12.2.2 In cases under Article 12.2.1, the following parties shall have the right to appeal to CAS: (a) the Person Responsible who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the FEI; (d) the Person Responsible's National Federation and (e) the International Olympic Committee or International Paralympic Committee (...)".

54. Despite the clear text of article 12.2.2 of the EADMC Rules, Mr Christian Ahlmann asserts that this provision should not be taken into consideration as it is in conflict with article 170, para. 1 of the FEI GR which must therefore prevail in accordance with article 15.5 of the EADMC Rules.
55. The Panel does not perceive any conflict to exist between the EADMC Rules and the FEI GR which are, in the view of the Panel, obviously complementary. This is confirmed by article 100.8, first sentence of the FEI GR ("*The Sport Rules must be read in conjunction with the GRs*"). Article 170, para. 1 of the FEI GR is the general regulation and article 12.2.2 of the EADMC Rules is the *lex specialis*. This last provision clearly identifies the circle of entities and persons who are enabled to lodge "*Appeals from Decisions Regarding Anti-Doping and Medication Control Rule Violations*", i.e., who by definition have a "legitimate interest" to submit such appeals. The Panel concedes that an issue could arise with regard to an appeal submitted by a

person with a legitimate interest (as provided by article 170, para. 1, of the FEI GR), but who is not mentioned in article 12.2.2 of the EADMC Rules. However, the Panel does not need to deal with this issue as it is not relevant to the decision in the present proceedings.

56. In addition, the Panel observes that the German NF is a member of the FEI, which is an association established and organized in accordance with articles 60 et seq. of the Swiss Civil Code (see article 4 of the FEI Statutes). The right to contest a resolution of an association pursuant to article 75 of the Swiss Civil Code (or, alternatively, pursuant to an arbitration clause) is a mandatory right of membership (cf. HANS NATER, *Mandatory State Law as part of the CAS Appeals Process: Must Art. 75, Swiss CC, as a mandatory provision of Swiss law, be considered?*, in CAS Newsletter, N° 4, October 2006, p. 23). This provision applies to resolutions made not only by the highest decision-making organ, but also by a lower internal body, provided that all internal procedures and remedies have been exhausted and provided that the resolution is final (ATF 118 II 12; ATF 132 III 503).
57. The FEI Tribunal is the FEI competent body for the administration of justice and its decision of 22 October 2008 is final. As a member of the FEI, the German NF must comply with the Statutes, general regulations, sporting rules and any decision issued by the authorized bodies of the FEI in relation to the conduct of international equestrian events (see article 2.6 of the FEI Statutes). The German NF has, therefore, a direct interest to intervene when its opinions and views diverge from those of the FEI Tribunal on the interpretation of the FEI rules and annexes (namely article 3 of the EADMC Rules and the FEI Equine Prohibited list). One might actually expect the German NF to promote and support, by all means, the fair and correct application of the regulations, especially when fairness in sport and the health of horses are at stake. This lies in the legitimate interests of the German NF and of all its members.
58. Moreover, the German NF was not permitted to participate in the proceedings before the FEI Tribunal. It was not in a position to review or respond to Mr Christian Ahlmann's allegations until it initiated the instant proceeding before the CAS which constitutes the first chance for the German NF to exercise its right to be heard. There is no doubt in the view of the Panel that the image and reputation of the German NF sustained considerable damage following the revocation of the Gold Medal in two consecutive Summer Olympics. This occurrence might indeed suggest, in the public's perception, the existence of carelessness and superficiality of the German NF in the prevention and prosecution of doping violations. As a consequence, in the view of the Panel, it lies indeed in the interests of the German NF, both from a sporting and financial perspective, to attempt to rectify the situation and to reinstate itself in the public's perception.
59. Based on the foregoing, the Panel is of the opinion that the German NF has standing to appeal under article 12.2.2 of the EADMC Rules and article 170 par. 1 of the FEI GR.

C) Conclusion

60. For all the above reasons, the Panel holds that the appeal of the German NF is

admissible. The same is the case with regard to the appeal filed by Mr Christian Ahlmann and the procedural measures undertaken by the FEI, all of which were filed in a timely manner and in compliance with the other requirements of the Code.

IV.4 JOINDER

61. As confirmed by the CAS Court Office on 28 November 2008, the two appeal procedures (CAS 2008/A/1700 and CAS 2008/A/1710) have been consolidated with the parties' unanimous consent. Therefore, the Panel shall render one common award for both appeals.

IV.5 PROCEDURAL MOTIONS

A) Admissibility of New Evidence

62. Based on article 170.7 of the FEI GR, Mr Christian Ahlmann alleges that evidence which was not presented to the FEI Tribunal is inadmissible. This provision reads as follows: *"No new evidence may be presented on Appeal, other than in circumstances where it is shown that such new evidence could not have been obtained, with reasonable diligence, prior to the hearing before the first instance"*.
63. However, the Panel wishes to note that article 12.2.1 of the EADMC Rules provides as follows: *"In cases arising from competition in an International Event the decision may be appealed exclusively to the Court of Arbitration for Sport ('CAS') in accordance with the provisions applicable before such court. Subject to these provisions, evidence that should have been readily available at the hearing before the FEI Hearing Body and had not been presented to such Hearing Body shall be inadmissible on appeal"*.
64. The Panel remarks that, owing to the above quoted proviso *"Subject to these provisions"*, article 12.2.1 of the EADMC Rules grants priority to the CAS Code over FEI evidence rules with regard to anti-doping and medication cases. Stated differently, the provisions of the CAS Code supersede the EADMC Rules.
65. Among the *"provisions applicable before"* the CAS, the Panel refers to article R57, para. 1 of the CAS Code which reads as follows:

"R57 Scope of Panel's Review, Hearing

The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Articles R44.2 and R44.3 shall apply."

66. Under article R57 of the CAS Code, the Panel's scope of review is fundamentally unrestricted. It has full power to review the facts and the law and may even request *ex officio* the production of further evidence. In other words, the Panel not only has the power to establish whether the decision of the disciplinary body being challenged was lawful or not, but also to issue an independent decision based on the regulations of the interested federation (CAS 2004/A/607 Galabin Boevski v. IWF; CAS 2004/A/633 IAAF v. FFA & Mr Chouki; CAS 2005/A/1001 Fulham FC (1987) Limited v. FIFA; CAS 2006/A/1153 WADA v/ Portuguese Football Federation & Nuno Assis Lopes de Almeida). The CAS Code contemplates a full hearing *de novo* of the original matter and grants the CAS Panel the authority to render a new decision superseding that rendered by the previous instance. The "full power" granted the deciding Panel under the CAS Code precludes any notion that the Panel must abide by restrictions on evidence which may or may not have been adduced in previous proceedings before a national or international disciplinary tribunal. National or international sports organizations may freely decide to accept or not to accept the arbitral jurisdiction of the CAS; however, when they do accept the CAS's jurisdiction they necessarily accept the application of the basic principles of the CAS Code, including the principle of a *de novo* review of the case. The CAS must, therefore, be accorded the unrestricted right to examine not only the procedural aspects of an appealed decision, but also, and above all, to review and evaluate all facts and legal issues involved in the dispute.
67. This unlimited scope of review is especially justified and fundamental in the case at hand as the German NF was not a party to the proceedings in the previous instance.
68. In addition, the Panel observes that all parties – including Mr Christian Ahlmann – availed themselves of new evidence subsequent to the hearing before the FEI Tribunal. Moreover, in the case at hand, the Panel can find no "evidential ambush" which might have given unfair advantages to one or the other party.
69. As a result, the Panel accepts all the evidence presented before it.

B) Admissibility of new arguments presented by Mr Christian Ahlmann in his Answer.

70. The FEI submits that the "*The CAS Panel should not accept such litigation by ambush where an appellant comes up with entirely new appellate arguments in an answer submission (...). These new points and exhibits brought in defence to an appeal and not in appeal should be disregarded as belated and therefore inadmissible*".
71. The CAS Code prohibits only the submission of new arguments after the filing of the Appeal Brief and the Answer, except when agreed to by all parties (see article R56 of the CAS Code). Furthermore, it does not limit the content of an Answer. The latter should contain "*a statement of defence; any defence of lack of jurisdiction, any counterclaim, any exhibits or specification of other evidence upon which the Respondent intends to rely*" (article R55 of the CAS Code). In the case at hand, Mr Christian Ahlmann had the right to file an Answer to the Appeal Brief of the German NF containing new argumentation.

72. In his Answer, Mr Christian Ahlmann raised procedural motions and focused his arguments in support of his request for dismissal of the appeal of the German NF on the alleged belated filing and lack of standing or legitimate interest. With regard to the merits, Mr Christian Ahlmann did not amend his original submissions or the request for relief set forth in his own Statement of Appeal. As to the new arguments presented in Mr Christian Ahlmann's Answer, it lies at the discretion of the Panel to assess their relevance.
73. Furthermore, Mr Christian Ahlmann's new arguments resulted in no adverse effect on the FEI's position, the latter having filed its own submissions after the receipt of Mr Christian Ahlmann's Answer. The FEI had the possibility to present factual and legal reasoning in connection with these so-called "new arguments" and to comment on the entire breadth of Mr Christian Ahlmann's submissions, to address the evidence produced by him and to challenge such evidence by adducing its own evidence.
74. For all the above reasons, the Panel is of the view that the procedural motion of the FEI must be dismissed.

IV.6 THE MERITS

75. It is undisputed that Capsaicin was found in the blood and urine samples collected from the horse Cöster. Stated differently, the accuracy of the testing methods, the test results and the positive findings have been accepted by the parties.
76. The German NF and the FEI claim that the positive finding constitute an anti-doping rule violation, whereas Mr Christian Ahlmann asserts that the violation constitutes – at the most – a "Medication Class A" offence. However, the rider's first line of defence is that, because the findings evidence a very low concentration of Capsaicin, Equi-Block must be classified as a care product without any therapeutic effect and cannot be sanctioned within the parameters of the "*ambiguous and unclear Equine prohibited List*".
77. In view of the above, the main issues to be resolved by the Panel are:
- a) What rule violation has been committed?
 - b) What is the appropriate sanction?

IV.6.1 What rule violation has been committed?

78. The applicable FEI regulations include three classes of prohibited substances: Doping, Medication class A and Medication Class B (see article 2 of the EADMC Rules). In the present case, it is accepted by the parties that the conditions for a Medication Class B are not met.

A) The FEI Rules and their compatibility with Swiss law

79. Article 146, para. 1 of the FEI GR reads as follows: "*The use of any substance or method that has the potential to harm the Horse or to enhance its performance is*

forbidden. The precise rules concerning Prohibited Substances and Medication Control are laid down in the EADMCRs”.

80. Article 2.1.1 of the EADMC Rules reads as follows: *“It is each Person Responsible’s personal duty to ensure that no Prohibited Substance is present in his or her Horse’s body during an Event. Persons Responsible are responsible for any Prohibited Substance found to be present in their Horse’s bodily Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Person Responsible’s part be demonstrated in order to establish an anti-doping or medication control violation under Article 2.1”.*
81. Article 2.1.2 of the EADMC Rules reads as follows: *“Excepting those substances for which a quantitative threshold is specifically identified in the Equine Prohibited List, the detected presence of any quantity of a Prohibited Substance in a Horse’s Sample shall constitute a rule violation”.*
82. Article 2.2 of the EADMC Rules reads as follows: *“The success or failure of the Use of a Prohibited Substance or a Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used for a rule violation to be committed”.*
83. Article 4.1 of the EADMC Rules provides that the EADMC Rules incorporate the FEI Equine Prohibited List, which reads as follows, where relevant:

“PROHIBITED SUBSTANCES (DOPING)

Agents, cocktails or mixtures of substances that may affect the performance of a horse; masking agents; substances with no generally accepted medical use in competition horses; substances which are usually products prescribed for use in humans or other species; agents used to hypersensitise or desensitise the limbs or body parts, including but not limited to:

(...)

- hypersensitizing or sensitizing agents (organic or inorganic or other substances likely to have been applied to body parts or to tack to influence performance);*

(...)

and other substances with a similar chemical structure or similar biological effect(s).

PROHIBITED SUBSTANCES (MEDICATION CLASS A)

Agents which could influence performance by relieving pain, sedating, stimulating or producing/modifying other physiological or behavioural effects, including:

(...)

and other substances with a similar chemical structure or similar biological effect(s).”

84. The Panel notes that the FEI rules put in place a system according to which the mere presence of a prohibited substance in the horse’s body constitutes a rule violation regardless of its concentration, its performance-enhancing effects or its origin, and that the PR is responsible for any such prohibited substance found to be present in the horse’s bodily samples.
85. The Panel finds that the FEI disciplinary system is indeed compatible with the principles and statutes of Swiss law. Importantly, the Swiss Federal Court has recently ruled that this disciplinary system, based on strict liability, is fully justified in equestrian sport by prevailing public interest, as the fight against doping tends to safeguard parity among competitors and fairness of competitions, protect the animals’ health, maintain breeding quality, combat the use of dangerous substances, preserve the integrity of the sport, and ensure that a good example is set for young people. These objectives are unanimously recognised by sports organisations and government institutions (ATF 134 III 193, p. 203, para. 4.6.3.2.2; in the same sense, see CAS 2008/A/1569 Kürten v/FEI paras. 7.6 - 7.7; CAS 2008/A/1654 B. Alves v/FEI, paras. 5.18 – 5.23).
86. The Panel remarks also that Mr Christian Ahlmann’s allegation that the FEI regulations are “very unfair” and do not comply with article 7 of the Swiss Cartel Law is unsubstantiated by any evidence or market analysis. In particular, the rider has not even tried to define the relevant market, has not adduced any evidence on how the allegedly abusive conduct of FEI affects the economic activities of riders and has not concretely explained how the Swiss Cartel Law has been violated. Certainly, it cannot be argued that the FEI disciplinary rules run afoul of antitrust law because sometimes competitors are suspended and cannot perform their economic activity, as this would be tantamount to asserting that criminal laws alter competition between entrepreneurs when, occasionally, an entrepreneur is imprisoned and thus excluded from the market. In short, the Panel holds that Mr Christian Ahlmann’s submission based on Swiss Cartel Law is too vague and unsupported by any economic evidence and must thus be disregarded.

B) Capsaicin as a prohibited substance having a doping effect

87. On the basis of the ample evidence put forward by the experts, the Panel harbours no doubt that Capsaicin is a prohibited substance having first an hypersensitising effect and then a pain relieving effect.
88. In particular, all the experts heard by the Panel agreed that a treatment with a Capsaicin-based product has an unavoidable two-step effect:

–Firstly, when applied to the skin, Capsaicin induces an immediate sensation of burning and pain. This effect is caused by the interaction with receptors located on sensory nerve terminals and causes a skin sensitisation. In other words, after topical administration, Capsaicin causes a sensation comparable to an inflammatory reaction with stimulation

of the nerves, which can last between 10 minutes to 2 hours. This phenomenon is called hyperalgesia as it has a hypersensitising effect.

– Secondly, the burning sensation is replaced by an analgesic effect and removal of pain by desensitisation. As explained in the instruction leaflet for Equi-block, Capsaicin “*depletes and prevents the accumulation of Substance P. Substance P is a little known chemical that triggers the pain signal sent to the brain*”. The loss of sensation of pain results from an interruption in the nervous system pathway between the injured area sense and the brain. This effect can last between 2 and 3 hours.

89. The Panel must accept the unanimous experts’ opinion, according to which the above effects are necessarily consecutive, as the analgesic effect is the consequence of the hypersensitising effect. It is not possible to obtain the decrease of the pain perception without passing through the hyperalgesia stage. Capsaicin has an analgesic effect because, previously, it hypersensitises the body part on which it is applied. In the Panel’s view, the fact that Capsaicin is *also* a pain-reliever does not and cannot elude the fact that it is indeed an “*agent used to hypersensitise or desensitise the limbs or body parts*”, thus to be considered as a doping substance.
90. Based on the above, the Panel finds that by establishing the presence of Capsaicin in the bodily samples of the horse Cöster, the FEI has proven that, at some phase, some part of the horse’s body has necessarily been hypersensitised and, accordingly, that a doping offence – as defined by the FEI Equine Prohibited List – has effectively occurred.
91. The Panel does not share the FEI Tribunal’s view that “*the FEI has to prove more than the mere existence of the substance*”, because this would imply that the FEI has not only the burden of proving the presence of Capsaicin, but that it also must demonstrate the wrongful act itself, i.e., the application of Capsaicin on a limb or on any other part of the horse’s body. Most of the times, such evidentiary burden would be nearly impossible to meet. The expert witnesses explained to the Panel that this substance is difficult to detect because it does not leave traces on the skin (in particular if the horse is dark-coloured) and is absolutely untraceable in the horse’s bodily fluids after a few hours. In this respect, Mr Jonas Tornell testified to the Panel that after the positive findings for Capsaicin at the 2008 Summer Games, the Swedish equestrian national team adopted a rule according to which a horse treated with Capsaicin cannot compete for the next 96 hours in order to avoid any positive findings.
92. As a result, the CAS Panel concurs with the FEI when it submits that “*No product is specifically designed to hypersensitise a horse’s legs to increase his performance. Thus, any PR could simply declare that he used the substance for its original – e.g. therapeutic – purposes to escape any charge of doping. The effective use of the substance would be impossible to prove in most cases. This would make the fight against doping illusory, precisely against those types of offences which must be viewed as particularly serious, because they also put the horse’s health and welfare at risk*”.

93. In conclusion, the Panel holds that Mr Christian Ahlmann must be considered as having committed a doping offence prohibited by the applicable FEI regulations and must take responsibility for it (see articles 142 of the FEI GR and 10 of the EADMC Rules).

C) Irrelevance of the other issues concerning Capsaicin

94. The parties have debated at length several issues concerning Capsaicin, in particular, those related to the fact that a) Capsaicin-based products must be registered under state laws, b) it is commonly used in the equestrian world, c) its concentration in Equi-block is too low to have any therapeutic effect, d) alternative drugs are more appropriate to treat the chronic back pains of the horse.
95. In fact, having evaluated the experts' oral and written statements, the Panel observes that there are divergent views on several aspects concerning Capsaicin. While some experts assert that this substance is not registered in Germany and is therefore illegal in this country (Mr Björn Nolting) and probably in the rest of Europe (Mr Manfred Kietzman), other experts claim that it is authorised in many places, where it can actually be bought over the counter (Mr Jonas Tornell, Mr Peter Cronau and Mr Thomas Tobin). Mr Peter Cronau maintains that, because of the low concentration of Capsaicin in Equi-block, this product must be classified as a skin care product, mainly used as a massage ointment. This assertion is contested by others (Messrs Manfred Kietzmann, Björn Nolting, Paul Farrington, Marc Gogny, Richard Corde). There is also disagreement between those who allege that Capsaicin is rarely used for its analgesic properties (Mr Marc Gogny), those who contend that it is a very common substance that can be found in many preparations with no therapeutic effect (Mr Peter Cronau, Mr Thomas Tobin) and those who assert that it is often used as part of a progressive rehabilitation treatment after injuries or chronic inflammations (Mr Richard Corde). Finally, Mr Thomas Tobin claims that he is not aware of any positive calls for Capsaicin anywhere else in the world outside the 2008 Summer Games, whereas Mr Björn Nolting contends that he knew that Capsaicin could test positive and Mr Richard Corde maintains that he warns his clients not to use Capsaicin in competition, because of the controls that may be performed on these occasions, as there was already a positive case two years ago in France.
96. The Panel is of the opinion that the above described conflicts of opinion need not to be resolved by the Panel, as the related issues are irrelevant in light of the strict liability principle adopted by the FEI and of the above finding that Capsaicin is a prohibited substance that was found in the bodily samples of the horse Cöster. Those opinions are probably relevant in the process of drafting a new update of the FEI List of Prohibited Substances and they need to be considered and harmonised there. Therefore, the Panel dismisses without further consideration the issues related to the registration of Capsaicin under state laws, to its common use in the equestrian world, to its low concentration in Equi-block and to the fact that other drugs are more appropriate to treat the chronic back pains of a horse.

IV.6.2 What is the appropriate sanction?

97. This is the first time that Mr Christian Ahlmann has been found guilty of an anti-doping rule violation. On the basis of a doping offence, a period of ineligibility of up to two years and a fine of up to CHF 15,000.- may be imposed (see article 10.1 of the EADMC Rules). In comparison, a Medication Class A rule violation is sanctioned with a period of up to one year's ineligibility and a fine of up to CHF 15,000.- (see article 10.2 of the EADMC Rules).
98. Pursuant to article 166 of the FEI GR, "*1. The CAS has the power to impose the same scale of penalties as the FEI Tribunal. 2. 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 Appeal to the CAS is brought*".
99. In accordance with article 10.5 of the EADMC Rules, Mr Christian Ahlmann might obtain the elimination or reduction of the ineligibility period on the basis of "*exceptional circumstances*" if he proved, by a balance of probability, that he bore "*no fault and no negligence*" or "*no significant fault and no significant negligence*" for the anti-doping violation. However, given that the evidence submitted to the Panel that the initial hypersensitising action of Capsaicin is both evident and well-recognized by veterinary experts of equestrian sports, the Panel holds that an experienced rider such as Mr Ahlmann has been significantly negligent in allowing his horse to be treated with a Capsaicin-based product just before competition. Accordingly, the Panel does not find any exceptional circumstance which would eliminate or reduce the ineligibility period.
100. However, the Panel notes that, in contrast to anti-doping rules applicable to humans, equine anti-doping rules provide sanctions "*up to*" a given maximum, with regard to both the ineligibility period and the pecuniary fine (see *supra* at 97). In the Panel's view, this means that the Panel must take into account proportionality considerations in view of any aggravating or mitigating factors.
101. Accordingly, the Panel has taken into consideration the following aggravating factors:
- The competition in which the horse was participating (i.e. the Olympic Games) is the most important international event, with very large media coverage;
 - Mr Christian Ahlmann should have exerted particular care with regard to doping matters as he had already experienced the revocation of a Gold Medal at the 2004 Athens Summer Olympic Games because of a rule violation committed by one of his teammates;
 - Mr Christian Ahlmann caused serious damage to the image of the German NF and of equestrian sports in general;
 - After the incidents in the 2004 Athens Summer Olympic Games, the German NF formally cautioned its riders against the use of medication and creams applied on horses. A similar warning with regard to herbal or natural medicinal products can be found in Annex VIII to the applicable FEI Veterinary Regulations, which states

notably the following: “5. *The use of a herbal or natural product may result in a positive test result, contrary to the claim by the manufacturer or marketing agent. Many prohibited substances (e.g. salicylates, digitalis, reserpine) have their origin in plants and may be regarded as serious rule violations.* 6. *As the analytical techniques in the testing laboratory become more refined, the fact that these products have not been detected by testing in the past does not hold any guarantee for their safe use in competition*”; nevertheless, Mr Ahlmann applied a Capsaicin-based product on his horse a couple of hours before the Team Jumping Final – Round 2/Individual 2nd Qualifier which took place on 17 August 2008;

- Mr Ahlmann administered a Capsaicin-based product to his horse without mentioning it to his team veterinarian or to any official and without declaring it on the FEI medication control form during the sample collection procedure.
102. As mitigating factors, the Panel has considered that the FEI list of prohibited substances operates with a system of general definitions, which is supported by a non-exhaustive list of examples; this tends to exacerbate the nebulous situation encountered in the present case and complicates the Person Responsible’s freedom and discretion when faced with the need to administer a product to his horse for any reason whatsoever. The Panel has also taken into consideration the fact that Mr Christian Ahlmann admitted before the Panel that he made a mistake when he administered Equi-block without further research or inquiry with a professional veterinarian.
103. The Panel has also considered that, due to the prohibition of *ultra petita*, it cannot impose a larger sanction than that which was requested by the German NF in its motions for relief.
104. Based on the foregoing, and after a careful assessment of all the circumstances, the Panel considers that it is appropriate to impose an eight-month period of ineligibility upon Mr Christian Ahlmann. The Panel is comfortable with this sanction, as it represents a third of the maximum ineligibility period for a doping offence, which is proportionally equivalent to the penalty imposed by the FEI Tribunal for a Medication Class A offence (a third of the maximum of one-year ineligibility).
105. Pursuant to article 10.8 of the EADMC Rules, “*the period of Ineligibility shall start on the date of the hearing decision unless otherwise provided for by the decision of the Hearing Body. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served*”.
106. In view of all the circumstances, the Panel has considered that it is both in Mr Christian Ahlmann’s and in the interests of the sport to serve an uninterrupted period of ineligibility. Therefore, the Panel hereby increases the penalty and declares Mr Christian Ahlmann ineligible for a period of eight months, starting on 21 August 2008 and thus ending on 20 April 2009.
107. All results obtained by Mr Christian Ahlmann during the above-mentioned period of ineligibility are invalidated, with related forfeiture of any medals, points and prizes that he has obtained.

108. The fine of CHF 2,000.- imposed by the FEI Tribunal in its Appealed Decision can be confirmed, as the Panel finds it reasonable and appropriate under the circumstances.

109. (...)

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of the Deutsche Reiterliche Vereinigung e.V. against the decision of the FEI Tribunal dated 22 October 2008 is upheld.
2. The appeal of Mr Christian Ahlmann against the decision of the FEI Tribunal dated 22 October 2008 is dismissed.
3. The decision issued by the FEI Tribunal on 22 October 2008 is modified to declare Mr Christian Ahlmann ineligible for a period of eight months, starting on 21 August 2008 and thus ending on 20 April 2009.
4. All results obtained by Mr Christian Ahlmann during the above-mentioned period of ineligibility are invalidated, with related forfeiture of any medals, points and prizes.
5. (...)

Operative part communicated on 2 April 2009

Done in Lausanne, 30 April 2009

THE COURT OF ARBITRATION FOR SPORT

President of the Panel
Massimo Coccia

John A. Faylor
Arbitrator

Michael Geistlinger
Arbitrator

Patrick Grandjean
Ad hoc Clerk