CAS 2020/A/6695 Nicole Walker v. PANAM Sports
CAS 2020/A/6700 Equestrian Canada v. PANAM Sports
CAS 2020/A/7386 PANAM Sports v. Nicole Walker and Equestrian Canada

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Alan Sullivan QC, Barrister in Sydney, Australia
Arbitrators: Ms Maidie E. Oliveau, Attorney-at-law in Los Angeles, USA
Prof Dr Ulrich Haas, Law Professor, Zurich, Switzerland

in the arbitration between

Ms Nicole Walker, Canada

Represented by Mr Mike Morgan and Ms Liza Lazarus, Attorneys-at-law, Morgan Sports Law, London, United Kingdom

-Appellant in CAS 2020/A/6695 and CAS 2020/A/670
and First Respondent in CAS 2020/A/7386-

Equestrian Canada, Canada

Represented by Mr. Mike Morgan and Ms Liza Lazarus, Attorneys-at-Law, Morgan Sports Law, London, United Kingdom

-Appellant in CAS 2020/A/6695 and CAS 2020/A/6700
and Second Respondent in CAS 2020/A/7386

and

The Pan American Sports Organisation (PANAM Sports, Mexico

Represented by Mr. Antonio Quintero and Elena Mundaray, Attorneys-at-law, de Carrero & Quintero, Caracas, Venezuela

Respondent in CAS 2020/A/6695 and CAS 2020/A/6700
and Appellant in CAS 2020/A/7386

And as "*Amici Curiae*"

Canadian Olympic Committee (COC), Canada

Represented by Mr Adam Klevinas, Attorney-at-law, Quebec, Canada

"Amicus curiae"

&

Fédération Equestre Internationale (FEI), Switzerland

Represented by Mr Jonathan Taylor QC and Ms Lauren Pagé, Attorneys-at-law, Bird & Bird LLP, London, United Kingdom

"Amicus curiae"

&

Argentinian Equestrian Federation (FEA), Argentina

Represented by Dr iur Thilo Pachmann and Dr iur Rafael Bragger, Attorneys-at-law, Pachmann Ltd, Zurich, Switzerland

"Amicus curiae"

&

Argentinian Olympic Committee (COARG), Argentina

Represented by Dr iur Thilo Pachmann and Dr iur Rafael Bragger, Attorneys-at-law, Pachmann Ltd, Zurich, Switzerland

"Amicus curiae"

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I. THE PARTIES

1. Nicole Walker (Appellant in CAS 2020/A/6695 and First Respondent in CAS 2020/A/7386) is a 26-year-old equestrian who represents the Canadian Equestrian Team (Team Canada) in the jumping discipline.

2. Equestrian Canada is the national governing body for equestrian sport in Canada. Equestrian Canada is Appellant in CAS 2020/A/6700 and the Second Respondent in CAS 2020/A/7386.

3. Ms Walker and Equestrian Canada are also jointly referred to in this Award as the Appellants.

4. Pan American Sports Organisation (PANAM Sports) is a Continental Association of National Olympic Committees recognized as such by the International Olympic Committee. It organizes multi-sports games in the Americas, the Pan Am Games. PANAM Sports is Respondent in CAS 2020/A/6695 and CAS 2020/A/6700 and Appellant in CAS 2020/A/7386. In this Award PANAM Sports is also referred to as the Respondent.

II. FACTUAL BACKGROUND

5. These are three appeals, each relating to the same set of facts and dealing with the same issues and involving the same Parties. Each appeal relates to the results of Nicole Walker and Team Canada in the equestrian jumping competition at the 2019 Pan Am Games (the Pan Am Games). Equestrian Canada selected Ms Walker as a member of the jumping team for the Pan Am Games and Ms Walker thus contributed to Team Canada's result in the team jumping competition. PANAM Sports in the context of these appeals is responsible for results management in relation to anti-doping rule violations (ADRVs) committed during the Pan Am Games. Each of the appeals was heard together and all are dealt with collectively in this one single award.

6. Set out below is the summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, and evidence adduced at the CAS hearing. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the parties in the present proceedings, it refers in its Award only to those parts of that material which it considers necessary to explain its reasoning.

7. The Pan Am Games were held in Lima, Peru from 26 July 2019 to 11 August 2019.

8. PANAM SPORTS adopted the PanAm Sports Anti-Doping Rules (PADR) based on the 2015 World Anti-Doping Code for the Pan Am Games in May 2019.

9. The equestrian jumping competitions were held over three days, 6, 7 and 9 August 2019. On 6 August, the first individual qualifying competition (which was also doubled as the first qualifying round of the team competition) was held and Ms. Walker finished 9th. On 7 August, the team jumping competition was held, with the two rounds on that day

also counting as the 2nd and 3rd rounds of the individual qualifying competition where she finished 13th. On 9 August, the final individual jumping competition was held where Ms. Walker finished 4th. Team Canada finished in 4th for the team jumping competition, calculated by aggregating the scores of the four competitors and deducting the lowest scores of one competitor in each of the three rounds in the team competition.

10. Ms. Walker provided an in-competition urine sample on 7 August 2019 during the Pan Am Games. On analysis, the sample was found to contain benzoylecgonine, a metabolite of cocaine, a prohibited substance under the PADR, Article 4, which incorporates the *Prohibited List* which is published and revised by WADA.

11. PANAM Sports charged Ms. Walker with an ADRV by notice of 26 August 2019 under Article 2.1 (The presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's Sample) of the PADR.

12. A hearing was held on 4 December 2019 before the PanAm Sports Disciplinary Commission (the "PDSC"), which issued its decision on 11 December 2019 (hereinafter the "Appealed Decision").

13. The PSDC decided as follows:

> *1. The athlete, Ms Walker, committed during the Pan Am games an ADRV on account of the presence in a Sample provided by her of cocaine metabolites (benzoylecgonine) in such a quantity to constitute an ADRV contrary to the Panam Sports ADRs;*
> *2. To disqualify the athlete, Ms Walker, from the equestrian Jumping Individual Competition on the 7 and 9 of August, 2019 at the Pan Am Games;*
> *3. To Order that with regard to the equestrian Jumping Team Competition that the athlete's, Ms Walker's, results be Disqualified in all Competitions, on both the 6 and 7 August, 2019, and that Ms Walker's results on those dates be replaced with the results of the next applicable Canadian team member. It is ordered that Panam Sports recalculate the results of the equestrian Jumping Team Competition accordingly.*
> *4. To send the complete file of this case to the FEI for its use as it may deem appropriate.*
> *5. To notify the corresponding parties according to the Panam Sports Anti-Doping Rules and the World Anti-Doping Code.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 2 January 2020, Ms. Walker filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") appealing the decision of the Commission. The matter was registered as CAS 2020/A/6695.

15. On 2 January 2020, Equestrian Canada filed a Statement of Appeal with CAS appealing the decision of the Commission. The matter was registered as CAS 2020/A/6700.

16. On 13 January 2020, the CAS Court Office acknowledged receipt of the Statement of Appeal in the matter CAS 2020/A/6695 and set a deadline to Ms Walker to file her Appeal Brief within ten days following the expiry of the time limit for appeal.

17. On 15 January 2020, the CAS Court Office acknowledged receipt of the Statement of Appeal in the matter CAS 2020/A/6700 and set a deadline to Equestrian Canada to file its Appeal Brief within ten days following the expiry of the time limit for appeal. Furthermore, the CAS Court Office invited PANAM Sports to inform it within three days from receipt of this letter whether it agreed to consolidate the proceedings CAS 2020/A/6695 and CAS 2020/A/6700.

18. On 17 January 2020, Ms Walker and Equestrian Canada requested an extension to file the respective Appeal Briefs until 28 January 2020.

19. On 17 January 2020, the Canadian Olympic Committee ("COC") applied to intervene as a third party in each of the two cases.

20. On 20 January 2020, the CAS Court Office acknowledged receipt of Ms Walker's and Equestrian Canada's requests for an extension of the deadline to file the Appeal Brief and advised PANAM Sports that absent any objection filed by the latter on or before 22 January 2020, the respective requests would be granted.

21. On 21 January 2020, the appeals of Equestrian Canada (CAS 2020/A/6700) and Ms. Walker (CAS 2020/A/6695) were consolidated.

22. On 22 January 2020, PANAM Sports nominated Prof Ulrich Haas as arbitrator.

23. On 23 January 2020, the CAS Court Office following its letter dated 20 January 2020 granted the Appellants' request for an extension of the deadline to file the Appeal Briefs until 28 January 2020.

24. With separate letter of the same day, the CAS Court Office acknowledged receipt of COC's request for intervention in both cases.

25. Each of the Appellants filed their Appeal Briefs on 29 January 2020.

26. On 30 January 2020, PANAM Sports declared that it accepted the intervention of the COC in the present proceedings.

27. Still on the same day, the CAS Court Office acknowledged receipt of the Appellants' Appeal Briefs and invited PANAM Sports to file its Answer within 20 days upon receipt of this letter.

28. On 3 February 2020, the Appellants advised the CAS Court Office that they agreed with the request for intervention by the COC.

29. On 21 February 2020, PANAM Sports requested an extension until 9 March 2020 to file its Answer.

30. On 24 February 2020, the CAS Court Office granted PANAM Sports request for an extension of the deadline to file the Answer.

31. On the same day, the Appellants nominated Ms Maidie Oliveau in both proceedings as arbitrator.

32. On 28 February 2020, PANAM Sports requested another extension of the deadline to file the Answer until 10 March 2020.

33. On 2 March 2020, the CAS Court Office invited the Appellants to comment on PANAM Sports' request.

34. On 8 March 2020, PANAM Sports requested yet another extension of the deadline to file the Answer until 13 March 2020.

35. On 9 March 2020, the CAS Court Office noted that no objection was filed by the Appellants in response of the CAS' letter dated 2 March 2020. The Appellants were advised that PANAM Sports further request for an extension would be granted, if no objection was raised on or before 11 March 2020.

36. On 10 March 2020, the Appellants agreed to PANAM Sports request for an extension of the deadline.

37. On 11 March 2020, the CAS Court Office granted PANAM Sports request to file the Answer until 13 March 2020.

38. PANAM Sports filed its Answer, together with its Cross-Appeal in both cases on 13 March 2020. As part of its Answer, PANAM Sports requested the joinder of the Fédération Internationale Equestre ("FEI"), the Argentinian Olympic Committee ("COARG") and the Argentina Equestrian Federation ("FEA").

39. On 18 March 2020, the CAS Court Office acknowledged receipt of PANAM Sports Answer filed on 13 March 2020 and advised the Parties that subject to the exceptions listed in Article R56 of the CAS Code the Parties would not be authorized to supplement or amend their requests and arguments.

40. On 19 March 2020, the CAS Court Office noted that the Respondent had requested the joinder of the FEI, FEA and the COARG in its Answer and invited the Appellants to express their position strictly limited to the Respondent's request for joinder on or before 30 March 2020.

41. On 25 March 2020, each of FEI, COARG and FEA were advised by CAS that PANAM Sports had requested their joinder and to provide the CAS with their position by 1 April 2020.

42. On 25 March 2020, the Appellants requested to be granted an opportunity to respond to the Cross-Appeal filed by the Respondent in its Answer.

43. On 30 March 2020, the CAS Court Office acknowledged receipt of the Appellants' letter and advised the Parties that instructions with regards to the Respondent's Cross-Appeal and the Appellants' requests thereto would follow, once the Panel was constituted.

44. On 30 March 2020, FEI advised that it wished to be joined as an interested party in the appeals.

45. On 30 March 2020, the Appellants asked for an extension of the deadline to comment on the Respondent's request of the joinder of various third parties until 6 April 2020.

46. On 1 April 2020, the CAS Court Office granted the Appellants' request for an extension of the deadline.

47. On 1 April 2020, the COARG informed the CAS Court Office that it wished to participate in this matter and accepted the joinder.

48. On 6 April 2020, the Appellants filed their comments in relation to the Respondent's request to join the FEI, COARG and the FEA to these proceedings.

49. On 8 April 2020, the CAS Court Office acknowledged receipt of the Appellants' objection to the joinder of COARG, FEA and FEI and advised the Parties that it would be for the Panel once constituted to decide on this matter.

50. On 2 June 2020, the Appellants informed the Panel that "a number of matters are awaiting determination pending the constitution of the Panel", in particular the joinder requests of the FEI, COC, FEA and COARG, the request of the Appellants to be granted leave to respond to Respondent's Cross-Appeal and the question of the hearing venue.

51. On 4 June 2020, pursuant to Article R54 of the Code of Sports-related Arbitration ("CAS Code"), the Parties were notified of the Panel appointed to decide these appeals, constituted as follows:

President:	Mr Alan Sullivan QC, Barrister in Sydney, Australia
Arbitrators:	Ms Maidie E. Oliveau, Attorney-at-law in Los Angeles, California, USA
	Prof Dr Ulrich Haas, Professor in Zurich, Switzerland

52. On 4 June 2020, the Respondent requested that the COARG, FEA and FEI be granted an opportunity to respond to the objections file by the Appellants in relation to their joinder.

53. On 15 June 2020, the Panel directed the Parties to explain why the joinder of any particular third party was necessary or desirable and what benefits the joinder of any of the third parties would bring to the hearing and the disposition of these Appeals. This was supplemented on 17 June 2020 when the Parties were requested to address any prejudice any Party may suffer by the non-joinder of any third party. It advised the Parties that the Panel would determine the issue of the joinder on the basis of the written submissions only. Furthermore, the Panel invited the Parties to comment on the

admissibility of the Respondent's Cross-Appeal on or before 22 June 2020. The Panel also advised the Parties that it would decide on the issue of the Cross-Appeal based on the written submissions.

54. On 17 June 2020, the Respondent requested an extension of the deadline to provide its comments on the issues raised in the CAS Court Office letter of 15 June 2020.

55. By letter dated 17 June 2020, the CAS Court Office granted the Respondent's request for an extension of the deadline.

56. On 17 June 2020, the FEI, COC, FEA and COARG were requested to make submissions on: (a) the power or right relied upon to be joined; (b) the role intended to be played if they were joined; (c) what assistance they were able to give by way of submissions and/or evidence that would not be available through or from the existing Parties to the appeals; and (d) any prejudice their organization would suffer by not being joined.

57. On 18 June 2020, the Appellants also requested an extension of the deadlines to file their position on the various joinders and the admissibility of the Cross-Appeal.

58. On 19 June 2020, the Appellants objected to the letter sent by the CAS on 17 June 2020 to the FEA inviting it to reply to questions (a) – (d). The Appellants submitted that the CAS Court Office on 25 March 2020 had already given the FEA the possibility to indicate its position on being joined until 1 April 2020.

59. On 22 June 2020, the CAS Court Office acknowledged receipt of the Appellants' letter dated 18 and 19 June 2020. It advised the Appellants that their request for an extension of the deadline had been granted.

60. On 23 June 2020, the FEA and COARG requested an extension of the deadline to answer the questions posed in the CAS letter dated 17 June 2020.

61. On 24 June 2020, the Panel granted the extension of the deadline requested by the FEA and COARG.

62. Still on 24 June 2020, the FEI filed its comments in relation to the CAS Court Office letter dated 17 June 2020.

63. With letter dated the same day, the Panel declined the Appellants' request dated 19 June 2020. It advised the Parties that it had not yet determined, one way or the other, whether the non-response of FEA to the CAS letter of 25 March 2020 was fatal or adverse to the request to join FEA.

64. On 6 July 2020, the Appellants and the Respondent filed their observations on the various joinders and the issue of the Cross-Appeal.

65. Also on 6 July 2020, the COARG and the FEA filed their responses to the CAS Court Office letter of 17 June 2020.

66. On 7 July 2020, the CAS Court Office acknowledged receipt of the Parties' respective submissions.

67. On 8 July 2020, the CAS Court Office acknowledged receipt of the submissions of COARG, FEA and FEI.

68. On 8 July 2020, the Respondent requested leave from the Panel to file a brief reply to the Appellants' comments on the admissibility of the Cross-Appeal.

69. On 12 July 2020, the Appellants requested to be permitted to file submissions in response to the submissions of the FEI, COARG and the FEA.

70. On 16 July 2020, the Panel granted a 7-day deadline to the Appellants to submit their response strictly limited to the submission on joinder filed by the FEI, COARG, FEA and Respondent.

71. On 23 July 2020, the Appellants filed their comments on the submissions on joinder filed by the FEI, COARG and FEA and the Respondent.

72. The Panel notified the Parties on 6 August 2020 that the Respondent's "Cross-Appeal" filed with its Answer on 14 March 2020 was admissible pursuant to Article 12.2.3 PADR. Furthermore, the Panel granted the Appellants a 20-day deadline as from receipt of this letter to submit their respective Answers. In addition, the Panel advised the Parties that in respect of the intervention and joinder applications, the COC, COARG, FEI and FEA be permitted to participate in the appeals as *amici curiae* only and on specific conditions laid out in the letter. Finally, the Parties were invited to state their position on the conduct and venue of the hearing.

73. On 20 August 2020, the Panel forwarded the Appeal Briefs and Answers already filed to the *amici curiae*. It granted the latter a 34-day deadline from receipt of its letter to file "a single submission (and only one) in response to those Appeal Briefs and Answers to the Cross-Appeal" and advised them that they would be allowed to attend the hearing of the appeals, but that they would not be permitted at the hearing to call witnesses, adduce other evidence, cross-examine witnesses or make oral submissions. Finally, the *amici curiae* were advised that irrespective of the outcome of the appeals none of them would be liable to pay costs or a contribution to costs and similarly, none of the *amici curiae* would be entitled to claim costs or a contribution towards costs from any other party.

74. On 24 August 2020, the Appellants requested to stay the deadline to file their Answers to the Cross-Appeal pending payment of the Respondent of the Court Office fee and the advance on costs.

75. On 25 August 2020, the CAS Court Office acknowledged receipt of the Appellants' letter, set aside the deadline set in its letter dated 6 August 2020 and advised the Parties that a new deadline would be fixed once the Respondent paid its share of the advance on costs.

76. On 27 August 2020, FEA and COARG objected to the decision of the Panel to grant them the status of *amici curiae* only. According to FEA and COARG this constituted a violation of their right to be heard.

77. With letter dated the same day, the CAS Court Office acknowledged receipt of FEA's and COARG's letter.

78. On 1 September 2020, the Panel advised COARG and FEA that it saw no reason to change its previous decision to accord to them the status of *amici curiae*.

79. On 9 September 2020, the Respondent submitted its position concerning the venue and conduct of the hearing.

80. On 10 September 2020, the CAS Court Office advised the Parties that a new procedure was initiated by PANAM Sports, *CAS/A/7386 PANAM Sports v. Nicole Walker and Equestrian Canada*, for the "Cross-Appeal" filed by PANAM Sports and that this case has been consolidated with the initial two cases.

81. On 22 and 23 September 2020, COC, FEI, FEA and COARG filed their respective *Amicus Curiae* Briefs.

82. On 28 September 2020, the CAS Court Office advised the Appellants that the Respondent had paid its share of the advance on costs in relation to the Cross-Appeal and set a new 20-day deadline as of receipt of this letter to file the respective Answers hereto.

83. In response to the Panel's invitation to make submissions on the form and location of the hearing, the Appellants requested an in-person hearing in North America as soon as in-person hearings could be held, and PANAM Sports also requested an in-person hearing [by letter of 9 September 2020], suggesting it could be held in Mexico because of less strict measures and no restrictions to enter the country.

84. On 6 October 2020, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing on 21 and 23 December 2020, unless the Parties would be unavailable on such dates. The Panel determined that due to the Covid-19 pandemic and the resultant restrictions on travel, the hearing would be held by video conference.

85. On 9 October 2020, the CAS Court Office informed the FEI, FEA, COARG and COC of the Panel's decision to hold a hearing in the present proceedings on 21 and 23 December 2020 and reminded them of the Panel's decision of 6 August 2929, whereby they would be allowed to attend the hearing but would not be permitted to call witnesses, adduce other evidence, cross-examine witnesses or make oral submissions.

86. On 30 October 2020, the Appellants requested the Panel to "*reconsider the proposed hearing format so that it includes oral arguments*".

87. On 3 November 2020, the Panel granted the Respondent to opportunity to submit its observations on the Appellants' letter of 30 October 2020 by 6 November 2020.

88. On 6 November 2020, further to several granted requests for extension of deadline, the Appellants filed their Answer to Respondent's "Cross-Appeal". In that Answer, the Appellants also made submissions with respect to the *Amici Curiae* Briefs.

89. On 30 November 2020, the CAS Court Office advised the Parties that the Panel had decided to start the hearing scheduled on 21 and 23 December 2020 at 3pm (Swiss time) and last until 10pm (Swiss time) at the latest and requested the Parties to confirm that all their submissions and evidence can be dealt within such timeframe. The Parties were further informed that the Panel would grant them the opportunity to file closing submissions at a later date during January in the event the Parties cannot confirm that all their submissions and evidence can be dealt within the specified timeframe.

90. On 16 December 2020, the CAS Court Office acknowledge receipt of the Parties respective positions.

91. On 17 December 2020, on behalf of the Panel, the CAS Court Office issued an Order of Procedure and invited the Parties to return a signed copy thereof on or before 21 December 2020.

92. On 20 December 2020, the Parties signed the Order of Procedure to govern the hearing of the appeals. Pursuant to the Order of Procedure the Parties agreed:

(a) That the jurisdiction of the CAS is not contested by the Parties;
(b) The composition of the Panel;
(c) That the seat of the Panel is Lausanne, Switzerland;
(d) That the language of the arbitration is English;
(e) That the law applicable to the merits shall be the applicable regulations and, subsidiarily, 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;
(f) That unless the Parties agree otherwise, a summary, and/or a press release setting forth the results of the proceedings shall be made public by the CAS and in accordance with Article R59 of the CAS Code, the Award shall be made public by CAS;
(g) With respect to costs, Article R64 of the CAS Code shall apply.

93. On 22 December 2020, the Appellants submitted that Dr Viret's report shall be admitted by the Panel in the present proceedings and requested the Panel to perform a direct examination with Dr. Viret with cross-examination and re-direct.

94. On 23 December 2020, the CAS Court Office acknowledged of the Appellants' letter of 22 December 2020 and informed the Parties that such letter would be transmitted to the Panel for its consideration.

95. The hearing was held by video conference on 21 and 23 December 2020 with the following in attendance:

For Ms Walker and Equestrian Canada

Ms Lisa Lazarus, Morgan Sports Law
Mr Mike Morgan, Morgan Sports Law
Mr Richard Martin, Morgan Sports Law
Mr Tom Seamer, Morgan Sports Law
Ms Lisa Jones, Morgan Sports Law
Mr Tim Danson, Danson Recht LLP
Mr Howard Jacob, Law Offices of Howard L Jacobs
Ms Nicole Walker

Appellants' Experts and Witnesses:

Dr Keith Ashcroft, Centre for Forensic Neuroscience
Prof. Jack Uetrecht, University of Toronto
Mr Mario Deslauriers, athlete
Ms Karen Hendry-Ouellette, Equestrian Canada
Mr Mark Kinsella, athlete and trainer
Mr Rafael Rocca, Miranda & Armado
Dr Geoff Vernon, Veterinian

For PANAM Sports

Mr Ivar Sisniega, General Secretary PANAM Sports
Mr Antonio Quintero, Attorney-at-law
Ms Elana Mundaray, Attorney-at-law

Respondent's expert

Professor Martial Saugy, University of Lausanne

For FEI

Ms Aine Power, FEI Deputy Legal Director
Mr Jonathan Taylor, Bird & Bird LLP
Ms Lauren Pagé, Bird & Bird LLP

For FEA and COARG
Dr Thilo Pachmann, Pachmann Ltd
Dr Rafael Brägger, Pachmann Ltd

For COC

Ms Marianne Bolhuis, General Counsel for COC
Mr Adam Klevinas, Sportlex

96. The Parties did not object to the composition of the Panel, and to the conduct of the proceedings and hearing.

97. On 12 January 2020, the Panel issued the Operative Part of the Award.

IV. THE SUBMISSIONS OF THE PARTIES

98. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. For convenience, the summary includes the relevant Party's arguments in both the Appeals, Answer and Cross-Appeal. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Position of Ms Walker

Ms Walker submitted that:

(a) The Adverse Analytical Finding (AAF) which resulted in a commission by her of the ADRV was caused by the consumption of tea on the morning of 7 August 2019 which, unbeknown to Ms Walker at the time, contained cocaine.

(b) She did not challenge the disqualification of her *individual* results obtained on 7 and 9 August 2019 but did challenge the disqualification of her results obtained on 6 August 2019 in so far as they were part of the Qualifying Round for the team competition (it being noted that the PSDC did not disqualify Ms Walker in respect of the Individual Qualifying Competition on 6 August 2019).

(c) Her results from 6 and 7 August 2019 must not be subtracted for the purpose of calculating the team competition points earned by the Canadian Jumping Team.

99. In support of her submission that the ADRV was caused by the consumption of tea containing cocaine only on the morning of 7 August 2019 Ms Walker made many submissions as to factual matters and called lay and expert evidence in support. To the extent necessary, reference will be made to such submissions and evidence below.

100. In support of her submission that her results from 6 and 7 August 2019 should not be subtracted for the purpose of calculating the team competition points, Ms Walker made a number of careful and thoughtful legal and factual submissions including her primary submission which may be summarized as follows:

(a) That the matter was governed by the PADR and, where applicable, the FEI's Anti-Doping Rules for Human Athletes (FEI ADRHA) and the 2015 World Anti-Doping Code (the 2015 WADC).

(b) Article 19.4 of the PADR provided that the 2015 WADC was to be considered an integral part of it and was to prevail *in case of conflict with* the PADR.

(c) Additionally, Article 19.6 of the PADR provided that the comments annotating various provisions of the 2015 WADC were to be incorporated by reference into the PADR, and were to be treated as if fully set out in the PADR.

(d) The Equestrian Jumping Competition at the Pan Am Games was not for the purposes of the PADR nor, for that matter, for the purposes of the 2015 WADC a "Team Sport" because to be a "Team Sport" for the purposes of such rules substitution of players (participants) must be permitted during a Competition and that was not the case with the Equestrian Jumping Competition. It should be noted that this was common ground between all Parties and is clearly correct.

(e) Although the Equestrian Jumping Competition was not a Team Sport (as defined by the PADR) it was a sport in which awards were given to teams.

(f) However, the PADR effectively provided for the two sets of conflicting disqualification rules in respect of sports in which awards are given to the team, but which fall outside the definition of Team Sports.

(g) The two sets of conflicting qualification rules were, on the one hand, Article 11.4 of the PADR which provided, amongst other things, for the *automatic* Disqualification of the result obtained by the team in the relevant competition and Article 11.2.2 of the FEI ADRHA which relevantly provided that where a member of a team commits an ADRV, the Athlete's results *may* be Disqualified in all competitions. Should that occur, the Athlete's results were to be substituted from the team result and replaced with the results of the next applicable team member.

(h) Further or alternatively, Article 11.2.3 of the FEI ADRHA gives discretion to the decision maker to consider "exceptional circumstances" when exercising the discretion conferred by Article 11.2.2 of the FEI ADRHA and that such a discretion should, in the circumstances of this case, be exercised in her favour.

(i) The provisions of the FEI ADRHA prevail over those of the PADR and must be applied because otherwise the PADR would be *in conflict with* the 2015 WADC.

(j) This conflict arises because Article 19.6 of the PADR expressly incorporates the comments in the 2015 WADC. One of the comments in the 2015 WADC is in respect of Article 9 of the 2015 WADC. That comment, relevantly, is as follows:

> *"In sports which are not Team Sports but where awards are given to teams, Disqualification ... when one or more team members has committed an [ADRV] shall be as provided in the applicable rules of the International Federation."*

(k) The "comment" to Article 9 of the 2015 WADC should not be treated as something which may be used merely to interpret the 2015 WADC and the PADR. Rather, as a matter of law, that comment is a stand alone and operative binding provision of the 2015 WADC. As such, it mandates that, in the relevant circumstances, the FEI ADRHA rules are to apply rather than the PADR ones.

101. Ms Walker also made further detailed submissions as to the consequences which should follow if her primary submission, as summarised above, was accepted. In particular, these concerned the way in which the discretions conferred by the FEI ADRHA should be exercised. Essentially, in this regard, Ms Walker submitted that since, on the facts, the ADRV occurred, at the earliest, on 7 August 2019 her results obtained in the Competition on 6 August 2019 should not be disqualified either individually or for the purposes of the team competition.

102. However, as the Panel does not accept Ms Walker's primary submission for the reasons which are set out below, it is unnecessary to set out in any further detail these submissions of Ms Walker based on the discretion conferred by the FEI ADRHA.

103. Ms Walker's Request for Relief are as follows:

(a) To set aside the Appealed Decision.

(b) To reinstate her results obtained at the Pan Am Games, for the purposes of the Equestrian Jumping Team Competition on both 6 and 7 August 2019, thereby reinstating Canada's 4th place position in the Equestrian Jumping Team Competition at the Pan Am Games.

(c) Order PANAM Sports to:

(i) Reimburse her legal costs and other expenses pertaining to the Appeal before CAS; and

(ii) Bear the costs of the Arbitration.

B. The Position of Equestrian Canada

104. Equestrian Canada appeals only in relation to the issue of the subtraction of Ms Walker's scores from Team Canada's result.

105. It adopted, in writing and orally, all arguments and submissions made on behalf of Ms Walker.

106. It made an additional submission, assuming that Article 11.2 of the FEI ADRHA applies rather than Article 11.4 of the PADR – namely that, based on the principle of proportionality, to eliminate Ms Walker's contribution of 6 August 2019 from the team result would represent a manifestly disproportionate sanction.

107. Equestrian Canada made the following requests for relief:

(a) That the Appealed Decision be set aside.

(b) That Ms Walker's results obtained at the Pan Am Games for the purposes of the Equestrian Jumping Team Competition on both 6 and 7 August 2019 be reinstated, thereby reinstating Canada's 4th place position in the Equestrian Jumping Team Competition at the Pan Am Games.

(c) Order PANAM Sports to:

(i) Reimburse Equestrian Canada its legal costs and other expenses relating to the Appeal before CAS; and

(ii) To bear the costs of the Arbitration.

C. The Position of PANAM Sports

108. As noted in paragraph 39 above, PANAM Sports filed not only an Answer to the Appellants' Appeal Briefs but also a Cross-Appeal on 13 March 2020. It is convenient to summarise together its submissions both in Answer to the Appeals and also in respect of its own Cross-Appeal because they overlap.

109. PANAM Sports submitted, as a factual matter, that Ms Walker had not proven, as was her burden, that the ADRV resulted from the consumption of tea containing cocaine only on 7 August 2019. It submitted that there were a number of other possibilities as to how the Prohibited Substance came to be found within Ms Walker's sample such as deliberate recreational use of cocaine and/or the drinking of tea containing cocaine not only on 7 August 2019 but also earlier.

110. It further submitted that even if the cause of the ADRV was the drinking of tea containing cocaine solely on the morning of 7 August 2019 this did not assist Ms Walker or Equestrian Canada because of the application and consequences of Article 11.4 of the PADR.

111. PANAM Sports also submitted that the relevant "Competition" for the purposes of the PADR was the 2019 Pan Am Games Team Jumping Competition viewed as a whole but, alternatively, it submitted that it did not matter if the individual qualifying rounds were viewed as separate "competitions" for the purposes of the PADR because the ultimate outcome would be the same.

112. In this context, PANAM Sports submitted that Article 11.4.1 of the PADR clearly and unequivocally mandated the automatic Disqualification of the result obtained by Team Canada in the entire 2019 Pan Am Games Team Jumping Competition given Ms Walker's admitted ADRV.

113. Further, as noted, even if the qualifying rounds of that "competition" were viewed as separate "competitions" for the purposes of the PADR it would make no difference

because Ms Walker's admitted ADRV on 7 August 2019 would result in the Disqualification of Team Canada's results for the qualifying rounds on that day with the consequence that Team Canada would not have progressed to the final round of qualification and would not have finished 4th in the final classification.

114. PANAM Sports submitted that Article 11.4 of the PADR applies rather than Article 11.2.2 of the FEI ADRHA because there is no conflict between the PADR and the 2015 WADC. The "comment" to Article 9 to the 2015 WADC is only permitted to be used to interpret an operative provision of the WADC or a derivative anti-doping policy such as the PADR. It is not an operative binding provision itself. The 2015 WADC is deliberately silent as to what is to occur in circumstances such as these. There is thus no conflict between the 2015 WADC and the PADR.

115. PANAM Sports made further detailed submissions as to what the consequences ought to be even if Article 11.2.2 of the FEI ADRHA were to apply. But it is unnecessary to set those out here since the Panel takes the view that Article 11.2.2 of the FEI ADRHA does not apply.

116. PANAM Sports requested the Panel to rule as follows:

(a) To dismiss the Appeals of the Appellants.

(b) By way of Cross-Appeal to vary the decision of the PSDC to the extent of disqualifying the results of Ms Nicole Walker of 6 August 2019 in the Individual Equestrian Jumping Competition.

(c) And also by way of Cross-Appeal to disqualify the results of the Equestrian Team of Canada from the Pan American Games Lima 2019 in the Team Event owing to the ADRV committed by Ms Walker.

Alternatively –

(d) To uphold the decision of the PSDC.

(e) To dismiss the Appeals of the Appellants.

In any case –

(f) To order the Appellants to pay the Arbitration Costs, as well as a contribution towards PANAM Sports legal fees and other expenses incurred in connection with these Proceedings in accordance with Article R64.5 of the CAS Code.

D. The Positions of The *Amici Curiae*

Canadian Olympic Committee (COC)

117. The COC confines its submissions to the issue of whether the PSDC was correct to subtract Ms Walker's 6 August 2019 contribution to the Canadian Equestrian Team

scores. It submits that since the ADRV was committed on 7 August 2019 it was wrong to subtract the contribution on the earlier date.

118. In this regard, the COC expressly adopts the submissions of Ms Walker and Equestrian Canada. As stated, those submissions are premised upon the assumption that Article 11.2 of the FEI ADRHA are applicable rather than Article 11.4 of the PADR.

119. COC makes one additional submission, namely that the PSDC's decision to apply Articles 11.2.2 and 11.2.3 of the FEI ADRHA was beyond the scope of the authority of the PSDC and that it ought to have referred the matter to the FEI. Once more this submission assumes that the applicable rules are Articles 11.2.2 and 11.2.3 of the FEI ADRHA.

COARG and FEA

120. These *amici curiae* filed a joint submission. Their submissions were essentially similar to those of PANAM Sports. They dispute, factually, that the cause of the ADRV was the ingestion of tea containing cocaine only on 7 August 2019 and submit, alternatively, that if that was the case, Ms Walker was grossly negligent in consuming tea containing cocaine on that day.

121. These *amici curiae* expressly adopt the submissions of PANAM Sports that the relevant Rules are contained in Article 11.4 of the PADR and not contained in Articles 11.2.2 or 11.2.3 of the FEI ADRHA.

122. They submit that Article 11.4.1 of the PADR leaves no other option than the disqualification of Team Canada's result in the Jumping Team Competition of 7 August 2019.

123. Alternatively, they submit that if the relevant Rules are Articles 11.2.2 and 11.2.3 of the FEI ADRHA, the PSDC exercised its discretion properly and flawlessly. They deny there were any "exceptional circumstances" such as to bring Article 11.2.3 into play.

124. These *amici curiae* (unlike PANAM Sports) also submit that Equestrian Canada's Appeal is, in any event, inadmissible because it is not an entity referred to in Article 12.2.2 of the PADR.

125. Finally, these *amici curiae* made extensive submissions to the effect that the Quota Place for the 2021 Olympic Games cannot be taken away from COARG and FEA. As that is not an issue for this Panel to consider in any of these Appeals, those submissions may be placed to one side.

FEI

126. In summary, the FEI submits that:

(a) The Rules that apply to determine impact of Ms Walker's ADRV on Team Canada's result in the Team Competition are the PADR not the FEI ADRHA.

(b) FEI ADRHA Article 11.2 applies only to cases where the FEI ADRHA had been violated. It does not apply where (as here) the Anti-Doping Rules of another event organizer are violated.

(c) Article 11.4.1 of the PADR applies to the circumstances of this case (i.e., Consequences for teams that are not "Team Sports") and requires the automatic disqualification of Team Canada's results at the 2019 Pan Am Games.

(d) Even if (contrary to the above), the Panel applies FEI ADRHA Article 11.2, the decision of the PSDC should not be disturbed, and so Team Canada's results at the 2019 Pan Am Games would remain disqualified.

127. The FEI developed these core submissions in much more detail and, to the extent necessary, reference will be made to those more detailed submissions below.

V. JURISDICTION

128. Article R47 of the CAS Code provides as follows:

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

129. Ms Walker, Equestrian Canada and PANAM Sports rely on Article 12.2 of the PADR as conferring jurisdiction on the CAS in respect of the three Appeals. Subject to the submissions made as to admissibility which have been dealt with above, the jurisdiction of the CAS was not contested by any Party and was confirmed by the signing of the Parties of the Order of Procedure dated 20 December 2020 (see paragraph 92 above).

VI. ADMISSIBILITY

130. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late."*

131. Each of the Appeals and the Cross-Appeal were lodged within the specified timeframe and thus there is no contravention of Article R49 of the CAS Code.

132. However, there were two challenges to admissibility on other grounds. The first challenge was by Ms Walker and Equestrian Canada to the admissibility of PANAM Sports Cross-Appeal. As noted above (paragraph 74) the Panel notified the Parties on

6 August 2020 that the "Cross-Appeal" filed by PANAM Sports with its Answer on 14 March 2020 was admissible pursuant to Article 12.2.3 PADR. It advised the Parties that the reasons for this decision would be provided in the final Award.

133. Additionally, as noted above (paragraph 123) COARG and FEA submit that Equestrian Team Canada's Appeal is inadmissible on the ground that Equestrian Canada is not an entity referred to in Article 12.2.2 of the PADR. The Panel is of the view that Equestrian Canada's Appeal is admissible and sets out its reasons below.

134. It is convenient to address first the admissibility of the Cross-Appeal by PANAM Sports and then the question of the admissibility of the Appeal by Equestrian Canada.

A. Admissibility of the Cross-Appeal

135. The Panel was asked to decide whether the Respondent is permitted to file and rely upon a purported Cross-Appeal in respect of the Appealed Decision which is the subject of the substantive appeals by the Appellants herein. The Panel granted the Parties the opportunity to deal and comment on the admissibility of such Cross-Appeal. In particular, the Panel had, and has considered fully, the following written submissions:

(a) Submissions of each of the Appellants dated 6 July 2020 (**the Appellants' Cross-Appeal Submissions**);

(b) The submissions of the Respondent in each appeal dated 6 July 2020 (**the Respondent's Cross-Appeal Submissions**);

(c) The submissions of the Appellants in reply to the Respondent's Cross-Appeal Submissions dated 6 November 2020.

136. As stated, the Panel has considered all of the above submissions in coming to its rulings. While the Panel has fully considered all submissions, it only refers to those submissions where it considers it to be necessary or desirable to do so in order to explain the Panel's reasoning in respect of its rulings.

137. For the reasons which follow, the Panel is of the view that the Respondent's Cross-Appeal is admissible. Further or alternatively, the Panel is of the opinion that even if the Cross-Appeal were not admissible, the Respondent would be entitled in its Answers to the Appellants' Appeals to agitate the issue of whether the PSDC came to the right decision but by the wrong chain of reasoning (that is, by preferring to apply FEI ADRHA Article 11.2.2 rather than Article 11.4.1 of the PADR).

138. The Respondent specifically contends that its right of appeal is conferred by Article 12.2.3 of the PADR. The wording of Article 12.2.3 is, as it is required to be, substantially identical with the wording of Article 13.2.4 of the 2015 WADC. Article 12.2.3 of the PADR specifically provides that:

i. *"Cross appeals ... by any respondent named in cases brought to CAS under the Code are **specifically permitted**. Any party with a right to*

appeal under this Article 12 must file a cross appeal ... at the latest with the party's answer." (emphasis in bold added).

139. The comments to the 2015 WADC are required to be taken into account in interpreting the provisions of the WADC (see Article 24.2 of the 2015 WADC). Likewise, with the equivalent provisions of the PADR (see Article 20.2 of the PADR).

140. The comment to Article 13.2.4 of the 2015 WADC (and therefore applicable to Article 12.2.3 of the PADR) is as follows:

i. *"This provision is necessary because since 2011, CAS Rules no longer permit an athlete the right to Cross-Appeal when an anti-doping Organisation appeals the decision after the athlete's time for appeal has expired. This provision permits a full hearing for all parties."*

141. The Panel does not think that the express omission in Article R55 of the CAS Code of the right to file an Answer which includes a "counterclaim" deprives PANAM Sports of the right to file its Cross-Appeal in these proceedings. Rather, in the Panel's view, and taking into account the parties' autonomy and freedom of contract and the comment in respect of the equivalent 2015 WADC provision, Article 12.2.3 of the PADR is an arbitration clause providing for an extended right of appeal in certain circumstances and entitling a party to file a Cross-Appeal to CAS notwithstanding the "silence" of the CAS Code in that regard if that party satisfies the preconditions for filing such a Cross-Appeal as set out in Article 13.2.4 of the 2015 WADC or, in this case, the derivative Article 12.2.3 of the PADR.

142. Here, the Respondent has been given an express right to appeal or cross appeal in respect of a decision not to impose a consequence for an ADRV by the combined operation of Article 12.2, 12.2.2 and 12.2.3 of the PADR.

143. The Appellants seek to refute the Respondent's right to Cross-Appeal as indicated above on four bases as set out in the Appellants' Cross-Appeal Submissions. They are:

144. That the Respondent has not paid the CAS Court Office fee as required by Article R64.1 of the CAS Code;

145. That the Respondent failed to file its Cross-Appeal in accordance with the requirements of the CAS Code and/or in accordance with Article 12.2.3 of the PADR;

146. That, contrary to the Article R51 of the CAS Code, the Cross-Appeal document was not separated from the Answer and thus is inadmissible; and

147. That, as a matter of substance, the PSDC was in fact an internal entity or organ of the Respondent and that the Respondent cannot appeal from its own decision.

148. For the reasons which follow the Panel is of the view that each of the Appellants' arguments is incorrect. Further, even if all or any of them are correct such that the Cross-Appeal is technically inadmissible nevertheless the Panel considers that the Respondent would be entitled to argue the substantial issue involved in its Cross-Appeal

(namely what the Respondent says was an error by the PSDC in its reasons – preferring to adopt FEI ADR Article 11.2.2 over Article 11.4.1 of the PADR) in its alternative defence of the decisions made by the PSDC.

149. The Panel shall deal with these matters separately.

1. Payment of the Court Office fee

150. The Appellants' submissions proceed upon the basis that a Cross-Appellant is required to pay a fee by Article R64.1 of the CAS Code. That is not expressly stated in that Rule.

151. Pursuant to Article R64.2 §2 of the Code, the Respondent was invited by the CAS Court Office to pay an advance of costs, which includes the Court Office fee. Such amount was duly paid by the Respondent, as confirmed by the CAS Court Office in its letter to the parties of 28 September 2020.

152. Therefore, the Panel does not see any substance in this argument.

2. Failure to adhere to the requirements of the CAS Code

153. The Appellants contend here that the Respondent failed to confirm to CAS within the requisite deadline that, in respect of its purported Cross-Appeal, its Answer comprised both its Statement of (Cross)-Appeal and its (Cross)-Appeal Brief. The Panel does not see any substance in this submission which it regards as super formalistic and contrary to what the Panel understands is ordinary CAS practice.

154. As conceded by the Appellants in their Cross-Appeal Submissions the Respondent's Answer was filed within time. When one views that Answer it is plain that it comprises both the Respondent's Statement of Cross-Appeal and the Respondent's Appeal Brief for the following reasons:

155. The document is expressly headed "Answer and Cross-Appeal";

156. [1] of that document expressly confirms the combined nature of the document;

157. [4] expressly summarises the relief sought by way of Cross-Appeal;

158. [113] expressly deals with the admissibility of the Cross-Appeal;

159. [120]-[148] and [168]-[197] deal in great detail with the legal and factual substance of the Cross-Appeal;

160. [198]-[203] expressly deal with the second reason relied on in the Cross-Appeal, namely the allegation that the provisions of the PADR required the complete disqualification of the Team Canada events rather than merely the subtraction from the Team's result of the Athlete's individual results;

161. In [218(e)] there is an express reference to the relief sought in the Cross-Appeal;

162. The document contains detailed submissions on all matters of fact and law and clearly sets out the evidence upon which the Respondent intends to rely in the Appeal;

163. Lastly, the prayers for relief are set out and they clearly distinguish between the prayers for relief sought in respect of the Appeal and in respect of the proposed Cross-Appeal.

164. Therefore, in substance, the Panel thinks the document is plainly one where the relevant Cross-Appeal has been filed "at the latest with the party's Answer" within the meaning of Article 12.2.3 of the PADR.

165. Likewise, to the extent that Article R55 of the CAS Code is relevant the Panel thinks that the document filed, within time, by the Respondent is one which states the facts and legal arguments giving rise to the (Cross)-Appeal together with all exhibits and specification of other evidence upon which it intends to rely.

166. For these reasons, the Panel thinks that the relevant procedural provisions are complied with.

3. The Appeal is inadmissible because the Cross-Appeal document was not separated from the Answer

167. Once more the Panel views this as a super formalistic argument. If the situation was as contended by the Appellants then the Panel would have expected the CAS Court Office to immediately advise the Respondent accordingly and provide for a period of grace in order to remedy this highly technical deficiency. Once more, there is no evidence of that occurring.

168. There is a clear delineation within the Respondent's document of those matters which go to the Cross-Appeal and those which go to the Answer. Of course, there is an overlap between the two because the factual matters are intertwined. Nevertheless, as set out in paragraphs 154-163 above it is easy to discern the particular parts of the document dealing expressly with the Cross-Appeal.

169. The Panel does not believe that CAS 2015/A/4215 referred to in the Appellants' submissions assists the Appellants even if it was binding upon the Panel.

170. This is because that decision, evidently, depended heavily upon the wording of Article 75.4 of the FIFA ADRs of which the Panel sees no equivalent here.

171. And, in any event, the Panel thinks for the Appellants to succeed on this basis would be a wrongful triumph of form over substance.

4. The argument that the Respondent cannot appeal its own decision

172. Whilst superficially attractive, the Panel thinks this argument cannot be accepted.

173. All Parties accept and concede they are contractually bound by the PADR. Those Rules expressly provide for the appointment of the PSDC and state its function in determining

whether there has been an ADRV and, if so, the consequences of that (Article 8 of the PADR).

174. Furthermore, the PADR expressly provide for an Appeal or Cross-Appeal by the Respondent in respect of the non-imposition of a Consequence by the PSDC (see Article 12 of the PADR).

175. Therefore, irrespective of what the position might otherwise have been, the Parties have agreed contractually that the Respondent has such a right to Cross-Appeal. They are bound by that contract.

5. Conclusion on Validity of Cross-Appeal

176. For these reasons, the Panel considers that the Cross-Appeal is admissible. Even if the CAS Code does not recognise Cross-Appeals, nevertheless it is open to the Parties by separate arbitration agreement (in this case Article 12 of the PADR) to confer a specific right of appeal, in the form of a "Cross-Appeal", in a CAS proceeding. However, even if the Panel is wrong about that, for the reasons which follow, the Panel considers that the substance of the argument raised by the Respondent in its Cross-Appeal can legitimately be used by it in its Answer to the Appeals.

6. Ability of Respondent to rely on its argument that Article 11.4.1 of the PADR should have been relied upon by the Disciplinary Commission rather than Article 11.2.2 of the FEI ADHRA

177. There were two distinct routes by which the PSDC could legitimately have made the decisions/orders which it did:

178. First, it could have found Article 11.4.1 of the PADR relevant and applicable (that article is summarised in para 6.15 of the PSDC decision). If it had taken that route there would have been an automatic disqualification of the Team Canada results on both 6 and 7 August 2019.

179. Secondly, it could have decided that Article 11.2.2 of the FEI ADRHA was applicable which, in effect, imported a discretion as to whether, for the purposes of the calculation of team scores, an individual athlete's results on a particular day should be disqualified.

180. The PSDC recognised the apparent conflict between Article 11.2.2 of the FEI ADRHA and Article 11.4.1 of the PADR.

181. It chose the discretionary route saying, on its interpretation, the provisions of the Article 11.2.2 of the FEI ADRHA prevailed over the provisions of Article 11.4.1 of the PADR.

182. It is unnecessary to consider, for the purposes of this aspect of the matter, whether the PSDC was correct or not in its construction approach. That is a matter which is relevant to the determination of the substantive appeals and is discussed later in these reasons.

183. However, what is important at this stage, is to note that even though the PSDC took the discretionary route in the making of its decision or determination, the destination it

arrived at was the same, or substantially the same, as would have been the result had it taken the mandatory route dictated by Article 11.4.1 of the PADR. That is to say, in the exercise of its discretion, the PSDC made a decision or determination disqualifying Ms Walker's results, for the purposes of calculating the team results, on both 6 and 7 August 2019. This had the same effect in substance as would have been the case had Article 11.4.1 of the PADR been utilised. Team Canada was relegated below the Argentinian team.

184. It is a basic principle of both common law and in civil law jurisdictions such as Switzerland that one appeals from orders or decisions and not from reasons for a decision. In the present case, this is confirmed by Article 12.2 of the PADR which specifically provides for appeals in respect of "decisions".

185. It is noted in its Answer and Cross-Appeal document the Respondent seeks, in the alternative, to uphold the decision of the Disciplinary Commission. That appears to be not only on the basis of the route chosen by the PSDC but also to say that it could have come to the same, or virtually the same, decision by applying Article 11.4.1 of the PADR.

186. In other words, in the Panel's view, the Respondent is entitled to argue the applicability of Article 11.4.1 of the PADR as an alternative reason why the PSDC should have made the decision which it did without the necessity to file a Cross-Appeal.

7. Conclusion as to admissibility of the Cross-Appeal

187. Accordingly, the Panel rules in favour of the admissibility of the Respondent's Cross-Appeal. In any event, the Panel is of the view that in its response to the Appeal the Respondent is entitled to rely upon its argument that Article 11.4.1 of the PADR should have been applied rather than Article 11.2 of the FEI ADRHA.

B. Admissibility of Equestrian Canada's Appeal

188. COARG and FEA submit that Equestrian Canada is a National Federation within the meaning of the PADR. They submit that Article 12.2.2 of the PADR governs which persons are entitled to appeal a decision of the PSDC. According to that provision, so the submission runs, the following entities, and only the following entities, have the right to appeal to CAS:

(a) The Athlete;

(b) PANAM Sports;

(c) The relevant International Federation (here, the FEI);

(d) The National Anti-Doping Organisation of the Athlete (here, the Canadian Centre for Ethics and Sport);

(e) The IOC or the IPC; and

(f) WADA.

189. COARG and FEA submit that this is an exhaustive list and that National Federations are not listed there as amongst the entities entitled to appeal. It thus submits that Equestrian Canada had no right to appeal and that the Panel should therefore declare Equestrian Canada's appeal is inadmissible.

190. Essentially for the reasons given by Equestrian Canada in its Answer to the Cross-Appeal dated 6 November 2020 the Panel rejects the submissions that Equestrian Canada's Appeal is inadmissible.

191. Article 12.2.2 of the PADR relevantly provides that:

> *"The following parties shall have the right to appeal to CAS:*
>
> *(a) The Athlete or* ***other Person who is the subject of the decision being appealed*** *..."* (emphasis added).

192. The PADR defines a "Person" as being a "natural person or an organisation or other entity". Equestrian Canada clearly qualifies as a "Person" according to this definition.

193. Further, Equestrian Canada was a subject of the Appealed Decision given that the PSDC ordered amongst other things that Ms Walker's results of 6 and 7 August 2019 be subtracted from the Canadian Team results and that the results of the Team Competition be recalculated accordingly. One result of that order is that Equestrian Canada lost its place in the jumping event at the 2020 Olympics. Plainly, Equestrian Canada was thus clearly the subject of the Appealed Decision.

194. The Panel therefore concludes that Equestrian Canada was a "Person" which was a subject of the Appealed Decision and that, accordingly, Article 12.2.2 of the PADR gave it the right to appeal.

195. The Panel therefore rules that Equestrian Canada's Appeal is admissible.

VII. THREE OTHER PROCEDURAL ISSUES

196. As already noted (see paragraph 73 above) the Panel permitted each of COC, COARG, FEA and FEI to participate in the Appeal but only as *Amici Curiae* and with only limited rights in that regard. In these reasons, the Panel addresses its reasoning in so deciding.

197. Also, during the course of the Final Hearing on 23 December 2020, without any prior notice, Mr Pachmann, on behalf of COARG and FEA, made an application that the hearing be adjourned for an unspecified period stating that at the hearing on 21 December 2020 there had been evidence referred to which his clients had not seen or had the chance to consider. He requested an adjournment until such time as his clients had a chance to consider that evidence and decide what, if anything, they wished to do

in respect of it. The adjournment application was opposed by all other Parties. The Panel adjourned briefly to consider this application, and, on resumption of the hearing, informed those in attendance that the application for an adjournment was refused and that the Panel would give its reasons for that refusal in its Final Award.

198. Finally, for the purposes of the Final Hearing, Ms Walker and Equestrian Canada submitted an expert opinion by Dr Marjolaine Viret, a highly qualified Swiss lawyer. That expert opinion dealt with the "interplay between the [PADR], the [FEI ADRHA] and the 2015 World Anti-Doping Code". Ms Walker and Equestrian Canada submitted that Dr Viret's Report was admissible as expert evidence in these proceedings even though it purported to give an opinion on the interpretation and application of the 2015 WADC and the derivative Anti-Doping Rules (or the interplay between them) being matters upon which the members of the Panel themselves may be considered to have considerable experience and expertise. PANAM Sports contended that Dr Viret's Report was inadmissible as "expert evidence" and should be treated simply as a submission made on behalf of Ms Walker and Equestrian Canada. On that basis, PANAM Sports declined the opportunity to cross-examine Dr Viret as to the contents of her Report. The Panel provisionally admitted the Report of Dr Viret into evidence explaining that it would make a final decision as to its admissibility as expert evidence on the one hand or as a mere submission on the other in its Final Award.

199. It is convenient to deal with each of these three procedural issues separately on the basis, as will appear below under the heading "Applicable Law", that the procedural law to be applied in these Appeals is Swiss law.

A. The Joinder of COC, COARG, FEA and FEI as *Amici Curiae* only

200. The Panel needed to decide whether any of the FEI, the COC, COARG or the FEA should be joined the appeals and, if so, on what terms. The Panel, through the CAS Court Office, invited submissions from the Parties, and to the extent relevant, from the proposed third parties to be joined on these two issues and set timetables for the provision of such submissions.

201. In respect of the proposed joinder of various third parties, the Panel has had the benefit of, and fully considered, in particular, the following submissions:

(a) The submissions of each of the Appellants dated 6 July 2020;

(b) The submissions of the Respondent in respect of the joinder issues submitted on 6 July 2020;

(c) The submissions of FEI on joinder dated 24 June 2020;
(d) The submissions of the FEA on joinder, dated 6 July 2020;

(e) The submissions of COARG on its joinder also dated 6 July 2002;

202. As stated, the Panel has considered all of the above submissions in coming to its decision. No party should think that because a specific submission is not expressly

addressed in this document it has not been fully considered by the Panel. On the contrary, the Panel has fully considered all submissions but only refers to those submissions where it considers it to be necessary or desirable to do so in order to explain the Panel's reasoning in respect of its rulings.

1. The status of COC

203. On 17 January 2020, the COC filed an application to intervene in CAS 2020/A/6695 and CAS 2020/A/6700 pursuant to Article R41.3 of the Code. The COC submits that it is affected by the Appealed Decision, since according to Section B.3 of the FEI's Qualification System for the Jumping Discipline for the 2020 Olympic Games, all quota places are allocated to the relevant national Olympic Committee. As such it has a direct interest in this matter. COC further submits that it wishes only to make submissions in relation to the Appealed Decision to subtract Ms Walker's 6 August 2019 contribution to the Canadian Equestrian team's scores and not in respect to Ms Walker's ADRV. Neither the Appellants nor the Respondent objected to the request for intervention of the COC.

204. The CAS Code provides as follows in relation to interventions:

> "R41.3
> *If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the CAS Court Office, together with the reasons therefor within 10 days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. The CAS Court Office shall communicate a copy of this application to the parties and fix a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39.*
>
> R41.4
>
> *A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.*
>
> *Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the participation of the third party, taking into account, in particular, the prima facie existence of an arbitration agreement as contemplated in Article R39. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.*
>
> *If the President of the Division accepts the participation of the third party, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement between the parties, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1. If a sole arbitrator is*

to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed, the arbitrators shall be appointed by the President of the Division and shall nominate the President of the Panel in accordance with Article R40.2.

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

After consideration of submissions by all parties concerned, the Panel shall determine the status of the third party and its rights in the procedure.

After consideration of submissions by all parties concerned, the Panel may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix."

205. According to the CAS case law, intervention (as a party) according to Article R41.3 of the CAS Code requires a legal interest of the intervenor (CAS 2018/A/6017, para. 75; CAS 2010/A/2296, decision on intervention, para. 18 ff; CAS 2008/A/1513, decision on intervention, para. 18 ff.). This is also in line with the legal literature in Swiss arbitration law (Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 3rd ed. 2014, no. 579 et seq.) and the purpose of the procedural concept of intervention. The latter serves procedural efficiency (coordination between several – potential – proceedings through a single and uniform decision) as well as the protection of the parties from undue interference from third persons. Thus, intervention can only be admitted, if the third party is sufficiently closely connected to the matter in dispute of the pending arbitration. Accordingly, there must be a legitimate legal interest involved for the third party in order to be admitted as a party (see also Arroyo/Schramm, Arbitration in Switzerland, 2nd edition, 2018, Art. 41 CAS Code No. 21, Art. 4 Swiss Rules No. 38).

206. In the absence of any defined threshold of legal interest in the rules and regulations, a specific legal interest to participate as a party requires that a person - as a result of its procedural status in the previous instance or the application of substantive rules and regulations - is directly adversely affected in his/her/its legal sphere by the outcome of the arbitration procedure. Such legal interest cannot be equated with a purely financial or sportive interest. Instead, a legal interest requires that a person is *adversely affected* in its legal sphere / position by the outcome of the arbitration procedure, i.e., that it has a claim against the entity that issued the decision in question.

207. In the view of the Panel no such direct legal interest exists for COC. The Appealed Decision is neither addressed to the COC nor does the COC claim that there is a provision in the applicable rules and regulation that entitles it to challenge the Appealed Decision. The COC's interest in the present matter is a purely sportive or financial one, i.e., to foster and protect Canadian interests in the 2020 Olympics in Japan. Such general sportive and/or financial interests do not justify the intervention as a party, but – in the view of the Panel – are sufficiently protected by giving COC the opportunity to participate as an *amicus curiae* in the present proceedings in accordance with Article R41.4 of the CAS Code.

2. On the Status of the FEI, COARG and FEA

208. In its Answer the Respondent requested that the FEI, COARG and FEA be joined to these proceedings according to Article R41.2 and R41.4 of the CAS Code. Article R41.2 of the CAS Code provides as follows:

> *"If a Respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer, together with the reasons therefor, and file an additional copy of its answer. The CAS Court Office shall communicate this copy to the person whose participation is requested and fix a time limit for such person to state its position on its participation and to submit a response pursuant to Article R39. It shall also fix a time limit for the Claimant to express its position on the participation of the third party."*

209. The Respondent, in support of its request for a joinder, submits that the CAS Court letter dated 25 March 2020 did not fix a fatal deadline if it was not met by the third parties and that, anyways, a more lenient stance should be adopted in view of the COVID-19 pandemic crisis that has hindered operations of sports federations all over Latin America. According to the Respondent the FEI's right to be joined follows from Article 12.2 of the PADR. FEA's and COARG's right to be joined follows from the PANAM Sports Constitution.

210. The Appellants have objected to a joinder of the above third parties. According to the Appellants the FEI does not have sufficient legal interest to warrant its joinder. The general interest of the FEI that its provision be applied correctly is – according to the Appellants – an insufficient basis to join the FEI to these proceedings. The Appellants also base their submissions on CAS jurisprudence (CAS 2015/A/3910, no. 141). Furthermore, the Appellants submit that the FEI's participation in these proceedings would not assist the Panel and that it would not suffer any prejudice if were not allowed to participate. With respect to the COARG and the FEA, the Appellants submit that neither is bound to the arbitration agreement that brought the dispute before the CAS. In addition, the Appellants are of the view that the COARG's participation in these proceedings is neither necessary nor desirable. In relation to the FEA the Appellants submit that the latter must be deemed to have rejected the Respondent's request that it be joined to these proceedings by failing to answer to the CAS Court Office letter dated 25 March 2020.

211. The FEI submitted in support of its alleged right to be joined to these proceedings that it has a clear and direct stake in the issues in dispute. These issues, in particular, relate to the proper application and interpretation of its rules and regulations, i.e. the FEI ADRHA. Such interest is (based on CAS jurisprudence, CAS 2015/A/3888 & 4000) sufficient - according to the FEI – to be joined in these proceedings. Furthermore, the FEI submits that its participation would assist the Panel in understanding the qualification system of the FEI (as agreed with the IOC). Furthermore, the FEI is of the view that it will suffer prejudice, if it is not joined. The FEA is of the view that as a member of the Olympic Movement it is bound to the arbitration agreement and "heavily affected" by the outcome of the procedure and thus has a clear and concrete interest in

the outcome of the proceedings. Furthermore, the FEA submits that the fact that it did not reply to the CAS Court letter dated 25 March 2020 cannot be held against it. The letter got blocked "by the spam filter software or unintentionally lost in the AEF administration" due to the complete lockdown in Argentina due to the COVID-19 pandemic. The COARG equally submits that is bound by the arbitration agreement in question and has a direct interest at stake, because at the moment it holds an entry spot for the jumping team competition at the 2020 Olympic Games. If the Appealed Decision was quashed following the Appellants' appeal the entry spot may be taken away from COARG.

212. The Panel finds that the FEI does not have a legitimate interest to be joined as a party in these proceedings. The Panel follows the reasoning in CAS 2015/A/3910 no. 141 according to which the general interest of an international federation "that its rules and regulations be applied consistently, uniformly and correctly vis-à-vis its members" is of "general and abstract" character and does not award a sufficient legal interest to a party. The Panel therefore finds that this general interest of FEI is best covered by attributing the standing of an *amicus curiae* in these proceedings. As for the AEF and the COARG the Panel finds that they are not covered by the same arbitration agreement within the meaning of Article R41.4 of the CAS Code. The Panel finds that this requirement does not need to be fulfilled in relation to *amicus curiae*. Literally translated "*amicus curiae*" means "*friend of the court*". The term *amicus curiae* or *amicus* brief describes an instrument allowing someone who is not a party to a case to voluntarily offer special perspectives, arguments or expertise on a dispute, usually in the form of a written *amicus curiae* brief or submission, in order to assist the court in the matter before it. The Panel finds that in order to assist a Panel by providing an additional perspective or expertise it is not necessary for this third person to be covered by the same arbitration agreement. Furthermore, the Panel finds that in view of the COVID-19 crisis the fact that FEA did not respond to the CAS Court letter of 25 March 2020 does not amount to a waiver of its right to participate in these proceedings. This is all the more true considering that the letter did not provide for consequences in case no answer was received by the CAS Court Office within the deadline prescribed. Considering also that the COC was granted the standing of an *amicus curiae*, the Panel believes that it would be equally advisable to have the COARG's and the FEA's point of views on this case.

3. The concrete rights and obligations of the amici curiae

213. According to Article R41.4 (6) of the CAS Code the Panel "*may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix.*" The Panel has done so in its letter dated 6 and 20 August 2020. It made it explicit therein that the *amici curiae* will be allowed to each file a single submission on the matter in dispute only ("a single submission (and only one)"). Insofar as the Panel also referred to the Answer to the Cross-Appeal, this is a clerical mistake, since no Answer to the Cross-Appeal was filed at the time when the deadline to file the respective briefs for the *amici curiae* was set.

B. The Adjournment Application

214. At the hearing, on 23 December 2020, counsel for COARG and FEA, Mr Pachmann, requested that the hearing be adjourned. He did not specify for how long the hearing should be adjourned. Mr Pachmann submitted that his clients' right to be heard had been violated, since they were not granted the opportunity to comment on the Answers of the Appellants to the Respondent's Cross-Appeal.

This submission is – in the view of the Panel – misconceived for several reasons. In order for the right to be heard to be infringed, the person in question must be a (formal) party to the proceedings. This, however, is not the case in respect of COARG and the FEA. They are involved in these proceedings only as *amici curiae*. The Panel has the discretion to define the status of an *amicus curiae*. That discretion is an unfettered one and the Panel can, therefore, also change at any moment in time "rights" previously granted. The Panel has accorded to COARG and FEA the opportunity to file one submission only in respect of the matter in dispute. COARG and FEA did not have a formal right to be heard on all pertinent issues before this Panel. This is evidenced by the fact that the *amici* were not granted the right to make oral submissions at the hearing or to cross examine witnesses. The Panel notes that Mr Pachmann made use of the opportunity granted by this Panel to file submissions on behalf of COARG and FEA. Furthermore, the Panel notes that there is a significant overlap between the issues at stake in the Appeals and in the Cross-Appeal. Thus, by being granted the opportunity to file submissions on the Appeals filed by the Appellants and the Cross-Appeal by the Respondent, COARG and FEA were sufficiently informed to make all necessary submissions that they deemed useful or appropriate in these proceedings.

215. Moreover, the application for adjournment was strongly opposed by Ms Walker, Equestrian Canada and PANAM Sports. Those Parties were extremely anxious that the Panel issue its Award as quickly as possible due to the necessity, depending on the outcome of the proceedings, to get ready for the 2021 Tokyo Olympic Games.

216. In all of these circumstances, in the Panel's view, there was no reason in the case at hand to adjourn the hearing to allow Mr Pachmann's clients a further opportunity to comment on the Appellants' Answer to the Cross-Appeal especially when PANAM Sports could, in the Panel's view, make any appropriate submissions in that regard.

C. The Status of Dr Viret's Report

217. The 2015 WADC and derivative anti-doping policies adopted by International Federations or event organisers who are signatories to the Code have force only as a matter of contract. Ordinarily, when one is considering the interpretation and application of a contract or its interplay with other contracts it is necessary to have regard to what is the proper law of the contract. That proper law of the contract may have been expressly agreed by the parties or, absent such an agreement, it may be the system of law with which the contract in question has its most natural connection.

218. But such an approach is not to be applied with respect to the 2015 WADC or the anti-doping policies put in place by signatories to the WADC in a context where they have

contractually agreed that their anti-doping rules are to adopt the WADC without substantive change (Article 23.2.2 of the 2015 WADC).

219. The 2015 WADC expressly eschews an attempt to interpret or apply it in accordance with the domestic laws of the countries of domicile of particular signatories. Article 24.3 of the WADC states:

> *"The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments."*

220. Likewise the provisions, application and "interplay" of the PADR and the FEI ADRHA. The stream cannot rise higher than the source. Furthermore, Article 13 of the 2015 WADC (and Article 12 of the PADR and Article 13 of the FEI ADRHA) make it plain that the intention of such anti-doping rules and policies is that the CAS is the final "court of appeal" in respect of anti-doping disputes arising under such rules. As stated, in making its decisions the CAS must interpret and apply the relevant rules as independent and autonomous text and not by reference to the existing law of any particular country.

221. Thus, the questions of the interpretation of the 2015 WADC, PADR and the FEI ADRHA, the application of those rules and the interplay between them are not matters of "foreign" law so far as CAS is concerned. Rather the principles to be applied are ones of global acceptation common to all legal systems (see, e.g., Sullivan, *"The World Anti-Doping Code and Contract Law"* in Haas and Healey (ed.) *Doping and Sport and the Law*, Hart (2016) pp.72-79).

222. Further, as already noted, Swiss procedural law governs these Appeals. The rules regarding admissibility of evidence are regarded as procedural because they are directed to governing or regulating the mode or conduct of the legal or arbitral proceedings (see, e.g., Nygh's *Conflict of Laws in Australia*, 10th ed., (2020) pp.408-411).

223. Thus, whether an expert opinion can be qualified as evidence is a procedural question governed by Swiss law. Consequently Article 182 of the Swiss Private International Law Act (PILA) applies. The provision reads as follows:

> *"(1) The parties may directly or by reference to rules of arbitration regulate the arbitral procedure, they may also subject the procedure to the procedural law of their choice.*
> *(2) If the parties have not regulated the procedure, it shall be fixed if necessary, by the Arbitral Tribunal either directly or by reference to a law or rules of arbitration.*
> *(3) Irrespective of the procedure chosen, the Arbitral Tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding."*

224. In the case at hand there is no agreement between the Parties how to procedurally treat the expert opinion. Furthermore, the CAS Code does not provide guidance how to treat legal opinions in CAS Arbitrations. It follows from the above, that it is up to the Panel to regulate the procedure related to the matters in accordance with Article 182(2) PILA. In addition, the Panel is also aware of Article 184(1) PILA which states as follows:

> *"(1) The Arbitral Tribunal shall take evidence.*
>
> *This procedure merely clarifies that the Arbitral Tribunal shall itself conduct the taking of evidence."*

225. It is the view of the Panel that evidentiary proceedings serve – first and foremost – to establish the relevant facts for the outcome of the dispute. It is uncontested that the contents of the legal opinion of Dr Viret do not relate to facts, but to legal questions. It is widely acknowledged that the *iura novit curia* (or, in the present arbitration, *iura novit arbiter*) principle must be respected by arbitral tribunals having their seat in Switzerland, including CAS. In applying this principle, an arbitral tribunal has to determine the law applicable to the merits and apply such law so determined. It is, however, also acknowledged that this duty of the arbitral tribunal is not unlimited. In particular in cases where none of the members of the Panel is educated under the relevant foreign law and where it would be disproportionate for the Panel to investigate the pertaining rules the Panel may request the parties to co-operate in ascertaining the relevant content of the law applicable to the merits. An expression of this idea is found in Article 16(1) PILA which states as follows:

> *"(1) The content of foreign law shall be established ex officio. The assistance of the parties may be requested. In case of pecuniary claims, the burden of proof on the content of foreign law may be imposed on the parties."*

226. Even though this provision is first and foremost addressed to state courts, this Panel finds that it may take guidance of its contents also in these arbitration proceedings. In the case at hand the legal questions at issue can be judged and assessed by the members of this Panel. The applicable anti-doping rules are not "foreign law" within the above meaning, but fall within the core competence of this Panel. It is also for this reason that the Panel did not formally ask the Parties (within the meaning of Article 16 of PILA) to assist them by way of evidence in the determination of the applicable legal principles in the case at hand. It follows from the above that the legal report by Dr Viret shall not be qualified as evidence in the case at hand, but will be considered and assessed in this Final Award as part of the Appellants' legal submissions.

227. Also, to the extent that it is relevant, but consistently with the stated object of the 2015 WADC that it be interpreted and applied globally the approach under Swiss law closely resembles the position at common law in countries such as the United Kingdom, the United States of America and Australia. The common law is quite clear that in a case before a state court (or an arbitral tribunal comprised solely of lawyers) expert evidence is only admissible on questions of foreign law not on those of domestic law. This common law position was properly summarised by Lindgren J of the Federal Court of Australia in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Limited (No. 6)* (1996) 64 FCR 79 at 83 where his Honour said:

> *"It is fundamental that the ascertainment of the law relevant to a matter before the court and its proper application to the facts of the particular case are of the essence of the judicial function and duty. Although those processes are properly*

> *the subject of submission, evidence of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible ... Such evidence cannot be allowed to be probative or to rise higher than a submission, such evidence is necessarily irrelevant. ... In the case of foreign law, the only variation required to the foregoing statements is that the foreign law is proved in a way in which facts are proved ...*" (emphasis added).

VIII. APPLICABLE LAW

228. Article R58 of the CAS Code provides as follows:

> *"The panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision ...*"

229. In the Order of Procedure, the Parties agreed that the law applicable to the merits shall be the applicable regulations and, subsidiarily, 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.

230. PANAM Sports is the body which has issued the challenged decision. Its head office is in Mexico City, Mexico (see Article 3.2 of the PANAM Sports Constitution). Thus, at first sight, substantively the law of Mexico applies to these Appeals. However, the "applicable regulations" within the meaning of Article R58 of the CAS Code, i.e., the PADR, provide in Article 20.3 that the PADR "shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments." Thus, the PADR exclude any reference to the laws of Mexico insofar as the PADR govern the dispute.

231. Thus, for the reasons given, the law of Mexico has no role to play in the interpretation, application and interplay of the 2015 WADC, the PADR and the FEI ADRHA. Understandably no submission was made by any party that the law of Mexico was applicable to the legal issues in dispute in the present cases and no party led evidence of what that law was.

232. Article R28 of the CAS Code provides that the seat of the CAS and of each Arbitral Panel is in Lausanne, Switzerland. Swiss procedural law, more particularly the 12th chapter of the PILA, therefore applies to these arbitration proceedings.

233. The Panel has already applied Swiss procedural law in respect of the issue involving Dr Viret's Report.

IX. FACTS AND EVIDENCE

234. These Appeals involved strongly contested issues of fact and law. Factually, the key issue was whether the ADRV committed by Ms Walker, namely the presence of the Prohibited Substance, or its metabolites in her sample (in this case a metabolite of cocaine) came about solely as a result of the inadvertent ingestion by her of tea containing cocaine on 7 August 2019 (as contended by Ms Walker and Equestrian Canada) or whether, on the other hand, that presence was attributable to other causes such as drinking tea containing cocaine on several occasions including 6 August 2019 or was the result of some deliberate ingestion by Ms Walker of cocaine recreationally whilst she was in Peru.

235. Except for the issue of whether Ms Walker's individual results on 6 August 2019 should also be disqualified, the factual issue, in the Panel's view, is only relevant if it is the provisions of the FEI ADRHA which are to apply in respect of the consequences for the team results of Equestrian Canada. The relevance of the factual issue, if that was the case, is that the FEI ADRHA rules give a discretion to the decision maker as to which particular results to disqualify. Ms Walker and Equestrian Canada both submit that it would have been an inappropriate and unreasonable exercise of the discretion for the purposes of the team competition, to disqualify the results achieved by Ms Walker on 6 August 2019 if, as a matter of fact, the ADRV was committed no earlier than the next day.

236. In such circumstances, none of the relevant anti-doping rules or policies have anything to say about who bears the onus of proof on this question of fact. However, it is a central part of the Appeals by both Ms Walker and Equestrian Canada that the ADRV was the result of the one single ingestion on her part on 7 August 2019 of tea containing cocaine. That being the case, the onus of proving that fact falls upon Ms Walker and Equestrian Canada. They must prove that fact on the balance of probabilities.

237. A very large proportion of the written submissions and evidence and of the oral submissions and evidence at the hearing was devoted to the resolution of this factual issue.

238. In the end, because of the view the Panel takes as to the legal issues involved in these Appeals, it is not strictly necessary to decide this issue in order to determine the outcome of these Appeals. But there are significant reputation issues involved for Ms Walker in the light of the suggestions that she deliberately committed an ADRV by the recreational use of cocaine. There are also cost implications because of the amount of time, effort and, presumably, money spent by the Parties in pursuing this issue. Also, the factual issue remains relevant to whether Ms Walker's individual results on 6 August 2019 are to be disqualified (as contended for by PANAM Sports in its Cross-Appeal) although, in the scheme of things, this was an issue of considerably less significance than the other issues. The Panel therefore considers that it is necessary to determine this factual issue.

Summary of Relevant Evidence

239. During the Pan Am Games Ms Walker and Team Canada, together with a number of other teams including the American Team, stayed at the Los Incas Lima Hotel. At the main entrance of the hotel there were displayed the national flags of a number of teams staying at the hotel as well as official Pan Am Games logos. Ms Walker, and other members of the Canadian entourage, gave evidence that they believed that the hotel was an "official" hotel for the purposes of the Games. Ultimately, however, it became common ground that the Los Incas Lima Hotel was not an official hotel for the purpose of the Games although a number of athletes and teams participating at the Games stayed there. The evidence clearly establishes that neither Ms Walker nor any member or official associated with Team Canada formally checked as to whether the hotel was an official one or not. The Panel accepts, however, that Ms Walker and Team Canada genuinely believed that it was such an official hotel.

240. For the purposes of her stay in Lima, Peru Ms Walker brought with her from Canada eight teabags of her favourite green tea. She chose that number deliberately because she thought she would be there for eight days and her practice was, when the weather was hot, to drink one cup of tea per day. Her practice, when the weather was colder, was to drink two cups of tea per day. According to Ms Walker, it was much colder in Lima than she expected. She arrived in Lima during the evening of 2 August 2019. Because the weather was so cold she drank two cups of tea on each of 3, 4, 5 and 6 August 2019 thus running out of the teabags she had brought with her. According to her evidence, up to the end of 6 August 2019 whilst in Peru Ms Walker did not drink any tea other than tea made with the teabags she had brought with her.

241. On the morning of 7 August 2019, prior to departing from the hotel for the competition venue at approximately 6.30am, Ms Walker attended the hotel's breakfast service area. In that service area there was a range of teabags which guests could choose from. Ms Walker chose from the selection a tea that she believed to be green tea. She chose this because the label attached to the teabag was green in colour. That teabag in fact was of the "Valle" brand (a local Peruvian brand) and the tea was described thereon as "matte de coca". Ms Walker does not speak Spanish nor can she read it. She was unaware of what "matte de coca" meant when translated into English. In particular, she did not know that the Spanish word "coca" means "cocaine".

242. It became common ground or incontestable at the hearing that tea containing cocaine is readily available in Peru. It also appears that no warning was provided to Ms Walker either by Team Canada officials or by those organising the Pan Am Games of the prevalence of such tea in Peru. For Ms Walker's part, she assumed that such tea would be illegal in Peru as it was in Canada or other places she had visited. According to her evidence, she also believed that the hotel she was staying at was an official hotel associated with the Pan Am Games and that food or beverage containing Prohibited Substances would not be provided at such places or venues.

243. A number of other witnesses associated with Team Canada also gave evidence that they believed that the Los Incas Lima Hotel was an official Games hotel. However, once more, they based this belief upon the existence of the flags flying at the main entrance

to the hotel, the display of the official Games logo and the fact that other teams from other countries were staying there. None, however, made any enquiry either before staying at the hotel, or during their stay there, to confirm their belief that it was an official hotel. It appears to the Panel that it would have been easy to ascertain the hotel's status by enquiry of the organisers of the Games or by enquiring directly of the hotel itself. No-one chose to do that.

244. One of the people who stayed at the hotel was Dr Geoff Vernon, a veterinarian for Team Canada. He gave evidence that he had tea at the hotel using the same type of teabags as that chosen by Ms Walker on the morning of 7 August 2019. He too did not speak or understand Spanish but believed he was choosing a teabag containing "green tea". He even gave evidence to the extent that he liked the tea so much that he went to a local supermarket and bought a packet of it to take home with him to Canada. It was only subsequently, according to Dr Vernon, that he discovered that the tea, in fact, contained cocaine. Like Ms Walker, however, Dr Vernon made no enquiries to satisfy himself that his assumption that the tea was "green tea" was correct. He did not ask any of the hotel's staff or anyone else whether it was in fact green tea or ask someone to translate the label to him.

245. Reverting to the narrative, on the morning of 7 August 2019 Ms Walker says that after having selected the teabag at the hotel she then made a cup of tea with it in a "to go" cup and boarded the team shuttle bus to the equestrian venue, drinking the tea during the course of that journey. Mr Mario DesLauriers, a fellow member of Team Canada, gave evidence that he saw Ms Walker drinking from a "to go" cup on the team bus. Although Mr DesLauriers was cross-examined by PANAM Sports, he was not cross-examined on that particular aspect of his evidence.

246. According to Ms Walker, she had no further tea prior to being drug tested on the afternoon of 7 August 2019.

247. Ms Walker also gave evidence:

(a) That she had never intentionally taken cocaine in her life, recreationally or otherwise;

(b) That although she went out to dinner several times whilst in Lima, she never had any other beverages which could possibly contain cocaine on such occasions;

(c) That she had never, in the past, committed an ADRV; and

(d) That she went to the Pan Am Games fully expecting to be drug tested.

248. In respect of the issue of the availability of tea containing cocaine at the Los Incas Lima Hotel on 7 August 2019, Ms Walker relies on the evidence of Dr Vernon already summarised. Although Mr Vernon's evidence was challenged in other respects in cross-examination he was not challenged on the fact that he drank tea using a teabag of the same sort as Ms Walker says she used or that he subsequently purchased identical

teabags at a supermarket and that he subsequently found that such teabags contained tea, of which a constituent part was cocaine.

249. Further, Mr Rafael Rocca gave evidence in writing, and orally, that he attended the Los Incas Lima Hotel in October 2019 and December 2019 and on each occasion observed a tea selection box from which tea containing cocaine was available. On the latter occasion, namely December 2019, Mr Rocca, who is an associate attorney in a large Peruvian law firm, took photos of the tea selection box and the teabags available. Ms Walker and Dr Vernon identified from that photos, in oral evidence, the teabags which they used and it now appears to be common ground or beyond dispute that the tea in teabags so labelled is tea which in fact contains cocaine.

250. Finally, on this aspect, Ms Walker and Team Canada sought to rely upon a letter provided by a Ms Málaga, an employee of the Los Incas Lima Hotel in August 2019, which confirmed that tea containing cocaine was in fact available at the hotel in August 2019.

251. Unfortunately, Ms Málaga, although required for cross-examination, was not available, or was unwilling, to appear to give evidence. PANAM Sports challenged the admission of her letter into evidence on that basis. In the Panel's view, the evidence of Ms Málaga as contained in that letter, is relevant and admissible although its weight is much diminished by the failure of her to attend for cross-examination.

252. There is also expert evidence from Professor Uetrecht (called by Ms Walker/Equestrian Canada) and from Professor Saugy (called by PANAM Sports) which is indirectly relevant to this issue. That evidence will be analysed later. However, for present purposes, it is sufficient to say that the evidence of neither of these witnesses is direct proof of whether or not tea containing cocaine was ingested on 7 August 2019. As will appear, however, the ingestion of tea containing cocaine on 7 August 2019 is not inconsistent with the evidence of either of these witnesses.

253. It appears to the Panel that there are two specific factual issues which need to be determined. First, whether or not Ms Walker intentionally or inadvertently consumed cocaine prior to 7 August 2019 and secondly did Ms Walker unintentionally consume cocaine by drinking tea made with a teabag which she took from her hotel on the morning of 7 August 2019.

Did Ms Walker intentionally or inadvertently consume cocaine prior to 7 August 2019?

254. PANAM Sports and several of the *amici curiae* (COARG and FEA) contend that Ms Walker has not proved that she did not consume some cocaine prior to 7 August 2019 – intentionally or inadvertently.

255. It is first convenient to deal with Ms Walker's evidence. Ms Walker impressed the Panel as an intelligent, sincere and honest witness. She was the subject of careful cross-examination by PANAM Sports but, in the Panel's view, that cross-examination did not undermine her credit.

256. Ms Walker's evidence on this topic may be summarised as follows:

(a) She did not take cocaine intentionally or deliberately at the Pan Am Games in Lima;

(b) She has never used cocaine recreationally or otherwise in the past;

(c) The only tea she had in Peru prior to 7 August 2019 was tea made from the teabags she had brought with her from Canada.

257. Ms Walker and Equestrian Canada produced evidence from Mr James Nutt, an expert who conducted scientific analysis of hair samples provided by Ms Walker in order to detect the presence of cocaine or metabolites thereof. Although it is accepted between the Parties that such hair testing cannot exclude the possibility of an intentional but isolated taking of cocaine it is equally agreed between the Parties that Mr Nutt's evidence (and Mr Nutt was not cross-examined) confirms that Ms-Walker was not, as at 7 August 2019, a regular or habitual user of cocaine.

258. Ms Walker and Equestrian Canada also led evidence from an expert in polygraph testing, Dr Keith Ashcroft. Mr Ashcroft was the subject of cross-examination on behalf of PANAM Sports. However, in the Panel's view, Dr Ashcroft was a reliable and plausible witness of considerable experience in the area of polygraph testing and who conducted that testing in a proper and regular manner.

259. PANAM Sports challenged the admissibility or reliability of evidence of polygraph testing in proceedings such as this pointing to the fact that it was notorious that several high-profile athletes in the past who had subsequently been proven to have intentionally committed ADRVs had passed such polygraph testing. PANAM Sports also relied upon the fact that such test results are not regarded as admissible evidence in many legal jurisdictions around the world.

260. On the other hand, Ms Walker and Equestrian Canada point out that, as conceded by PANAM Sports in its Answer, CAS Panels have frequently considered polygraph examination results to be admissible. Those decisions include CAS 2011/A/2384 at [241]-[242]; CAS 2013/A/3170 at [79] and, more recently, CAS 2019/A/6313 at [88]. This Panel has already noted above the approach to admissibility of evidence in accordance with Swiss law. Consistently with that approach and with the decisions of other CAS Panels which the Panel has referred to, the Panel determines that Dr Ashcroft's evidence is admissible. Of course, it is not decisive and the weight to be attached to it will depend upon the Panel's satisfaction with the thoroughness, reliability and carefulness of the way in which the polygraph testing was conducted and the methodology employed. If the Panel is satisfied of such matters then like the Panel in CAS 2019/A/6313, this Panel takes the view that such polygraph examination results can be taken into consideration in assessing the credibility of Ms Walker's denial of any intentional ingestion of cocaine.

261. As stated, Dr Ashcroft was an experienced and impressive witness. He explained in detail his methodology and the steps he took to satisfy himself that the results of his

polygraphic examination were reliable and sound. No expert evidence was called by PANAM Sports to contradict his conclusions or to question his qualifications, experience or methodology.

262. During the polygraph test, Dr Ashcroft asked Ms Walker on three occasions whether she had knowingly taken cocaine and on each occasion, she made it clear that she had not. After reviewing the physiological data that had been collected during the polygraph test, Dr Ashcroft concluded that, in giving such answers, Ms Walker was telling the truth. His level of confidence in that regard was 98.8%. He said that this was one of the higher or clearest levels of confidence that he had ever had in conducting some 453 polygraph examinations.

263. In those circumstances, the Panel considers that Dr Ashcroft's evidence in respect of the polygraph examination results adds force to Ms Walker's declarations of innocence concerning the intentional taking of cocaine but, as stated, that evidence is not decisive in that regard and must yield, if there is persuasive objective evidence to the contrary.

264. But there is no such evidence to the contrary. Although PANAM Sports and COARG/FEA suggested in submission that it might be the case that Ms Walker had intentionally taken cocaine they produced no evidence to support such suggestion or speculation.

265. Further, PANAM Sports called evidence from Professor Martial Saugy in respect of the scientific analysis of Ms Walker's AAF. Likewise, Ms Walker and Equestrian Canada called similar evidence from another expert, Professor Jack Uetrecht. The Panel will discuss the evidence of these two highly qualified expert witnesses in more detail below but, for present purposes, it is sufficient to say that Professor Saugy's view was that there is no test which can identify whether the metabolites of cocaine found within Ms Walker's system came from ingestion of tea on the one hand or the deliberate consumption of cocaine in powder ~~form~~ or otherwise on the other hand. He was unable to come to any conclusion whatsoever as to whether or not there had been an intentional ingestion of cocaine.

266. Professor Uetrecht on the other hand whilst agreeing that, in the light of the relatively scant scientific data available, it was impossible, on the basis of Ms Walker's AAF, to exclude the possibility of the deliberate ingestion of cocaine by Ms Walker nevertheless opined that it was unlikely that the AAF had resulted from the deliberate ingestion of cocaine prior to 7 August 2019 because, in his view, the amount of cocaine deliberately taken in days prior to 7 August 2019 to produce such a result would have to have been an unusually high level and that he would have expected the hair sample analysed by Mr James Nutt to have produced a different result in that scenario. Professor Uetrecht's conclusion (which will be discussed in more detail below) was that the most likely scenario was that the AAF was the result of the ingestion of one cup of tea containing cocaine on 7 August 2019.

267. Furthermore, Ms Walker and Equestrian Canada put on evidence from several highly experienced equestrian jumpers that the ingestion of cocaine by an equestrian jumper would hinder rather than enhance the performance of that jumper in an event such as the

Pan Am Games. None of those jumpers was required for cross-examination. Likewise, in his first report, admittedly based on assumptions of fact (which are proven by the unchallenged evidence of the equestrian jumpers just referred to) Professor Uetrecht was of the view that cocaine would hinder, rather than help, a show jumper's performance.

268. Moreover, although Professor Saugy, in the evidence before this Panel, did not opine on this matter, he had produced an earlier paper which is of some relevance. That paper is referred to in PANAM Sports' Answer and is further discussed in Ms Walker's Answer to PANAM Sports Cross-Appeal. It is fair to say that there are statements or opinions going each way in that paper and the Panel regards it as, at best, neutral on this matter.

269. When all of this evidence is viewed in its totality, the Panel is satisfied that Ms Walker's ADRV was not caused by the deliberate ingestion of cocaine by Ms Walker.

270. Turning to the question of the possible inadvertent consumption of cocaine by Ms Walker prior to 7 August 2019 through the ingestion of tea containing cocaine or otherwise, the Panel also concludes, as a matter of probability, that it is unlikely that Ms Walker inadvertently consumed cocaine at any relevant time prior to the morning of 7 August 2019.

271. First, there is the evidence of Ms Walker herself. She gave evidence that although she went out on three occasions whilst in Lima, she did not take any beverage which could possibly have been a source of cocaine. No evidence was led by PANAM Sports to contradict this assertion nor was she the subject of any cross-examination on this matter which causes the Panel to doubt the veracity of her evidence.

272. Secondly, Ms Walker explained, as noted above, how she had taken eight teabags of her favourite green tea to Lima but had run out of those teabags by the morning of 7 August 2019. Ms Walker was strongly cross-examined by Mr Quintero on behalf of PANAM Sports about her "practice" of consuming tea at various quantities depending on whether the weather was hot or cold but in the Panel's view that cross-examination did not affect the veracity or reliability of Ms Walker's evidence on that topic.

273. PANAM Sports itself led no evidence as to how Ms Walker might inadvertently have consumed cocaine prior to 7 August 2019 but rather seemed to adopt the position that Ms Walker had not excluded that possibility and therefore her version of events should not be accepted. The Panel thinks that is too rigorous a test. The Panel does not think it necessary, in the present context, for Ms Walker to prove there was no possibility that she intentionally or unintentionally ingested cocaine prior to 7 August 2019. Rather, what she needs to do is to satisfy the Panel, on the balance of probabilities, that she did not intentionally or unintentionally ingest cocaine prior to 7 August 2019.

274. Apart from Ms Walker's evidence, the only other evidence led before the Panel was the expert evidence of Professors Uetrecht and Saugy. No challenge was made to the expertise of either witness and rightly so. Moreover, each came across as careful expert witnesses who were attempting to give their opinions honestly to the Panel. There was, however, one major difference in the nature of the evidence of these two expert witnesses. On the one hand, Professor Saugy appears to have been asked, and thus to

have answered, the questions upon which he was asked to express an opinion on the basis of whether it was *possible* that things happened or did not happen. Many of his answers contained expressions such as "The possibility cannot be excluded …". On the other hand, Professor Uetrecht, although also sometimes talking in terms of possibility, also gave evidence as to whether the scientific data examined by him enabled him to express an opinion, as a matter of *probability* or *likelihood*, that certain events happened or did not happen. Moreover, Professor Uetrecht in a thorough and persuasive manner pointed out significant deficiencies in the various scientific papers relied upon by Professor Saugy in his Report. These deficiencies are summarised in Ms Walker's Answer to the Cross-Appeal. It is highly significant, in the Panel's view, that neither Professor Saugy, in his oral evidence nor PANAM Sports in its submissions sought to contradict the "mistakes" there summarised.

275. Indeed, Professor Saugy very fairly agreed that each of Professor Uetrecht's Reports was "completely adequate" and that he also agreed with the graphs contained in Professor Uetrecht's Report. Despite the alleged errors in the Mazor Paper relied upon by him in his Report, nevertheless, based on that and other matters, Professor Saugy maintained his view that he could not exclude the possibility that the AAF was the result of Ms Walker inadvertently consuming cocaine, by the taking of tea containing cocaine or the like, on each of 6 August 2019 and 7 August 2019. He acknowledged in his oral evidence in chief, however, that the taking by Ms Walker of tea containing cocaine on 5 August 2019 was not compatible with the estimated concentration found in the drug test on 7 August 2019. He also accepted that the AAF results were consistent with Ms Walker ingesting cocaine by reason only of having tea containing cocaine on 7 August 2019.

276. Professor Uetrecht was more confident than Professor Saugy in believing that he was able to express conclusions, as a matter of probability, based on the scientific data. He gave detailed evidence undermining or questioning the validity of the scientific papers relied upon by Professor Saugy in his Report which, as said, was not rebutted by Professor Saugy or by PANAM Sports in its submissions.

277. After a careful analysis of the scientific data and the scientific papers, and despite vigorous cross-examination by Mr Quintero on behalf of PANAM Sports, Professor Uetrecht's expert opinion remained that whilst he could not exclude the possibility of the AAF being the result of Ms Walker having one cup of tea containing cocaine on 6 August 2019 and one cup of tea containing cocaine on 7 August 2019 nevertheless the most likely scenario was of her having one cup of tea containing cocaine on 7 August 2019.

278. Each of the members of the Panel is a lawyer not a scientist. It is often a difficult, if not invidious, task to determine which of competing expert views should be accepted in such circumstances. In approaching the task, the Panel has borne in mind the following matters:

(a) The expert's duty is not to represent the interests of the party calling him or her, but, rather, to express his or her views honestly and as fully as necessary for the

purpose of a case. An expert should provide independent, impartial assistance to the Panel. An expert should not be an advocate for any party;

(b) The Panel cannot completely disregard any expert evidence which is otherwise admissible or before it. Rather the Panel must pay regard to the content of the expert evidence, but it is not bound by it, or required blindly to follow it;

(c) The expert opinion should be comprehensible and lead to conclusions that are rationally based, with reasoning explained. The process of inference that leads to conclusions must be stated or revealed in a way that enables conclusions to be tested and a judgment made about their reliability;

(d) In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable objective procedure for reaching the expert opinion so that qualified persons can either duplicate the result or criticise the means by which it was reached, drawing their own conclusions from the underlying facts;

(e) The value of expert evidence depends upon the authority, experience and qualifications of the expert and, above all, upon the extent to which his or her evidence carries conviction; and

(f) In cases where experts differ, the Panel will apply logic and common sense in deciding which view is to be preferred, or which parts of the evidence are to be accepted.

(See also CAS 2016/A/4803 at [103].)

279. Consistently with the approach set out above, where there is an inconsistency between the evidence of Professor Saugy on the one hand and Professor Uetrecht on the other hand, the Panel prefers to adopt the reasoning and conclusions of Professor Uetrecht. We consider Professor Uetrecht's evidence to be based on reasoning which is clearly explained and enables fair criticism to be made of the conclusions which he has reached. His evidence also exposes some fundamental issues concerning the scientific data upon which Professor Saugy's opinions were based which were not contradicted by Professor Saugy. Further, as stated, Professor Uetrecht appears to address the correct question for these Appeals, namely, on the probabilities, whether various things happened or did not whilst Professor Saugy's opinion appears to be based on answering a different, less relevant question, namely whether the possibility of something happening or not happening can be excluded.

280. Based, therefore, on the evidence of Ms Walker supported by the evidence of Professor Uetrecht the Panel concludes that, based on the balance of probabilities, Ms Walker's AAF was not the result, in whole or in part, of the inadvertent ingestion by her of cocaine prior to 7 August 2019.

Did Ms Walker unintentionally consume cocaine by drinking tea made by using a teabag provided by the hotel on the morning of 7 August 2019?

281. In the Panel's view, the evidence which has been led confirms that this question should be answered in the affirmative.

282. The Panel is satisfied that teabags containing cocaine were available in the breakfast service area at the hotel on 7 August 2019. Both Ms Walker and Dr Vernon identified the teabags in question by reference to the photographs later taken. The labels on such teabags state that they are "matte de coca". It is beyond doubt that "coca" is the Spanish word for cocaine.

283. Thus, there is direct evidence from those witnesses that teabags containing cocaine were available at the hotel on 7 August 2019.

284. Furthermore, there is the letter from Ms Torres Málaga who was the General Manager of the hotel but who, by the time the hearing had taken place, was no longer employed by the hotel. That letter stated unequivocally that teabags containing cocaine were available at the hotel to athletes such as Ms Walker during the Pan Am Games. Ms Málaga was not prepared to give evidence before this Panel because she no longer worked at the hotel and therefore did not consider herself to be the right person to assist. Neither Ms Walker nor Team Canada was able to come up with any substitute witness. In these circumstances, the weight of Ms Málaga's evidence is much diminished as one cannot cross-examine a piece of paper. Notwithstanding this, however, the Panel considered Ms Málaga's letter to be admissible as evidence albeit, as said, of limited weight.

285. However, as already noted, Mr Rafael Rocca (an associate attorney at a large Peruvian law firm, Miranda Amado) visited the hotel on two occasions. First in October 2019 and secondly in December 2019. On each occasion he noted in the breakfast service area of the hotel teabags stating that they contained cocaine and, on the second occasion, in December 2019, he took photographs of such teabags. It was those photographs that Ms Walker and Dr Vernon identified as containing pictures of teabags identical with the teabags that they had used at the hotel during the Pan Am Games.

286. It also became common ground between the Parties, or at least beyond serious dispute, that tea containing cocaine is in prevalent use in Lima (or at least, it was, in 2019). In such circumstances it is not difficult to infer that such tea would have been available at the Los Incas Lima Hotel especially as that was not, contrary to the belief of Ms Walker and Team Canada, an "official" games hotel.

287. Given the prevalence of the availability of tea containing cocaine in Lima, Peru at the time and the subsequent observations of the availability of such tea in the breakfast service area of the Los Incas Lima Hotel in October and December 2019, as a matter of common human experience, the Panel would accept the likelihood that such tea was available at the hotel on 7 August 2019 without having regard to Ms Málaga's letter. But that letter, although of little weight in itself, assumes greater importance because of the evidence to which the Panel has referred. It is inherently unlikely that the evidence

in that letter is unreliable given those two other pieces of undisputed evidence. All of this evidence, in turn, corroborates the direct testimony on this point of Ms Walker and Dr Vernon.

288. In those circumstances, the Panel was satisfied, as a matter of probability, that teabags containing cocaine were available in the breakfast service area of the Los Incas Lima Hotel on 7 August 2019 and that Ms Walker then used such a teabag to make tea which she consumed on that day.

Conclusion on whether the AAF was the result of Ms Walker drinking tea containing cocaine solely on the morning of 7 August 2019

289. For the reasons given the Panel:

(a) Accepts that Ms Walker did not intentionally ingest cocaine at any relevant time on or prior to 7 August 2019;

(b) Accepts that there was no unintentional ingestion of cocaine by Ms Walker at any relevant time prior to 7 August 2019;

(c) Finds that the AAF was the result, and only the result of, the unintentional ingestion of cocaine by Ms Walker on the morning of 7 August 2019 as a result of her using a teabag containing cocaine which she took from the breakfast service area of the Los Incas Lima Hotel.

290. However, as will be explained below, unfortunately for Ms Walker and for Equestrian Canada these factual findings do not significantly affect the outcome of these Appeals.

X. MERITS

291. As already stated, the provisions of the PADR or, for that matter, the FEI ADRHA only have binding effect because athletes, teams and organisations participating in competitions or events agree, as a matter of contract law, to be bound by such anti-doping regimes.

292. In this case, it is clear that Ms Walker and Team Canada as a condition of being permitted to compete at the Pan Am Games, agreed to be contractually bound by the PADR rather than by any other anti-doping regime such as the FEI ADRHA.

293. In order to participate in the 2019 Pan Am Games each athlete (including Ms Walker and other members of Team Canada) was required to sign the "Eligibility Conditions Form", which relevantly provided:

> *"I declare that I know and commit to comply with the policies, rules and procedures set forth in the World Anti-Doping Code and the Pan Am Sports Anti-Doping Rules, and to undergo controls and/or medical exams and/or sample collections at any time; otherwise, I will be immediately excluded from the Pan American Games and my accreditation card will be removed."*

294. The introduction to the PADR states:

> *"These anti-doping rules shall apply automatically to*
>
> *(a) Pan Am Sports*
> *(b) All athletes in one of Pan Am Sports' events or who have otherwise been made subject to the authority of Pan Am Sports for a future event;*
> *(c) All athlete support personnel supporting such athletes;*
> *(d) Other Persons participating in the activities of Pan Am Sports; and*
> *(e) Any organisation, body or entity operating (even if only temporarily) under the authority of Pan Am Sports.*
>
> ...
>
> *Organisations, bodies or entities operating (even if only temporarily) under the authority of Pan Am Sports are automatically bound by these anti-doping rules as a condition of their participation in Pan Am Sports' activities.*
>
> *These anti-doping rules shall apply to all Doping Controls over which Pan Am Sports has jurisdiction."*

295. Furthermore, Article 12.5 of the Pan American Games Regulations states:

> *"The Pan Am Sports anti-doping rules apply in* ***every respect*** *to the Games, as do any other anti-doping regulations enacted by the executive board that are applicable to the Games." (emphasis added).*

296. There can thus be no doubt that both Ms Walker and her fellow riders representing Team Canada agreed, as a condition of their right to participate in the Pan Am Games, to be bound by the PADR.

297. Neither Ms Walker nor Equestrian Canada contest that the PADR was the primary anti-doping regime applicable at the Pan Am Games. Their submission is a more nuanced one which has been summarised above. In effect, they say, that the relevant provisions of the PADR (Article 11.4) are "in conflict with" the 2015 WADC because they are in conflict with a comment to Article 9 of the 2015 WADC which is, in reality, according to them, a stand-alone operative provision of the 2015 WADC and which mandates that the relevant sanctions for teams be as stated by the FEI ADRHA rather than by an event organiser such as PANAM Sports.

298. If Ms Walker and Equestrian Canada fail in this "conflict" submission then no other basis is put forward for asserting that Article 11.4 of the PADR is inapplicable.

1. The 2015 WADC

299. Reference has already been made to some of the provisions of the 2015 WADC. For present purposes, it is necessary to focus upon the following provisions of that Code.

300. Article 24.2 provides:

> *"The comments annotating various provisions of the Code shall be used to interpret the Code."*

301. It is to be noted here that the expression "comments" is used in contradistinction to the expression "Code". This strongly suggests that the "comments" are not intended to be operative provisions of the "Code" itself but rather to be used, and only used, to interpret the operative provisions of the WADC. Resort to the comments for the purposes of interpreting an operative provision of the WADC may be necessary or desirable where the operative provision in question is unclear, ambiguous or capable of more than one meaning.

302. However, in the Panel's view, where the operative provisions of the WADC are clear and unambiguous or where it cannot be said that the clear and unambiguous meaning of the operative provision was not the intended one then, in the Panel's view, the comments cannot be used or relied upon as if they are, themselves, operative provisions of the WADC.

303. The relevant comment relied upon in the present Appeals is a comment to Article 9 of the 2015 WADC. Article 9 states as follows:

> *"An anti-doping rule violation in **Individual Sports** in connection with an **In-Competition** test automatically leads to **Disqualification** of the result obtained in that **Competition** with all resulting **Consequences**, including forfeiture of any medals, points and prizes." (emphasis as in the original).*

304. The comment to Article 9 reads as follows:

> *"For Team Sports, any awards received by individual players will be Disqualified. However, Disqualification of the team will be as provided in article 11. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation."*

305. Article 23.2.2 of the 2015 WADC requires the relevant signatory (in this case PANAM Sports) to implement without substantial change in its anti-doping rule regime, amongst other things, Article 9 of the 2015 WADC. It also requires comments in that anti-doping regime to have the same status as they do in the 2015 WADC.

306. Consistently with this requirement, Article 9 of the PADR replicates the language of Article 9 of the 2015 WADC but does not expressly set out thereunder the comment to

Article 9 of the 2015 WADC. However, this is done indirectly by Article 19.6 of the PADR which provides:

> *"The comments annotating various provisions of the [2015 WADC] are incorporated by reference into these anti-doping rules, shall be treated as if set out in full herein, and shall be used to interpret these anti-doping rules."*

307. Article 9 of the 2015 WADC (and of PADR) is only applicable in respect of "*Individual Sports*". That is a defined term. It is defined to mean "any sport that is not a *Team Sport*".

308. "*Team Sport*" is defined as:

> "In a sport in which the substitution of players is not permitted during a *Competition*."

309. Leaving aside, presently, the definition of "*Competition*" it is common ground, and correct, that the show jumping event at the Pan Am Games was not a "Team Sport" as substitution of players (in this case riders and their horses) was not permitted.

2. No Conflict between the 2015 WADC and the PADR

310. There is no express operative provision in the 2015 WADC dealing with consequences for "team sports" which do not satisfy the definition of "Team Sports". In the Panel's view, this is a deliberate omission on behalf of the authors of the Code. The plain intention of the 2015 WADC is that the "consequences" for team sports which do not qualify as "Team Sports" are not covered by the 2015 WADC.

311. In the Panel's view, the "comment" to Article 9 is simply meant to clarify this deliberate omission and to put people on notice of the fact that the 2015 WADC has no operation in such a situation. The comment reminds people that such consequences are not dealt with in the 2015 WADC but that if a Signatory wishes to provide for such consequences then it will be a matter for that Signatory to make provision for such consequences in its own anti-doping regime. There will be no inconsistency or conflict with the 2015 WADC if a Signatory does so because the 2015 WADC expressly does not deal with such consequences.

312. Contrary to the views just expressed, Ms Walker and Equestrian Canada place reliance upon the use of the words "shall be as provided" in the comment. They submit that the use of such an expression indicates that the "comment" is not a "comment" at all but rather a separate operative provision of the 2015 WADC mandating the International Federation, and the International Federation alone (to the exclusion of any other Signatory), to include in its anti-doping regime a provision dealing with the consequences for team sports which do not qualify as "Team Sports" for the purposes of Article 11 of the 2015 WADC.

313. It is in this respect that Ms Walker and Equestrian Canada rely on the "report" of Dr Viret which, as already noted, the Panel treats as a submission made on behalf of those

Parties rather than as expert evidence. Dr Viret repeats on a number of occasions her opinion that the "comment" is in fact a "genuine, stand-alone mandatory rule assigning the authority and responsibility for imposing Consequences on teams outside Team Sports to IFs and that, therefore, Article 19.4 of the PADR commands that this **rule** contained in the 2015 WADC must prevail over a conflicting regime in the PADR" (emphasis added).

314. Central to Dr Viret's opinion (and also to the other submissions made on behalf of Ms Walker and Equestrian Canada) is that the comment to Article 9 of the 2015 WADC uses the word "shall" which Dr Viret describes as a prescriptive term pointing at a mandatory rule, as opposed to a mere recommendation. She says that the use of the prescriptive language is inconsistent with viewing the "rule" as a mere Comment.

315. There is nothing in the language of the operative provisions of the 2015 WADC or in the comment to Article 9 of the 2015 WADC, viewed in context, which suggests that the comment to Article 9 is intended to impose a binding mandatory obligation upon an international federation and upon an international federation alone to impose Consequences on teams outside Team Sports. Such a construction, in the Panel's view, inconsistently with Article 24.2 of the 2015 WADC, would seek to elevate a "comment" designed to be used to interpret an operative provision of the Code to being an operative provision itself.

316. It has long been accepted that "shall" is capable of being interpreted as reposing a discretionary power rather than imposing an obligation, depending on the context. Viewed in the context of the 2015 WADC as a whole, it is the Panel's view that the use of the word "shall" in the comment to Article 9 of the 2015 WADC is to be interpreted as confirming a discretionary power for an international federation to cater for such consequences. However, nothing in the WADC nor the comment requires the international federation to provide for such consequences and, certainly, nothing in the WADC or the comment should be interpreted as saying that it is an international federation, and only an international federation which can, in its anti-doping regime, deal with such consequences.

317. If, as the Panel believes, the comment to Article 9 of the 2015 WADC cannot be viewed as a separate, stand-alone operative provision of the 2015 WADC then the substance of Ms Walker's and Equestrian Canada's "conflict" argument disappears. Article 11.4 of the PADR is not in conflict with, or inconsistent with, the 2015 WADC simply because the 2015 WADC expressly and deliberately does not deal with the circumstances covered by that Article of the PADR.

318. It follows, in the Panel's view, that the relevant provision applicable in the present appeals is Article 11.4.1 of the PADR.

3. Article 11.4.1 of the PADR

319. Article 11.4.1 of the PADR reads as follows:

> *"11.4.1 An anti-doping rule violation committed by a member of a team (outside of **Team Sports**) in connection with an **In-Competition** test automatically leads to **Disqualification** of the result obtained by the team in that **Competition** with all resulting consequences for the team and its members, including forfeiture of any medals, points and prizes."*

320. No-one disputes that, if applicable, this is the rule in the PADR relevant to the consequences of Ms Walker's ADRV for Team Canada in the event at the Pan Am Games. The article, however, contains a number of defined terms and must be read in the light of those definitions. But, again, no-one disputes that the tests conducted on Ms Walker on 7 August 2019 was "*In-Competition*" within the meaning of the rule. What is presently important is what for the purposes of the Pan Am Games, was the "*Competition*"?

4. What was the "Competition"?

321. The term "*Competition*" is defined in the PADR to mean:

> *"A single race, match, game or singular sport contest. For example, a basketball game or the finals of the Olympic 100-meter race in athletes. For stage races and other sports contests **where prizes are awarded on a daily or other interim basis** the distinction between a **Competition** and an **Event** will be as provided in the rules of the applicable International Federation."* (emphasis added).

322. There is no evidence in the present case that prizes in the team jumping competition were awarded on a daily or other interim basis and thus it is the first sentence of this definition which is presently relevant.

323. The jumping events at the Pan Am Games comprised three "competitions", namely the Qualifying Competition, the Final Individual Competition, and the Team Competition. This is illustrated by paragraph 9.1 of Annexure 1 to the 2019 FEI Rules for Jumping Championships and Games which were the specific jumping rules applicable to the Pan Am Games. Paragraph 9.1 reads:

> *"9.1 The official program of the Pan-American Games will comprise the following Competitions:*
>
> *The first **individual** qualifying Competition;*
>
> *The **team** jumping Competition, the first and second rounds also count as the second and third qualifying Competition;*
>
> *The final **individual** jumping Competition."* (emphasis added).

324. Paragraph 11 of the same FEI Rules provides that "[team] competition takes place over two rounds (qualifying round and final round) on the same day over the same course".

325. Moreover, at p.29 of the Pan Am Games Organising Committee's Technical Manual for Equestrian Events, in the section on jumping, it is stated that:

> *"The Games comprise three competitions and each one will take place on a different day."*

326. It follows that here, as submitted by PANAM Sports and FEI, the relevant "*Competition*" at the 2019 Pan Am Games was the Team Competition held on 7 August 2019. The result obtained by Team Canada in that Team Competition was the fourth place in the final classification. The two rounds in the Team Competition are not separate Competitions. Rather, together they comprise the one competition, namely the "Team Competition". It follows that the ADRV committed by Ms Walker leads to the Disqualification of the result obtained by Team Canada (4^{th} place) in the Team Competition.

327. It will be seen that the Panel's views in this regard coincide closely with submissions made by PANAM Sports and FEI. However, Ms Walker and Equestrian Canada appear to submit that each of the rounds of the Team Competition itself was a separate "competition" for the purposes of the PADR. For the reasons given, the Panel does not accept these submissions.

328. However, even if the submissions were accepted, the outcome would not be substantially different for the reasons again put forward by PANAM Sports and FEI. As stated in the FEI submission:

> *"Even if the rounds were separate 'Competitions', it would make no difference here because (i) even if the round 1 (qualifying round) results were disqualified, Team Canada would not get through to the final round, and (ii) even if the round 2 (final round) results were disqualified, Team Canada would not finish 4^{th} in the final classification."*

329. It follows that the results of Team Canada in both rounds of the Team Competition on 7 August 2019 fall to be automatically disqualified under Article 11.4.1 of the PADR.

5. The curious position in respect of the Individual Qualifying Competition held on 6 August 2019

330. The Panel notes one curious but inevitable consequence of its acceptance of the PANAM Sports/FEI submissions as to what "Competition" means for the purposes of Article 11.4 of the PADR.

331. The Individual Qualifying Competition took place on 6 August 2019. The description of that competition is misleading in a sense because it also counted towards the Team Competition – the results then obtained determined the order in which teams would

compete the next day and the points incurred counted towards the final placings in the Team Competition (see section 5.15 of the Technical Manual). Yet, somewhat incongruously, because of the language used in the PADR and in the FEI documents, the Individual Qualifying Competition held on 6 August 2019 was a separate "Competition" from the Team Competition held on 7 August 2019.

332. The In-Competition drug test undertaken by Ms Walker which resulted in her ADRV was not undertaken in respect of the Competition on 6 August 2019. Rather it was undergone in respect of the Team Competition held on 7 August 2019. Thus, applying Article 11.4.1 of the PADR, the results achieved by Team Canada in the Competition on 6 August 2019 are not automatically disqualified. They should stand.

333. However, this is of little consolation to Team Canada. As the Panel has found, Article 11.4.1 of the PADR automatically requires the disqualification of the results obtained by Team Canada in both rounds of the Team Competition conducted on 7 August 2019. That means Team Canada's 4th place result in the Team Competition is also disqualified and that, therefore, the Appeals by the Appellants must be dismissed and that the Cross-Appeal is partially upheld.

6. Ms Walker's individual results on 6 August 2019

334. As noted in paragraph 115(b) above, PANAM Sports in its Cross-Appeal also sought disqualification of Ms Walker's results of 6 August 2019 in the Individual Equestrian Jumping Competition. For the reasons just discussed, the Individual Qualifying Competition was a separate competition for the purposes of the PADR. The AAF was revealed as a result of testing on 7 August 2019 and the Panel has found it resulted solely from events which occurred on 7 August 2019. There is thus no basis for the automatic disqualification of Ms Walker's individual results in the Individual Qualifying Competition on 6 August 2019 under Article 9 of the PADR and the Panel, like the PSDC, sees no reason to disqualify those individual results pursuant to Article 10 of the PADR. On the evidence, Ms Walker competed on that day without any Prohibited Substance in her system and her ADRV was committed inadvertently. Consequently, the Cross-Appeal is partially dismissed.

7. Irrelevance of Article 11.2 FEI ADRHA and of exercise of discretion

335. In the light of the above analysis, it is unnecessary for the Panel to consider the situation which might have existed if Article 11.2 of the FEI ADRHA was the applicable rule to apply in respect of sanctions for teams such as Team Canada. These reasons are already extremely lengthy due to the multiplicity of issues required to be discussed and resolved and, in such circumstances, the Panel does not propose to address the hypothetical

question of what the outcome would have been had it determined that Article 11.2 of the FEI ADRHA was applicable.

XI. COSTS

336. R64.5 of the CAS Code is in the following terms:

> *"In the Arbitral Award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

337. It is not necessary to consider the costs positions of the *amici curiae*. The terms upon which those parties were permitted to participate in these Appeals included stipulations that they bear their own costs and that they would not be liable to costs orders in respect of the costs of others or in respect of the arbitration costs.

338. So far as Ms Walker, Equestrian Canada and PANAM Sports are concerned, the Panel has already set out their submissions as to what should be the outcome concerning costs. None of those Parties made any detailed submissions in amplification of their general ones. None of those Parties led any evidence in respect of the costs issue.

339. As the length of these reasons indicate, the Parties raised many issues of a procedural, factual and legal nature. No Party was universally successful in respect of such issues. It is true to say that the proceedings were complex and that each of the Parties had a measure of success. On the factual issues, which perhaps comprised the majority of time and effort spent by the Parties and the Panel, Ms Walker and Equestrian Canada were successful but on the legal issues, and in respect of the ultimate outcome, PANAM Sports was successful. These Appeals were marked by each of the Parties taking positions on at least some of the issues which, at best, were optimistic or only faintly arguable. Further, there is no evidence before the Panel of the respective financial resources of the Parties but given the magnitude of these proceedings, their obvious cost and the identity of the Parties involved it is reasonable for the Panel to assume that there was no great disparity in the respective financial resources of the Parties.

340. In all the circumstances, in respect of costs, the Panel is of the view that:

(a) The costs of the arbitration should be determined and served separately to the Parties by the CAS Court Office and should be borne as to one quarter by Ms Nicole Walker, one quarter by Equestrian Canada and one half by PANAM Sports.

(b) Each Party should bear its own costs and expenses incurred in connection with these arbitration proceedings.

(c) The *amici curiae*, COC, FEI, FEA and COARG should bear their own costs and expenses incurred in connection with these proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeals filed by Ms Nicole Walker and Equestrian Canada on 2 January 2020 against PANAM Sports with respect to the decision rendered by the PANAM Sports Disciplinary Commission on 11 December 2019 are dismissed.

2. The appeal filed by PANAM Sports on 14 March 2020 against Ms Nicole Walker and Equestrian Canada with respect to the decision rendered by the PANAM Sports Disciplinary Commission on 11 December 2019 is partially upheld.

3. The results for Team Canada in the jumping competition at the 2019 Pan Am Games are disqualified, which includes forfeiture of any medals, points and prizes.

4. The costs of the arbitration to be determined and served separately to the Parties by the CAS Court Office shall be borne by ¼ by Ms Nicole Walker, ¼ by Equestrian Canada and ½ by PANAM Sports.

5. Each Party shall bear its own costs and expenses incurred in connection with these arbitration proceedings.

6. The *amici curiae*, Canadian Olympic Committee (COC), Fédération Internationale Equestre (FEI), the Argentinian Equestrian Federation (FEA) and the Argentinian Olympic Committee (COARG), shall each bear their own costs and expenses incurred in connection with these proceedings.

7. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Operative Part notified on 12 January 2021
Lausanne, 22 April 2021

THE COURT OF ARBITRATION FOR SPORT

Alan Sullivan QC
President of the Panel

Maidie Oliveau
Arbitrator

Ulrich Haas
Arbitrator