



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2006/A/1043 Hetzel v/FEI

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Michael **Geistlinger**, Professor, Salzburg, Austria

Arbitrators: Dr Martin **Schimke**, Attorney-at-Law, Düsseldorf, Germany

Mr Quentin **Byrne-Sutton**, Attorney-at-Law, Geneva, Switzerland

in the arbitration between

HOLGER HETZEL, Germany

represented by Mr Rudolf Pellengahr of Heckmann, Pellengahr & Todtenhöfer Attorneys-at-Law,
Düsseldorf, Germany

- Appellant -

and

FÉDÉRATION EQUESTRE INTERNATIONALE (FEI), Lausanne, Switzerland

represented by Mr Guy Vermeil and Dr Xavier Favre-Bulle of Lenz & Staehelin Attorneys-at-Law,
Geneva, Switzerland

- Respondent -

I. The Parties to the Proceedings

- 1.1 The Appellant, Mr Holger Hetzel, is a professional rider of Germany, who has been competing at international level for 25 years. He took part in the CSI2* Event in Neuendorf, Switzerland from 24 – 26 June 2005 (“the Event”) with his horse Oreade de Fontin (“the Horse”). The horse is a 7 year-old novice show jumper, which was delivered to the Appellant by its owner for schooling on 15 March 2005.
- 1.2 The Respondent, the Fédération Equestre Internationale (FEI), is the IOC-recognized international federation for equestrian sport. The FEI has the mission to promote, regulate and administer humane and sportsmanlike competition in the traditional equestrian discipline.

II. The Facts and Submissions of the Parties

- 2.1 On 25 June 2005 the Horse was submitted to a medication control test at the Event. An analysis of the sample taken from the Horse conducted by the Laboratoire des Courses Hippiques in Verrières le Buisson/France revealed the presence of Gabapentin. Gabapentin is a prohibited substance, being a human anti-epileptic drug which is also used for the control of neuropathic pain. As it acts *inter alia* on the nervous system, it falls under the list of prohibited substances defined by article 1013 of the FEI Veterinary Regulations and annex IV thereof. Gabapentin has been classified by the Chairman of the FEI Medication Sub-Committee as a substance with a high potential to affect performance (highest class on a scale 1 – 5). The most commonly reported adverse effects associated with Gabapentin in veterinary literature are somnolence, dizziness, ataxia and fatigue.
- 2.2 The Appellant did not request a B-analysis and admitted by letter dated 26 August 2005 to the FEI that he had administered the last dose of the substance Gabapentin to the Horse five days before the Event upon the instructions of his veterinary surgeon. The Horse had occasionally demonstrated episodes of unusual behaviour and was treated from 5 April 2005 onwards. According to the Statement of Appeal this unusual behaviour happened in the box for a period of several minutes and was constituted by the Horse grinding its upper and lower jaws together in an atypical manner. The Horse’s eyelids trembled distinctively and the Horse was unsteady on its feet. The equine veterinary surgeon had diagnosed epileptiform seizures. The Appellant declared that Gabapentin was contained in the human medication Neurontin (Gabapentin) which was prescribed when various therapies had shown no success, thus in a case of a therapeutic state of emergency. The Appellant stated he had not been informed of the contents of Neurontin before he received the result of the doping test. The equine veterinary surgeon had recommended that he cease administering the medication as a precautionary measure five days before the Event. The administration had been done by an employee of the Appellant. Both the equine veterinary surgeon as well as the employee confirmed the explanation of the Appellant by statements of 19 August 2005 and of 18 June 2005, respectively. The veterinary surgeon viewed renal failure and extremely high temperatures during the Event as possible reasons for the substance appearing in the body fluids despite the administration having been stopped at the right moment. The employee stated that the treatment with the medication was continued after the Event.

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- 2.3 In a memorandum of 13 October 2005 the head of the Veterinary Department of the FEI commented to the Legal Department of the FEI that *“epileptic seizures”* *“is an ‘almost unheard of’ clinical condition”* of which only one case has been reported to him in a period of thirty years. If a horse would have such condition to a level which would request that a prohibited substance would be required in order to compete in a FEI event he holds *“that such a horse would pose serious inherent welfare risks and possibly safety risks for the public”*. It should not be considered to be fit to compete. The equine Veterinary surgeon *“should have advised to report the situation immediately upon arrival at the event, so that the Veterinary Official would have had an opportunity to check the horse and consider if a medication form 1 was called for.”* The medication form 1 is used for the authorisation of emergency treatment. He expected, however, that the veterinary official would not have authorised such type of treatment.
- 2.4 In a letter of 16 October 2005 the equine veterinary surgeon of the Appellant criticised that the FEI memorandum of 13 October 2005 did not differentiate *“epileptiform”* from *“epileptic”* seizures. He cited *“The Equine Manuel”*, edited by A. J. Higgins and I. M. Wright, the respective pages of which were submitted to the CAS Panel by letter of the Appellant of 24 May 2006. The Appellant holds that on pages 761 to 767 and on pages 970 and 971 the Manuel describes *“epileptiform seizures”*, the medical condition diagnosed by the equine veterinary surgeon and *“suggests treatment with the human medication Diazepam. Diazepam – like the human medication Gabapentin – is not expressly licensed for the treatment of horses.”* In a witness statement of 28 March 2006 the head of the Veterinary Department of the FEI declared that the cited manual only deals with juvenile cases of epilepsy and can, therefore, not be adduced to give evidence that cases of *“epileptic or epileptiform seizures in adult horses”* are not rare. By another witness statement of 23 March 2006 submitted by the FEI, an associate professor in Equine Internal Medicine at the Faculty of Equine Sciences of the Utrecht University in the Netherlands reported that in a number of approximately 4000 horses treated in equine internal medicine per year 1- 2 or less cases of confirmed epileptiform seizures in horses occur. This statement has been confirmed by a witness statement of a professor of the Division of Equine Studies of the University of Liverpool of 24 March 2006 who finds a rate of 1 : 2000 an approximate realistic prevalence of cases of epileptiform seizures in horses compared to the overall number of horse hospital admissions at his university. Both witnesses hold that horses with seizures are never fit to compete. The Liverpool professor finds the treatment of seizures with Gabapentin *“bizarre”*.
- 2.5 By means of a supplementary statement of the employee attached to the Appellant’s letter of 24 May 2006 it was stated that these seizures *“only occurred in rest phases and ceased altogether when treatment with Gabapentin commenced.”* The equine veterinary surgeon of the Appellant held in his letter of 16 October 2005 *“that the use of non registered substances for the treatment of horses in general cannot be regarded as a forbidden proceeding”*. The head of the Veterinary Department of the FEI reports in his witness statement of 28 March 2006 that the FEI had two positive cases for Gabapentin in 2005 and that the FEI has issued a warning as to the use of Gabapentin for horses in the FEI Bulletin 04/2005.
- 2.6 The Judicial Committee of the FEI, based on articles 057 and 058 of the FEI Statutes, decided on 26 January 2006 that there was a case for legitimate presumption of a *“deliberate attempt”* of the Person Responsible to affect the performance of the horse as specified in article 174 para 6.2.1 of the FEI General Regulations and that the Person Responsible could not rebut this presumption by proving that the treatment of the Horse was a *“legitimate treatment of the horse”* within the meaning of article 174 para 6.2.2 of the FEI General

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Regulations. Therefore, the Horse and the Appellant, being the Person Responsible in the meaning of the FEI law, have been disqualified from the Event and all prize money won at the Event was to be forfeited. In addition, the Appellant was suspended for a period of five (5) months, to commence immediately and without further notice from the end of the period in which an appeal may be filed or earlier if the appeal is waived in writing by the Appellant. The Appellant was held liable to pay CHF 1,000 towards the costs of the judicial procedure.

- 2.7 The Appellant filed a Statement of Appeal with the CAS on 24 February 2006. Upon request from the CAS in a letter to the Appellant of 28 February 2006, the Appellant confirmed on 6 March 2006 that this Statement of Appeal was also to be considered as the Appeal Brief. The Appellant requested that

“the sanctions specified in Lit. E of the decision of 26 January 2006 be repealed.”

- 2.8 Lit. E of the decision of the Judicial Committee of the FEI rules on the suspension for a period of five months and on liability to pay CHF 1,000 towards the costs of the judicial procedure.

- 2.9 The Appellant argues in his Appeal Brief that there was no violation involving the deliberate doping of a competition horse. The medication was administered to the Horse for legitimate medical purposes to treat a medical disorder. There was a prescription of a veterinary surgeon which was followed by the Appellant in good faith. The Appellant holds that there is no evidence that the quantity of Gabapentin present in the Horse's body at the time of competition would have been sufficient to affect its performance. The Appellant has never committed an anti-doping rule violation, and much milder sanctions have been imposed on other riders for considerably more serious violations.

- 2.10 The Appellant states that Gabapentin was being used for a genuine therapeutic reason and *“is therefore fundamentally admissible.”* He holds that human medications, such as Gabapentin, can be prescribed for animals if there is no equivalent veterinary medication. This applies for the treatment of the epileptiform seizures in the case of the Horse of the Appellant. The welfare of the Horse was at stake and no other option for the treatment of the Horse available. It fell in the ethical responsibility of the veterinary surgeon to prescribe Neurontin, because it was the only effective means of therapy.

- 2.11 The Appellant argues that the accusation of deliberate doping is unfounded because the Appellant had assumed that the Horse would not have any prohibited substances when competing. He had assumed in good faith that by ceasing administration five days prior to the Event he could ensure that the medication would have no effect and would not be present in the Horse's bodily fluids. In addition the Horse had no health or temperament-related problems, except the epileptiform seizures. It is an exceptionally talented show jumper with a quiet disposition. The Appellant had no reason whatsoever to influence the performance of the Horse as he had no chance of winning a class on the Horse at that stage of training.

- 2.12 The Appellant holds in his Statement of Appeal and Appeal Brief and in his letter dated 1 June 2006, that since Gabapentin has not been on the list of prohibited substances until 18 July 2005, whereas the case of the Appellant relates to an incident which occurred on 25 June 2005, *“a doping offence can only be adjudicated on the basis of evidence which determines the quantity and concentration of gabapentin that have an effect on the horse...”*

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Otherwise, it cannot be proven whether the substance in question was likely to have any effect at all...". The FEI Judicial Committee's decision does not state the quantity or concentration of the substance which was found in the Horse. In addition the Appellant was not aware that Neurontin contains the substance Gabapentin. In particular the Appellant states:

"It has not been established whether the quantity of the substance found in the horse was above or below the 'irrelevance' threshold. This has to be clarified before any decision on imposing sanctions on the person responsible can be made."

- 2.13 The Appellant considers that it is also questionable whether the alleged offence can be classified as a Class 1 offence given the necessity of the principle *nulla poena sine lege*. The Appellant raises several objections with regard to the doping test. He finds that no details of the technical detection limits in the chosen analysis method, no quantity used to measure the reference sample, no criteria supporting a positive result, and no data pertaining to sample preparation have been provided. The Appellant, thus, must be presumed innocent.
- 2.14 Only in the event the CAS finds appropriate to impose sanctions on the Appellant, the latter submits, that the *"sanctions ... are absolutely inappropriate."* There is no case of deliberate doping, the 5-month suspension is inappropriate because the Appellant has never committed an anti-doping rule violation before, because he was cooperative, because the substance had no performance enhancing effect, and last but not least because the Appellant as professional rider is hit by the decision in his ability to earn his living.
- 2.15 The Appellant finds the sanction also disproportionately severe compared to sanctions imposed before on other riders and adduces the cases of V. d. Pol, Lanferini, Frances, Beerbaum, O'Connor, and Salzgeber.
- 2.16 The Respondent in his Answer to the Appeal of 27 March 2006 refers to the articles 142 paras 1 and 2 (*"Persons Responsible"*), 146 paras 1 and 2 (*"Medication Control and Protection of Horses"*), and 174 paras 6.2, 6.2.1, 6.2.2, and 9 (*"Penalties"*) of the FEI General Regulations as well as to the articles 1006 paras 1, 3 and 8 (*"Responsibilities of Persons Responsible for Horses"*), 1013 paras 1 – 3 and 1027 of the FEI Veterinary Regulations (*"Treatment with a Prohibited Substance"*). The Respondent also adduces annex VII to the FEI Veterinary Regulations as far as it relates to authorisation of emergency treatment and annex IV first six sentences to the FEI Veterinary Regulations, which describe the principles of the list of prohibited substances. The Respondent further mentions that from 1 June 2006 new FEI anti-doping regulations, the *"FEI Equine Anti-Doping and Medication Control Rules"* will enter into force. These new rules will classify anti-epileptic substances in the category of the most strongly prohibited substances.
- 2.17 The Respondent makes reference to communications in the FEI 4/2005 Bulletin, published on 9 September 2005, at page 34, where the FEI community has been informed that the use of prohibited substances, including Gabapentin, will be *"detected in competition, and will be prosecuted to the fullest extent."*
- 2.18 The Respondent points at FEI law and CAS decisions with regard to FEI which confirm that the liability of a rider for the presence of a prohibited substance in his horse is a no-fault liability. The Appellant, therefore, in the view of the Respondent is strictly required to know and comply with the FEI Regulations and is responsible for this. Gabapentin is not a threshold substance pursuant to the definition in article 1013 para 2 FEI Veterinary

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Regulations. The only issue seen in dispute by the Respondent is the sanction imposed on the Appellant by the FEI Judicial Committee. The Respondent holds, however, that the sanction imposed is legitimate under article 174 para 6.2.1 FEI General Regulations. The finding of a prohibited substance is "*presumed to be a deliberate attempt of the Person Responsible to affect the performance of the horse.*" According to the Respondent the Appellant did not rebut this presumption which gave the right to the FEI Judicial Committee to decide a suspension from 3 months up to 24 months. Actually 5 months have been given. There was no legitimate treatment of the Horse. Gabapentin was not approved for horses and had not been tested scientifically. The Appellant endangered the welfare of the Horse and, thus, also counteracted FEI policy.

- 2.19 With regard to the arguments of the Appellant, the Respondent holds that the FEI Regulations define prohibited substances "*by their pharmacological actions on the system of the horse ... and not by their pharmacological components. Accordingly the MSC Report has classified the Prohibited Substance (Gabapentin) as acting inter alia on the nervous system.*"
- 2.20 The Respondent points at established CAS practice relating to FEI matters that under FEI anti-doping regulations "*neither the quantity of the prohibited substance which was found nor the potential absence of effect of the prohibited substance on the performance of the horse were relevant in order to find a violation.*" The Respondent underlines the responsibility of the Appellant as professional rider and holds the opinion that his veterinary surgeon, having even chaired the FEI Veterinary Commission in the period 1990 – 1998, must have known the FEI Regulations.
- 2.21 Given the fact that Gabapentin is a human anti-epileptic drug, the Appellant in the opinion of the Respondent cannot "*convincingly contend that using the Prohibited Substance on the Horse would constitute a legitimate treatment, given that the effects of such treatment are scientifically unknown.*" Since the Horse suffered from epileptiform seizures, the taking of the Prohibited Substance could not cure this condition and, thus, cannot constitute a legitimate treatment of the Horse in the opinion of the Respondent. In the opposite, competing with such Horse in such severe condition constituted a "*serious threat for the welfare of the Horse.*" The Respondent adduces two awards of the CAS to underline its position that the lack of a chance to win a class is not persuasive and must be disregarded. The Appellant cannot delegate his responsibility onto his veterinary surgeon, however experienced such person might be. The Appellant had the obligation to inform the FEI about the use of the Prohibited Substance before competing and to seek authorization according to article 1027 FEI Veterinary Regulations and annex VII. The Respondent holds that the Appellant hardly would have received such authorization. The Respondent also bases his view that the Appellant cannot invalidate the results of the analysis even if the exact amount of the prohibited substance was not established by the Laboratory on a number of CAS decisions. The Appellant having waived his right to open the B-sample is hold not to be allowed to raise later objections to the A-sample test. In addition the FEI Regulations do not require the enhancement of the performance of the Horse.
- 2.22 With regard to the alleged disproportionality of the sanction, the Respondent holds a suspension of five months as fair and legitimate considering the seriousness of the infringement and considering the fact that the Appellant could not discharge his burden of proof and could not rebut the legal presumption of a deliberate anti-doping rule violation. Due to the fact that the Appellant has also other income than just from being a professional

rider, the suspension in the opinion of the Respondent cannot severely affect the Appellant's ability to earn his living.

- 2.23 The Respondent enumerates a number of Judicial Committee decisions with regard to grade 3 and grade 2 prohibited substances showing that in the present case a suspension for 5 months is fair compared to sanctions imposed on other horse riders. The Appellant's cooperation in the procedure cannot have any influence on the length of the suspension. The Respondent, thus, requests the CAS

"- to DISMISS in its entirety the appeal ... and to CONFIRM the decision of the Judicial Committee ... dated January 26, 2006;

- to order HOLGER HETZEL to pay all costs of these appeal arbitration proceedings, including a participation to the legal costs incurred by the FÉDÉRATION EQUESTRE INTERNATIONALE".

III. The Proceedings before the CAS

- 3.1 On 7 March 2006 the Appellant nominated Dr Laurent Rivier as expert for pharmaceuticals, pharmacology and pharmacokinetics and Dr Björn Nolting as expert for veterinary medicine. This nomination was objected by the Respondent by letter of 14 March 2006 as inadmissible under articles R51 and R56 of the Code.
- 3.2 On 4 April 2006 the Appellant requested that a hearing take place. On 7 April 2006 the Respondent, stating that the present matter is essentially legal in nature and that all the relevant facts are established, asked the Appellant to reconsider this position and the Panel to decide not to hold a hearing. On 27 April 2006 the Appellant stated that although he was prepared to participate in a hearing, he agreed that a hearing would not be necessary if he was given the opportunity to file further submissions. On 8 May 2006, the CAS informed the parties that the Panel had decided to rule on the case without a hearing while allowing the parties to complete their written submissions. A time limit was fixed for both parties.
- 3.3 On 29 May 2006 the Appellant's supplementary submission dated 24 May 2006 was received by the Court office. In this submission the Appellant did not repeat its request with regard to the nomination of Dr Rivier and Dr Nolting as experts. In his submissions the Appellant focussed on further developing evidence showing that the use of Gabapentin was a legitimate treatment which did not create any risks, that the use of Gabapentin did not improve the performance of the Horse, that Gabapentin was not a prohibited substance when the Horse was tested positive, and that the sanction imposed on the Appellant was incorrect and inappropriate in view of other cases of the FEI.
- 3.4 By additional submission of 20 June 2006 the Respondent reacted to the arguments raised by the Appellant in his letter dated 24 May 2006. The Respondent deduces from the fact that the treatment with Neurontin containing Gabapentin continued after the competition "*that the Horse was not fit to compete*" (emphasis by the Respondent). The Respondent submitted a statement by the Chairman of the FEI Medication Advisory Group, supported by the textbook *The Equine Manual* which the chairman coedited and which on the pages cited by the Appellant following the first edition from 1995 (second edition 2005) referred only to idiopathic (juvenile) epilepsy of foals. The Respondent, based on scientific literature, holds that the human medications Diazepam and Gabapentin are not comparable. Whereas the use of Diazepam has been known for decades, the use of Gabapentin for horses has not been

discussed in scientific literature at all. Based on a number of references indicated by the Chairman of the FEI Medication Advisory Group the Respondent finds that the use of Gabapentin cannot be viewed as risk-free. The Respondent considers the Appellant's reference to the German Pharmaceuticals Act to be without merit since the case is not governed by German law. Gabapentin is considered a substance which can affect the performance of horses and this is sufficient for article 174 para 6.2.1 FEI General Regulations. The Respondent argues that it is irrelevant whether Gabapentin actually enhanced the performance of the Horse, as the ability to do so is enough and that the opposite view is not supported by an expert opinion referred to by the Appellant.

- 3.5 With regard to the argument that Gabapentin was not a prohibited substance when the Horse was tested positive the Respondent holds that the FEI Regulations "*define prohibited substances by their pharmacological actions on the systems of the horses ...*", and not by their pharmacological components. Gabapentin is a human anti-epileptic substance which acts *inter alia* on the central nervous system. Any substance capable of doing so falls under annex IV to the FEI Veterinary Regulations and was, therefore a prohibited substance under the FEI Regulations in force at the relevant time. The FEI confirms that the draft Equine Prohibited List which now expressly mentions Gabapentin as a prohibited substance has come into force as of 1 June 2006.
- 3.6 The Respondent also submits that neither the decision in the Ludger Beerbaum doping case, nor the Salzgeber Decision, nor the Smith Decision, support the position of the Appellant with regard to the proportionality and adequacy of the sanction imposed, due to the specific circumstances of each of the three cases.
- 3.7 The Order of Procedure was signed by both parties within the deadline of 7 July 2006. The Appellant signed under reservation that a reference to article 27/28 Swiss Civil Code and article 7 Swiss Cartel Law as well as to some provisions of the Swiss Federal Constitution be made in the Order of Procedure.

IV. The Jurisdiction of the CAS

- 4.1 None of the parties dispute the jurisdiction of the CAS in the present case. The Panel holds that the requirements set forth in Article 059 FEI Statutes 21st edition as in effect of 21 April 2004 have been met. The provision reads as follows:

"1. The Court of Arbitration for Sport (CAS), as an independent court of arbitration, shall judge all appeals properly submitted to it against decisions taken in the first instance by Appeal Committees and decisions of the Judicial Committee, as provided in the Statutes and the General Regulations. The parties concerned shall comply with the Statutes and Regulations of the CAS, and accept and enforce its decision in good faith. The parties concerned acknowledge and agree that the seat of the Court of Arbitration is in Lausanne, Switzerland and that procedures before the Court of Arbitration are governed by Swiss Law.

2. The rules of procedure of appeal before the CAS are set down in the Statutes and Regulations of the CAS, which can be obtained from the FEI Secretariat or the CAS.

...

4. Appeals shall be admissible provided:

4.1. The Appellant seeks the reduction or cancellation of a penalty or decision on the grounds that it was unfair or unreasonable or that it was not in accordance with the Statutes, Regulations and Rules.

...”.

V. The Applicable Law

- 5.1 Pursuant to article R58 of the Code, the Panel shall decide the dispute according to the applicable rules and regulations. The applicable rules and regulations in the present case are the FEI Statutes, the FEI General and the FEI Veterinary Regulations. According to article 059 FEI Statutes the parties to the procedure consider Swiss law as the applicable law of the CAS in the absence of other rules.
- 5.2 Although, for procedural reasons, the letter of the Appellant dated 7 July 2006 referring to Swiss civil law, Swiss cartel law, and Swiss constitutional law has not been admitted on record, the principle *jura novit curia* allows the Panel to consider whether Swiss law has been violated. However, the Panel finds the Appellant has not factually established any breach of Swiss law. Consequently, the Panel's reasoning below is focused on determining the meaning of the relevant provisions of the FEI regulations and whether the FEI Judicial Committee erred in its application of such provisions.

VI. The Merits

- 6.1 In the absence of counter evidence and any dispute on this issue it can be assumed that, pursuant to article 002 para. 4 FEI Statutes, the Appellant was subject to the Statutes, Regulations and Rules of the FEI as a “competitor” before and during the Event.
- 6.2 The FEI Judicial Committee's competence to impose a sanction derives from article 058 paras. 6 and 8 FEI Statutes.
- 6.3 It is not disputed by the parties that according to article 142 FEI General Regulations the Appellant is to be considered as the Person Responsible for the Horse. Article 142 FEI General Regulations reads as follows:

“1. The Person Responsible for a horse has legal responsibility for that horse, including responsibility under the GRs” (General Regulations) and the VRs” (Veterinary Regulations) and unless otherwise stated is liable under the Legal System (Chapter IX).

2. It is the obligation of the Person Responsible and of every other person subject to the Statutes, Regulations and Rules to know the Statutes, Regulations and relevant Rules, and lack of such knowledge does not relieve these persons from liabilities under the Statutes, Regulations and Rules.

3. The Person Responsible shall normally be the competitor who rides or drives the horse during an event or in Vaulting the lunge, but the owner may, be regarded as an additional Person Responsible if he is present at the event or has made a relevant decision about the horse.

...

7. The Person Responsible is responsible for any act performed in the stables to any horse under his jurisdiction, by himself or by any other person with access to the horse, and is responsible while riding, driving or exercising any horse under his jurisdiction. The Person Responsible is not relieved from such responsibility as a result of the lack or insufficiency of stable security."

- 6.4 Article 146 FEI General Regulations provides for a system to be followed by Persons Responsible for safeguarding medication control and protection of horses. The respective parts of the provision read as follows:

"Medication Control and Protection of Horses

1. The use of any substance or method that has the potential to harm the horse or to enhance its performance is forbidden. The precise rules concerning Prohibited Substances and Medication Control are laid down in the VRs.

2. Subject to prior authorisation by the FEI, any horse found to have a Prohibited Substance in any of its tissues, body fluids or excreta at an event as the result of a Medication test, is automatically disqualified, together with the competitor with that horse, from all competitions at that event and the classification adjusted accordingly, unless the Ground Jury has authorised the horse to participate or continue in the event or unless the Judicial Committee decides based on the evidence provided to terminate the proceedings of the case. If the disqualified horse and competitor are members of a team, the rest of the team is not automatically disqualified.

3. The Veterinary Delegate or Commission must give written approval on the appropriate form when any veterinary treatment or medication with a Prohibited Substance is administered to a horse during the entire course of an event (Veterinary Regulations Annex VII). Should emergency treatment with a Prohibited Substance be necessary the Veterinary Delegate or Commission must be informed at once. The appropriate medication form must be completed and countersigned by the President of the Ground Jury. The decision as to whether the horse may continue in the event is made by the President of the Ground Jury on recommendation of the Veterinary Delegate or Commission.

...".

- 6.5 Article 1006 FEI Veterinary Regulations reinforces the foregoing provisions. It reads as follows:

"Responsibilities of Persons Responsible for Horses

See General regulations for the definition of Person Responsible.

1. According to the General Regulations (GR art. 142), the Person Responsible shall normally be the competitor who rides or drives the horse during the event.

2. ...

3. The Person Responsible must be familiar with the relevant General Regulations, Veterinary Regulations and Discipline Regulations.

...

7. Written approval must be obtained from the Veterinary Commission/Delegate for any form of veterinary treatment or medication of a horse during an event, using the appropriate form for authorisation of treatment (medication form 1, 2, or 3: see Chapter VII and Annex VII). If a horse requires urgent treatment prior to the event, an authorisation of treatment can be given retrospectively, if the details of the case are reported to the Veterinary Commission/Delegate immediately upon arrival at the competition venue. Following veterinary recommendation, permission for such horses to continue in the event may be given by the Ground Jury (see Chapter VII).

8. The Person Responsible is liable to the appropriate penalties under the Statutes and the General Regulations for any violation of these Regulations, in particular if a sample from the horse for which he/she is responsible shows, at the time of the event, the presence of a prohibited substance in the horse's tissues, body fluids or excreta.

... ”.

6.6 Article 1013 FEI Veterinary Regulations defines “prohibited substances” for the purpose of the FEI law. The relevant parts of the provision read as follows:

“Prohibited Substances

***1. Prohibited substances** – The finding of a prohibited substance means detecting the substance itself or a metabolite of the substance or an isomer of the substance or an isomer of a metabolite. The finding of any biological or scientific indicator of administration or other exposure to a substance is equivalent to detection of the substance itself.*

...

3. It is a contravention of the Veterinary and the General Regulations if the analysis of a sample taken from a horse shows the presence in any one of its tissues, body fluids or excreta of a Prohibited Substance (see also General Regulations, Art 146). Sample means a sample from any part, or in contact with any part, of the horse.

4. The list of Prohibited Substances is submitted for annual approval to the General Assembly on the recommendation of the Bureau.

... ”.

6.7 At the time of the Event the list of Prohibited Substances was attached to the FEI Veterinary Regulations as annex IV. The relevant parts of this annex read as follows:

“PROHIBITED SUBSTANCES

Horses taking part in a competition must be healthy and compete on their inherent merits. The use of a Prohibited Substance might influence a horse's performance or mask an underlying health problem and could falsely affect the outcome of a competition. The list of

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Prohibited Substances has been compiled to include all categories of pharmacological action.

The following are prohibited substances:

Substances capable at any time of acting on one or more of the following mammalian body systems:

the nervous system.

the cardiovascular system.

the respiratory system.

...

Antipyretics, analgesics and anti-inflammatory substances.

Cytotoxic substances.

Endocrine secretions and their synthetic counterparts.

Masking agents.

A finding of a prohibited substance means a finding of the substance itself or a metabolite of the substance or an isomer of the substance or an isomer of a metabolite. The finding of any scientific indicator of administration or other exposure to a prohibited substance is also equivalent to the finding of the substance.

With the objective of helping riders, trainers and their veterinary advisers, the FEI may include in its rules examples of prohibited substances."

- 6.8 The FEI did not make use of its authority of including examples of prohibited substances until the adoption of the new FEI Equine Anti-Doping and Medication Control Rules together with an Equine Prohibited List, which both entered into force on 1 June 2006, i.e. after the alleged doping offence in this case. The 2006 Equine Prohibited List enumerates examples of substances, inter alia "*antipsychotic, anti-epileptic and antihypertensive substances including reserpine, gabapentin, fluphenazine, and guanabenz; ...*".
- 6.9 The FEI points at having drawn the attention of all stake-holders to Gabapentin in number 4/2005 of the FEI Bulletin. However, this issue of the bulletin appeared only on 9 September 2005, which was also after the alleged doping offence occurred. Nevertheless, as a human anti-epileptic drug acting *inter alia* on the central nervous system, Gabapentin fell within the general definition of banned substances at the time the alleged offence occurred, although an explicit warning with regard to Gabapentin had not yet been given by the FEI.
- 6.10 With regard to treatment of horses article 1027 FEI Veterinary Regulations rules as follows:

"Treatment with a Prohibited Substance

1. When treatment with a prohibited substance is required, the Treating Veterinarian must consult with the Veterinary Commission/Delegate, prior to treatment, on the condition of the horse, its fitness to compete and the preferred treatment. The Veterinary Commission/Delegate will consider whether the horse is still fit to compete and whether it may have a possible unfair advantage as a result of treatment. Consultation of the Veterinary Commission/Delegate must be carried out on a case-by-case basis. The welfare of the horse must have first priority. If in agreement, medication form 1 (see Annex VII)

must be completed and countersigned by the President of the Ground Jury. A copy of the form must be added to the veterinary report that is sent to the FEI upon completion of the event. If possible, a copy of the form must be available during the event for presentation to a steward, if requested. The form must also be completed if the horse is already withdrawn from competition but still resides at the competition venue. In this case, counter-signing by the President of the Ground Jury is not required.

2. If a horse must be treated with a prohibited substance prior to arrival at the event (e. g. during transport), the Veterinary Commission/Delegate must be consulted by the Person Responsible as soon as possible upon arrival at the venue. On such occasions, a signed statement describing the reason for treatment, the substance, dose and the exact time of administration must be provided by the person who administered the treatment. The Veterinary Commission/Delegate will carefully consider the lag time between treatment and competition and any possible unfair advantage that the horse may have as a result of treatment. If satisfied that the horse will not have an unfair advantage as a result of the treatment the Veterinary Delegate is entitled to complete medication form 1 retrospectively. Countersigning by the President of the Ground Jury is required.”

6.11 Annex VII to the FEI Veterinary Regulations (Guide to the Use & Authorisation of Veterinary Treatment during an FEI Event) contains three different forms for treatment of horses: Medication form 1 for authorisation of emergency treatment; medication form 2 for treatment with altrenogest; and medication form 3 for authorisation for the use of medication not listed as prohibited under FEI regulations. In the section on medication form 1 it is ruled that the “*use of a Prohibited Substance can only be authorised for treatment during an event in exceptional circumstances ...*”. The respective provision further requires that the “*Veterinary Commission/Delegate must always be consulted if medication is required for a horse competing under FEI Rules.*” and includes a chapter on “*Authorisation before the start of competition*” which reads as follows:

“Form 1 may also be used for retrospective authorisation of medication given before the start of the event providing such medication will not affect the horse’s performance by the time it is due to compete. In principle horses should not be treated with a Prohibited Substance before competition if the substance or its metabolites are likely to be detectable once the horse is under FEI rules. However, there may be some circumstances (e. g. during transport, mild spasmodic colic) when medication is deemed appropriate on veterinary grounds. On such occasions the treating veterinarian must provide a signed statement describing the substance administered, the dose, route of administration and the reason for treatment. The Veterinary Commission/Delegate will need to consider carefully whether the time lag between treatment and competition could give the horse an unfair advantage and must advise the Ground Jury accordingly.”

6.12 With regard to the sanctions article 174 FEI General Regulations rules as follows:

“ ...

6.2. The finding on analysis of a Prohibited Substance as defined in Art. 146 (Medication Control and Protection of Horses) will entail the disqualification of the horse from the event and the forfeiture of any prize money won by that competitor on that horse in the same event. The competitor will be disqualified on that horse and may be disqualified altogether;
6.2.1. The finding on analysis of a Prohibited Substance as defined in Art. 146 is presumed to be a deliberate attempt of the Person Responsible to affect the performance of the horse

and will entail the suspension of the Person Responsible from 3 to 24 months. A fine of CHF 1,000.- to 15,000.- can also be imposed.

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

...

9. The penalty imposed in any given case can consist of a combination of fine, suspension and disqualification. The amount of a fine and the duration of a suspension shall be decided according to the guidelines mentioned in paragraph 6 above and to the circumstances of the case."

A. Gabapentin – a Prohibited Substance?

- 6.13 Prior to the entry into force on 1 June 2006 of the FEI's more detailed list of banned prohibited substances, CAS jurisprudence relating to cases involving the FEI has deemed the generic listing, under annex IV of the FEI Veterinary Regulations, of the categories of prohibited substances according to their effects to be a valid basis for finding a doping offence, providing the substance in question is proven to have one of the defined effects (see eg CAS 2005/A/829 L. Beerbaum v/FEI, p 7 paras 8.7, 12.2, 12.5 (3) and 12.17 ff; CAS 2000/A/313 Bunn v/FEI, p 2 para 4, p 10 para 32, p 16 para 60; CAS 2000/A/275 Luyckx v/FEI, pp 8 f paras 21 f; TAS 98/204 Rizzi c/FEI, pp 6 ff paras 4 a ff). In the Beerbaum case critics have been raised that the relevant anti-doping regulations of the FEI are too vague and uncertain in order to serve as a sufficiently determined legal basis. Although this Panel welcomes the additional clarity deriving from the new FEI list, it considers that the previous system (applicable in this case) is valid where a prohibited effect is unambiguously identified in annex IV and proven to be caused by the substance found in the horse. Not only does the wording of annex IV make it clear that such is the system, but article 146 para 2 FEI General Regulations and article 1027 para 2 FEI Veterinary Regulations in conjunction with annexes IV and VII to the FEI Veterinary Regulations, provides a system whereby any rider who has a doubt regarding whether or not a substance is prohibited can enquire with the Veterinary Commission/Delegate of the FEI before the event.
- 6.14 In the present case, it is undisputed that Gabapentin acts on "*the nervous system*", which is one of the effects listed in annex IV. Furthermore, the fact that the Appellant and his veterinary surgeon decided to stop the treatment within a period they deemed sufficiently safe before the Event indicates that they must have understood that the substance might have a prohibited effect. Despite this, there is no evidence that the Appellant attempted to consult with the Veterinary Commission/Delegate before the Event.
- 6.15 For the above reasons, the Panel finds that Gabapentin was a prohibited substance as defined in the applicable regulations and that the Appellant committed an anti-doping rule violation by having allowed and ordered the Horse to be treated with the prohibited substance Gabapentin.

B. Legitimate Treatment of the Horse?

- 6.16 The Appellant has contended that he has not committed a deliberate anti-doping rule violation, but that he administered Gabapentin as a legitimate treatment of the Horse, relying on the opinion of his veterinary surgeon. He argues this with reference to the human

medication Diazepam and § 56 para 2 of the German Pharmaceuticals Act (Arzneimittelgesetz). However, in view of the expert evidence adduced by the parties, the Panel finds that Gabapentin is presently unknown as an appropriate treatment for horses. Consequently, and because of the obvious possible dangers linked to the epileptiform seizures which the Horse was suffering from, the use of Gabapentin to enable the participation of the Horse in the Event could not be viewed as risk free for the Horse, its rider and the public.

- 6.17 Moreover, as indicated above, the FEI regulations provide a procedure that has the purpose of enabling the FEI Veterinary Commission/Delegate to consider whether a horse is fit to compete under a proposed treatment or whether it must be withdrawn. According to CAS jurisprudence this procedure should be accorded due weight (see e.g. CAS 2005/A/829 L. Beerbaum v/FEI, p 23 para 12.17 (iii) with further reference).
- 6.18 Instead of relying on this procedure, which entails filing Medication Form 1 (see article 1006 para 7 FEI Veterinary Regulations) and results in the President of the Ground Jury making his decision on the recommendation of the Veterinary Commission/Delegate, the Appellant preferred to rely on his own expertise. A Person Responsible who ignores the procedure must provide convincing reasons for doing so. In the present case, except for stating that he believed himself to be on the safe side due to having suspended the treatment with Neurontin five days before the competition, the Appellant gave no explanation for his failure to seek authorisation by the Veterinary Commission/Delegate upon arrival at the venue.
- 6.19 For the above reasons, the Panel finds that the Appellant has not established that the adverse analytical findings *“are the results of legitimate treatment of the horse or of one or more parts of his body”* as required by article 174 para 6.2.2 FEI General Regulations.

C. Deliberate Attempt to Affect the Performance of the Horse?

- 6.20 According to article 174 para 6.2.1 FEI General Regulations *“The finding on analysis of a Prohibited Substance as defined in Art. 146 is presumed to be a deliberate attempt of the Person Responsible to affect the performance of the horse and will entail the suspension of the Person Responsible from 3 to 24 months...”* and according to article 174 para 6.2.2 a reduced period of suspension may be imposed if *“the Person Responsible can prove that it was not a deliberate attempt to affect the performance of the horse”*.
- 6.21 As indicated by its clear wording and confirmed by CAS jurisprudence, article 174 para 6.2.1 FEI General Regulations constitutes a legal presumption that the Person Responsible acted deliberately; meaning that the Person Responsible has the burden of proving she/he did not.
- 6.22 The Panel must, therefore, examine whether the Appellant has adduced such proof. In doing so, the Panel considers that article 1027 FEI Veterinary Regulations must also be accounted for because, in effect, it provides for a form of “Therapeutic Use Exemption” (hereinafter “TUE”) for horses. It is noteworthy in this relation that under the heading *“Doping control for animals competing in sport”*, article 16 of the World Anti-Doping Code (“WADC”) requires that relevant International Federations *“establish and implement rules that are generally consistent with Articles 1, 2, 3, 9, 10, 11, 13 and 17 of the Code”*. However, article 4 of the WADC, which deals with TUE, is not cited. The Panel understands this as meaning that International Federations governing sport involving animals can establish their own

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- procedures for TUE and this is precisely what article 1027 FEI Veterinary Regulations represents.
- 6.23 The rules on TUE for human beings can nonetheless be helpful in interpreting the objectives and conditions “*for treatment with a prohibited substance*” stipulated under article 1027 FEI Veterinary Regulations.
- 6.24 The main rules applicable to TUEs are contained in the “*International Standard for Therapeutic Use Exemptions*” (1 January 2005) (“International Standard”), wherein according to article 4.0 and 4.3: “*An exemption will be granted only in strict accordance with the following criteria: [...] The therapeutic use of the Prohibited Substance or Prohibited Method would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition*”.
- 6.25 Article 4.0 of the International Standard implies that when an athlete applies for a TUE he must establish through medical evidence and to the satisfaction of the Commission examining the application that the requested therapy will have no enhancement effect. The strict burden of proving the absence of any enhancing effect as a pre-condition to obtaining a TUE has been confirmed by CAS in the case *TAS 2005/A/965 UCI c/ AMA & Franck Bouyer*.
- 6.26 To a large degree, article 1027 FEI Veterinary Regulations resembles the foregoing provision of the International Standard, since it requires that the Person Responsible consult the Veterinary Commission/Delegate before the Event and, on the basis of “Form 1” apply for the authorization to use the substance, while the Veterinary Commission/Delegate has the responsibility, among others, to ensure that the therapy would not result in a “*possible unfair advantage that the horse may have as a result of the treatment*”.
- 6.27 In the present case, the Panel considers the Appellant understood the treatment of the Horse might have an enhancing effect and might therefore be prohibited, since he accepted his veterinary’s advice to stop the treatment 5 days before the Event. Furthermore, a reasonable person treating a horse for a recurring ailment affecting its nervous system, signalled by epileptiform seizures, should have realized that such treatment might be deemed to cause an unfair advantage due to the temporary improvement of the horse’s natural capacities resulting from the treatment, i.e. by the handicap of the seizures being overcome. Nevertheless, the Appellant administered (through the persons for whom he is responsible) Gabapentin to the Horse without consulting the Veterinary Commission/Delegate prior to the Event.
- 6.28. For the above reasons, the Panel finds that the Appellant did not and could not rule out the possibility that the treatment be deemed to provide an unfair advantage and finds that the Appellant’s intent to nonetheless treat the Horse, must be considered to fall within the definition of a deliberate offence defined at article 174 para 6.2.1 FEI General Regulations.
- 6.29 Thus the Appellant was not successful in disproving that he deliberately attempted to affect the performance of the Horse.

D. Incorrect and Inappropriate Sanction in View of Other Cases of the FEI?

- 6.30 Article 174 para 6.2 FEI General Regulations rules on automatic disqualification of the horse from the event and forfeiture of any prize money won by that competitor on that horse in the same event. These automatic consequences of an FEI anti-doping rule violation are not disputed by the Appellant. The Appellant, however, considers that a suspension for five (5) months in a possible range from three (3) to twenty-four (24) months together with a fine of CHF 1,000.- in a possible range from 1,000.- to CHF 15.000.- are entirely inappropriate, as it is not a case of deliberate doping, as the Appellant has never previously been in violation of anti-doping regulations, as the Appellant has fully cooperated in the clarification of the issue, as there was no performance enhancing effect of the substance, as the sanctions have a direct negative impact on the Appellant's ability to earn his living and when compared to sanctions previously imposed on other show jumpers.
- 6.31 The Panel has found that the Appellant has not been successful in disproving a deliberate attempt to affect the performance of the Horse. The Panel, thus, must evaluate whether the sanctions imposed are in proportion with the seriousness of the anti-doping rule violation. The Appellant and the Respondent referred to a number of decisions of the FEI Judicial Committee, which indicate that upon fixing the sanction that body notably accounts for the grade of the substance in terms of its performance enhancing effects, the danger resulting from a substance, whether it was the first anti-doping rule violation of a Person Responsible and other circumstances on a case-by-case basis.
- 6.32 Given the fact that the Appellant used a human medication graded 1 by the MSC on a scale of 1 to 5, given the fact that the substance used had not been scientifically tested before and therefore was of an unknown risk for the Horse, the rider and the public and considering other cases decided by the FEI Judicial Committee, the Panel finds it proportionate to confirm the suspension of five (5) months decided by the FEI Judicial Committee. Based on article 173 para 4 of the FEI General Regulations, the Panel rules that the suspension shall commence on the date of this decision.

VII. The Costs

- 7.1 According to article R65.1 of the Code the proceedings shall be free subject to articles R65.2 and R65.4. In accordance with article R64.1 of the Code, the minimum Court Office fee of CHF 500 (five hundred Swiss Francs) shall be retained by the CAS.
- 7.2 Taking into account the outcome of the proceedings as well as the conduct and financial resources of the parties, pursuant to article R64.5, the Panel finds it adequate to have the Appellant contribute the amount of CHF 3,000 (three thousand Swiss Francs) to the costs of the Respondent.

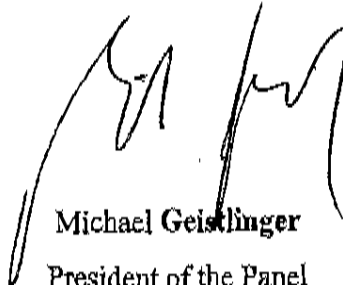
ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr Holger Hetzel on 24 February 2006 is dismissed.
2. The disqualification of Mr Hetzel's horse, Oreade de Fontin, from the CSI2* Neuendorf Event in June 2005 and the forfeiture of any prize money won by Mr Hetzel on his horse Oreade de Fontin in that Event are confirmed.
2. Mr Hetzel is hereby suspended for a period of 5 (five) months. The period of suspension shall commence on the date of this decision.
3. The Award is rendered without costs except for the Court Office fee of CHF 500 (five hundred Swiss Francs), which is retained by the CAS.
4. Mr Hetzel shall bear his own costs and shall contribute CHF 3,000 (three thousand Swiss Francs) to the costs of the Fédération Equestre Internationale (FEI).

Done in Lausanne, 28 July 2006

THE COURT OF ARBITRATION FOR SPORT



Michael Geistlinger
President of the Panel