28 O (Kart) 38/05

Pronounced on 13.09.2006

Hackert, chief court official
as deeds clerk
of the court office

COLOGNE REGIONAL COURT

IN THE NAME OF THE PEOPLE

DECISION

In the legal dispute

of Bernhard Lagat

Claimant

Counsel: *Rechtsanwälte* Bornheim u.a., Vangerowstr. 20, 69115 Heidelberg

v

World-Anti-Doping Agency, represented by its President, Richard Pound, Stock Exchange Tower, 800 Place Victoria, P.O. Box 120, Montreal (Quebec), H4Z1B7 Canada

Defendant 1

Counsel: *Rechtsanwälte* Wüterich u.a., Charlottenstr. 22, 70182 Stuttgart 05/0531

International Association of Athletics Federations, represented by its President, Lamine Diack, 17 rue Princesse Florestine, BP 359, 98007, Monaco Cédex

Defendant 2

Counsel: *Rechtsanwälte* CMS Hasche Sigle, Schöttlestr. 8, 70597 Stuttgart

Deutsche Sporthochschule, represented by its rector Prof. Dr Walter Tokarski, Carl-Diem-Weg 6, 50933 Cologne,

Intervener of Defendants 1 and 2

Counsel: *Rechtsanwälte* Bird & Bird, Karl-Theodor-Str. 6, 40213 Düsseldorf

the 28th Civil Chamber of Cologne Regional Court
in the oral hearing of 24.05.2006
In the persons of the presiding judge at the Regional Court Mrs Reske and judges at the regional court, Dr Koepsel and Mr Greb

has found follows:

The claim is dismissed.

The Claimant shall bear the costs of the legal dispute including the costs for the intervention by a third party in support of the claimant (*Nebenintervention*).

The decision is provisionally enforceable in return for a security of 110 % of the respective amount to be enforced.

G R O U N D S F O R D E C I S I O N :

The statement of claim is partially not permissible and otherwise without grounds.

Although the Claimant is free to take the matter to the state courts because the arbitration agreement between the parties does not cover the claims filed in the statement of claim, the claim is not permissible with regard to the motions under 2) and partially not permissible and partially unfounded with regard to 1). Motion 2) is not permissible because – irrespective of the issue whether the motion or the motions for alternative relief are specific enough – Cologne Regional Court does not have international jurisdiction pursuant to § 32 of the German Code of Civil Procedure. However, the claim – in as far as claims from tort owing to interference in the established and exercised business operation have been cogently pleaded and the Cologne Regional Court would have international jurisdiction - is unfounded with regard to the motion for payment under 1). The claim with respect to claims from the Act against Restraints on Competition and/or positive violation of a contractual duty is to be dismissed as not permissible owing to the lack of international jurisdiction of Cologne Regional Court.

The detail is as follows:

I.

The defence of the arbitration agreement does not apply, §§ 1032, 1025 (2) of the German Code of Civil Procedure. The Defendants cannot successfully appeal on the grounds that the Claimant has to appeal to the CAS, a Swiss arbitral tribunal, to pursue its claims, as - in the end - the subject of the claim is not covered by the arbitration provisions of Defendant 2, § 1032 (1) 1st half sentence of the German Code of Civil Procedure. Therefore the issue which the Defendants continue to address of whether the arbitration agreement refers to Defendant 1 or whether, if it were valid, it would also apply to the motions under 2) is irrelevant.

However, the Panel assumes that in principle the submission of the Claimant is valid in form under the association arbitration rules of Defendant 2 in accordance with the

provisions of Art II (1), (2) NYC (UN Convention on the Recognition and enforcement of Foreign Arbitral Awards – New York Convention – hereinafter NYC) which are definitive for the validity of the agreement. Pursuant to §§ 1025 (4), 1061 of the German Code of Civil Procedure the NYC is undoubtedly definitive for all parties to the agreement concluded under the doping control form as all countries which belong to the NYC acceded thereto before the events in August 2003 which form the subject of this dispute, that is the countries of Kenya, the USA (with respect to the Claimant), Switzerland (Defendant 1 and Monaco (Defendant 2). Thereby it is irrelevant whether and, if so, which individual national form provisions stipulate stricter requirements for the validity of the arbitration agreement as such would not have any effect anyway in the area of application of the NYC as the sense and purpose of the NYC is the uniformity of the form provisions, so that within the NYC's applicability any stricter form provisions would be ousted (see Cologne Regional Court, NJOZ 2002, 2479, 2480).

Pursuant to Art. II (1), (2) of the NYC a written agreement is necessary; under Art. II (2) this agreement must be signed as an agreement or arbitration agreement by both parties or contained in letters or telegrams exchanged between the parties. The doping control form of 8.08.2003 was signed under "confirmation" by the Claimant and Dr van der Sypt after the latter had submitted to the Claimant his power of attorney from Defendant 2 (Letter of Authority to collect Samples, Exhibit WADA 19, Sheet 1332). In as far as the Claimant doubts that Dr van der Sypt was authorised by the Defendants, the Panel assumes that this doubt is irrelevant. In view of the fact that the Defendant makes provision on the form for signature of the arbitration agreement at the time the doping sample is taken, it can be assumed that the party authorised by it to take the doping sample is also authorised to conclude the agreement on its behalf; no other person present at the time could be considered to be authorised to sign. The party authorised to obtain the doping sample is also expressly authorised thereto in writing. He presents the athlete with this document. He also carries the forms conceived by the Defendant with him which provide for parallel conclusion of an arbitration agreement to be signed by the same parties which are to be notified of testing and which are to acknowledge the rules (Notification of testing and acknowledgement). Given the above, the power of attorney of the tester has been sufficiently proved and the Claimant cannot restrict himself to merely denying that Dr van der Sypt had power of attorney.

The Panel also assumes that the Claimant in principle also submitted himself as non-member to the rulebook and therefore to the disciplinary power or arbitration of Defendant 2. Also with respect to non-members of the association setting up the rules, sporting rulebooks are not general terms and conditions within the meaning of the General Terms and Conditions Act in which a mere reference to pre-phrased arbitration clauses would not satisfy the written form requirement of Art. II NYC (Munich Higher Regional Court, NJW-RR 1996, 1532). Indeed, normally the rules which competitors in sporting events have to subject themselves to are stipulated in largely standardised competition rules of the leading organisations responsible for the sporting discipline concerned and which apply to all participants equally. This does not at all constitute a sanction unduly restricting the personal or professional freedom of the individual, but is a necessary condition for sporting activity and the participation in organised competitions. Therefore, every athlete – the Panel includes the Claimant despite the objections uttered by him – assumes that written rules have been drawn up by the relevant federation for the sport practised by him which must be complied with equally by all athletes (see Federal Court of Justice NJW 1995, 583, 584). As the Claimant declared by providing his signature that he was submitting to the rulebook of Defendant 2 he cannot claim that he knew nothing about the sanctions to be expected if rules were breached. The Claimant does not need to have intimate knowledge of the rules for the submission to the rulebook of Defendant 2 to be valid. It is sufficient that he could have had knowledge of them. There is no indication that the Claimant was unable to gain knowledge in a reasonable way of the content thereof. The Claimant as a top athlete is aware that sport is operated in accordance with fixed rules. As a professional athlete he is obliged in his own interest to have knowledge of these rules, to inform himself so as not to suffer economic or legal disadvantages (see also: Munich Higher Regional Court NJWE-VHR 1996, 96, 98). Moreover, in the doping control form reference is again expressly made to arbitration as part of the rules of Defendant 2 so that if these were categorised as business terms and conditions the precondition of validity would be satisfied, under which if the general terms and conditions of both parties have not been supplied both a reference to the general terms and conditions and an express reference to an arbitration clause in the general terms and conditions must be made. Therefore the Panel does not join the view of the Claimant that he was forced to sign the document. It is a part of his profession to submit to doping tests between competitions as well as a condition for eligibility for sporting competitions. He

did not plead that he was not aware of this general rule or that he had reservations about subjecting himself to the rules of the Defendant on that day, and if necessary why. It is also not clear how the Defendant is supposed to have coerced the Claimant into signing.

However, it can be assumed that the case brought before the Panel for decision, i.e. the subject of the claim within the meaning of § 1032 (1) of the German Code of Civil Procedure, is not covered with reasonable certainty by the arbitration clause in the Rules of the Defendant so that the Defendants cannot appeal in this respect. As the Claimant is not turning against the sanction of the Kenyan member federation of Defendant 2, but is filing not only the cease and desist order with respect to the implementation of further doping tests but also compensation claims against the IAAF, i.e. Defendant 2, after the result of the evaluation of the B-test which was favourable for him and his (renewed) eligibility for competition, this constitutes a special case not covered by the arbitration agreement. In this connection it is not important that it would make sense from the Defendant's point of view to have the present issues also decided by the CAS to ensure uniformity in making decisions. It would be up to Defendant 2 to word its Rules with the according clarity.

First, there is no dispute within the meaning of Rule 21 No. 1 sentence 2 of the Constitution of Defendant 2 because the dispute is not between a member and the athlete. It is only the national federations which are members within the meaning of the rules of Defendant 2. As the Claimant does not attack the decision of the Kenyan National Federation, as illustrated, but the positive evaluation of the A-test and his factual ban from that date, this rule is not relevant.

Although Rule 21 No. 2 (iii) of the IAAF Constitution also covers disputes between an athlete and the IAAF, it can however be assumed that this does not mean all matters under dispute, but – according to the English version of the rules of Defendant 2 which are definitive in conflicts and which were valid in accordance with Rule 9 (3) at the time of the doping control - legal remedies (*Rechtsbehelfe*). In the present case the Claimant has not asserted a legal remedy within the meaning of a decision for a legal remedy ("*Rechtsmittel*"), especially as this is not a case of a decision attacked by the Defendants within the meaning of Rule 21 No. 2 of the IAAF Consitution.

The Panel assumes that the definitive term "appeal" is to be correctly interpreted as legal remedy ("*Rechtsmittel*") and not in its more general meaning as matter under dispute and could only be understood by the Claimant as such. Furthermore, the meaning of the regulation is clearly that the disputes which come under Rule 21 No. 2 of the IAAF Constitution should be directed against all previous decisions. The word "appeal" as a legal term can be used synonymously for, *Rechtsmittel*, *Berufung*, *Beschwerde*, *Einspruch* oder *Erinnerung* (Romain/ Bader/Byrd, Dictionary of Legal and Commercial Terms, 5.A.; Erdsieck/Dietl, Englisch-Deutsches Wörterbuch für Recht, Wirtschaft und Politik, 1964), and also in adminstrative law for *Widerspruch* (Romain/Bader/Byrd, a.a.O.). The associated terms also all refer to legal remedies, just as the adjectival form "appealable". The term "litige" used in French which can be generally translated by dispute matter, departs from this meaning. The Claimant correctly pointed out that under Rule 9 (3) of the Constitution of Defendant 2 - and not under Article 11 No. 3 of the IAAF Constitution which did not come into effect until later (Sheet 1431 of the petition) - it is provided that the English version is the definitive version, as in this case, if there are different interpretations of the text. The argument of the Defendants which also refer to the Spanish version ("todos los conflictos") that in reality there is no contradiction because the word "legal remedies" has to be understood as "disputes" in all language versions cannot be followed. That is not the case with the English version. First, there are different expressions in the English language for *Streitsache* or *Rechtsstrei*t, as such lawsuit, litigation, legal action, legal dispute or legal proceedings. However, Defendant 2 did not exactly use these general expressions when drawing up Rule 21 No. 2 of its Constitution. If one considers the structure of Rule 21 it reveals that the Defendant definitely meant *Rechtsmittel* when it stated "appeal" in Rule 21 and therefore wanted to provide for the jurisdiction of the CAS. On the one hand Rule 21 bears the title "disputes", i.e. *Auseinandersetzung* oder *Streit.* The same expression is used in No. 1 in the sense that disputes between a member and an athlete must be heard before an arbitral tribunal or a disciplinary court. No. 2 then talks about "appeals" examples of which are then listed in No. 3 (drug-related disputes). However, under No.2 there is a deadline of 60 days after notification of the decision attacked in each case within which the appeal is to be filed. From this it appears that the "appeal" as it is understood by Defendant 2, is always against an existing decision. This is not the case with the present legal dispute. Although it is

correct that under No. 3 3 ("The following are examples of disputes that may be submitted to CAS by way of an appeal") both terms are used, however, in the listed examples it is assumed that there is always a basic decision which has been attacked, whether the decision be from a member or from Defendant 2 itself. Also under subsection (v) ("Where an athlete has been found by the IAAF to have admitted taking a prohibited substance, or using, or attempting to use, a prohibited technique, and the athlete denies having made any such admission.") the issue at stake is an accusation made about an athlete whereas Defendant 2 did not accuse the Claimant of doping once the B-test had been evaluated. The present case is clearly not one such as set out under (v); indeed the Claimant's concern is the remedy of the consequences arising between the positively evaluated A-test and the result of the B-test. Therefore from the wording of the arbitration rules of Defendant 2, they do not cover the subject of this dispute and do not specify the arbitral tribunal competent herefor.

II.

Motion 1)

With respect to Motion 1) Cologne Regional Court only has international jurisdiction with regard to a claim for material compensation pursuant to § 823 (1) of the German Civil Code owing to interference in the established and exercised business operation (in this respect however not for the compensation for pain and suffering claimed) pursuant to § 32 of the German Code of Civil Procedure; otherwise an act in tort, such as a breach of a personality right has not been cogently pleaded by the Defendants *[Translator's note: The Court probably meant Claimant]*. There is no international jurisdiction for contractual claims through § 29 of the German Code of Civil Procedure or for cartel law claims through § 32 of the German Code of Civil Procedure. The jurisdiction of the Cologne Regional Court with respect to cartel law claims would not be assumed as a result of jurisdiction for other claims relating to tortious acts. However, under the case law of the Federal Court of Justice on the topic of international jurisdiction (see NJW 1996, 1411, 1413; NJW 2003, 828, 820) the authority of the German courts to decide is restricted to tort law claims bases in as far as § 32 of the German Code of Civil Procedure is referred to to confer international jurisdiction. However, international jurisdiction is to be conferred pursuant to § 32 of the German

Code of Civil Procedure both for general tort law and for cartel law claims pursuant to §§ 33, 20 of the Act against Restraints on Competition. The question whether with regard to the above international jurisdiction of the German courts under § 823 of the German Civil Code owing to a tortious act the could also establish jurisdiction for other claims in tort pursuant to §§ 33, 20 of the Act against Restraints on Competition is not an issue here as the Act against Restraints on Competition does not apply owing to the lack of German involvement and jursidiction does not arise either in connection with any other tortious acts.

1.

Cologne Regional Court does not have international jurisdiction for the decision about the compensation claims from §§ 20, 33 of the Act against Restraints on Competition because the area of application of the Act against Restraints on Competition is not affected by the interference which is the subject of the dispute as an alleged restriction on competition caused by the Defendants. According to the pleadings of the Claimant himself, the domestic reference within the meaning of § 130 (2) of the Act against Restraints on Competition which is a precondition for the applicability of the Act against Restraints on Competition cannot be assumed. This definitely applies in as far as the Claimant asserts compensation claims under Motion 1) in the amount of EUR 155,000 owing to loss of income in the second half of 2003, starting with the world championships in Paris – and the further loss of income of EUR 200,000. With regard to the amount of compensation for pain and suffering a claim from §§ 20, 33 of the Act against Restraints on Competition has not been cogently pleaded. Therefore it does not need to be decided whether Defendant 1 is to be regarded as a market-dominant company or whether it must be treated as a market-dominant company when it acts on behalf of an international sporting association.

The issue of the international jurisdiction of Cologne Regional Court is based on § 32 of the German Code of Civil Procedure for both Defendants. EC Regulation 44/2001 of 22.12.2000 of the Council on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) is not applicable as it does not contain any regulation of the international jurisdiction for non-signatory states and Monaco where Defendant 2 has its domicile, is not a signatory state. As Brussels I Regulation does not apply this means that international jurisdiction is regulated under

German law (Federal Court of Justice NJW 1996, 1411, 1412; Munich Higher Regional Court, NJWE-VHR 1996, 96,101).

As a matter of principle the jurisdiction for tortious acts under § 32 of the German Code of Civil Procedure is possible for claims from § 33 of the Act against Restraints on Competition. The place at which the act was committed within the meaning of § 32 of the German Code of Civil Procedure is not only the place of jurisdiction of the respective defendant but the place at which an important constituent fact was realised, especially the success relating thereto (Munich Higher Regional Court NJW 1996, 2382; Immenga/Mestmäcker-Schmidt, Act against Restraints on Competition, 3rd ed., § 87, marginal no. 40).

a)

Defendant 2 must be regarded as a market-dominant company within the meaning of §§ 20, 19 (2) of the Act against Restraints on Competition, particularly in the area of the fight against doping. Sporting clubs which were possibly established as ideal associations ("*Idealvereine*") have in practice developed into significant economic subjects. Irrespective of their civil law classification they must be regarded as companies in as far as they are active on the market for sporting events. They themselves become companies owing to their own business activity, such as sporting events organised by them or the conclusion of agreements relating to the commercial use of licence, marketing or media rights and they are therefore the persons affected by the legal norm. Professional athletes also are to be regarded as companies in as far as they market their sporting abilities. The Panel assumes that Defendant 2 has a market-dominant position on the market of sporting events and specifically with regard to the eligibility of athletes for international athletic events or the issue of deciding about bans. Although the Claimant pleaded very little in this respect, it could however be assumed - not just owing to the decision of Munich Higher Regional Court (NJWE-VHR 1996, 96 – Katrin Krabbe) that market dominance is to be assumed at least in the market in question in view of the significant position of Defendant 2. As the international athletics association to which 211 athletics federations belong, Defendant 2 has in reality a monopoly position in the area of International Athletics. Rule 13 of the IAAF Constitution (Exhibit WADA 1, Sheet 385, 395 of the claim) and Rule 18 (Sheet 396)

on "Advertising and displays during competition" set out its extensive rights when organising competitions. It may permit athletes to participate in competitions or refuse them the right to participate in such; as already set out, these athletes are also to be regarded as companies owing to their income from their sporting activity and the resulting marketing. The options to ban athletes, specifically in the area of doping, (Rules 58 and 59 of the IAAF Constitution, Exhibit WADA 1, 385, 405 of the claim) have a wide-reaching effect in the market of sporting events. The Panel shares the view of Stuttgart Regional Court (decision of 06 April 2006, case no. 17 O 241/05) that the activity of the sporting federations, also in the area of the drafting of doping rules in sets of regulations and their application by imposing bans or withdrawing eligibility is a business activity on the market. Listing doping sanctions in sets of regulations and applying them constitutes a business activity in the market relevant here. The decisive market for cartel law purposes is the market for licences to participate in organised (professional) sport because the athletes rely on the licences offered by the associations in order to be able to offer his/her sporting performance to the association or sponsors. Defendant 2 is dominant on this market for athletics as its performance as an international association cannot be substituted as only it can organise athletics internationally and may issue licences, as can be seen from its above-mentioned Constitution. At the same time international associations such as Defendant 2 are also parties which demand sporting performances for the competitions organised and approved by them as the professional athletes nominated by the national federations are granted eligibility for international competition by them if the conditions for participating have been satisfied. Therefore there is a market-dominant position on the market of demand for professional athletic performances on an international level quite apart from the issue of intending to gain profit ((Immenga/Mestmäcker-Zimmer, op.cit., § 1, marginal no. 57). Applying the functional approach applied by the Federal Court of Justice to sporting federations (see Federal Court of Justice NJW 1998, 756, 757), the specific area of activity is definitive. When drawing up and applying rules with regard to doping controls and bans on any professional athletes also active as companies this is considered to be a business activity of the sporting federations which must be measured against cartel law – here against the prohibition on prevention and discrimination of § 20 of the Act against Restraints on Competition. This corresponds to the consensus in German case law, which view the Panel also shares.

In as far as the Defendants have turned against this approach referring to the decision of the European Court of the First Instance 30.09.2004 (T 313/02 *Meca Medina*) and claimed that the antidoping fight is not a business activity, the Panel does not share this view; the Panel does not consider that it is bound to this decision. At this point it may remain open whether the competition rules in Art. 81 and 82 of the EC Treaty can apply at all as they prohibit conduct suited to affecting the trade between the Member States and have an influence on competition in the Common Market, whereas all the parties to this legal dispute are active well beyond this market so that the area of application of Community law may not be affected at all. Therefore the parties were correct to base their legal deliberations only on German cartel law and not on Community law.

The Panel also fully shares the view of Stuttgart Regional Court in the aforementioned decision (pp. 14 and 15) to the effect that German courts are not now obliged for legal reasons to subject the application and preparation of doping rules to cartel law owing to the precedence of EU cartel law. Precedence of Community law only applies without restriction in cases in which conduct which is prohibited under Community law but which is considered to be a permitted restriction on competition in German law; in such cases the EC prohibition may not be impaired by the German law owing to its unrestricted and uniform application (see Immenga/Mestmäcker-Mestmäcker, op.cit., Introduction, marginal no. 81). By contrast, the case - comparable with the present one – that a conduct is allowed under Community law which is prohibited under German law must be regarded differently: The application of German law to facts which the Commission has indemnified pursuant to Art. 81 (3) of the EC Treaty is only ruled out in as far as the full validity of the decision would have detrimental effect on the Common Market. This is provided that the decision of the Commission pursuant to Art. 81 (3) of the EC treaty leads to positive, although indirect, interferences to promote harmonious development of the Community within the meaning of Art. 2 of the EC Treaty (see Immenga/Mestmäcker-Mestmäcker, op.cit, Introduction, marginal no. 86). No such decision from the Commission can be seen in the decision in the *Meca-Medina* proceedings so that there is no reason to prevent measuring the imposition of doping bans by international sporting federations on professional athletes under German cartel law on the prohibition on prevention and discrimination of § 20 of the Act against Restraints on Competition. Further, Stuttgart Regional Court is correct to point out that

Community law only has precedence in the area of Art. 81 of the EC Treaty (in the form of its (3)) over competition restrictions in the form of agreements, resolutions and concerted practices but not over the conduct covered by Art. 82 of the EC Treaty or other unilateral conduct.

b)

However, the Defendants were correct to point out that even a factual ban of the Claimant as a result of an A-sample incorrectly analysed as positive does not constitute a restriction on competition in Germany which is why German competition law does not apply pursuant to § 130 (2) of the Act against Restraints on Competition. This applies in as far as the Claimant has appealed to an act of Defendant 2 to the area of lost profit claimed for 2003 and to the area of further loss in the amount of EUR 200,000, the estimate of which was put by the Claimant at the discretion of the court to decide pursuant to § 287 of the German Code of Civil Procedure. It is only in this respect that it can be called into question at all whether Defendant 1 – irrespective of the further issue of whether it is to be regarded as a company within the meaning of the Act against Restraints on Competition and, if so, as a market-dominant one - must let the acts of Defendant 2 be attributed to it. Irrespective of any other arguments of the Claimant this can be doubted for the reason that he himself admitted in the written statement of 10.10.2005 (see there p. 15, Sheet 937 of the file) that in his view as well Defendant 1 was no longer directly involved in further events after the announcement of the positive A-test. In as far as the Claimant claims compensation owing to the announcement and publication of the result of the A-test he has already not cogently pleaded that this was done by the Defendants. Moreover, the announcement was not the responsibility of the Defendants so that jurisdiction cannot be assumed from the outset owing to the lack of cogent pleadings with respect to a tortious act coming under the Restraints of Competition Act under § 32 of the German Code of Civil Procedure with respect to compensation for pain and suffering.

The details are as follows:

aa)

The Claimant does not question that all parties involved are active internationally, but none of them are principally or mainly active in Germany. The centre of vital interest of

the Claimant is in the USA and in Kenya; Defendants 1 and 2 have their domiciles in Canada and Monaco respectively, all act worldwide without any qualification. No party has a special link with Germany, the area of German law is only affected due to sporting events. The doping sample definitive for Motion 1) as an out-of –competition doping test was taken in Tübingen, the evaluation as a result thereof was made in Cologne. If Defendant 2 banned the Claimant – a matter which is disputed – this took place in Monaco while the Claimant was in Paris. Any act of Defendant 1 of whatever nature would have been in Canada.

§ 130 (2) of the Act against Restraints on Competition is a provision relating to the conflict of laws which restricts the application of the law compared with other countries. Normally with respect to the term "foreign effect" this provision is to be understood in such a way that in the case of §§ 12, 16 and 19 of the Act against Restraints on Competition (old version of each) it is the actual effect which is important, i.e. the abuse on the German market or the essential or unfair effect on the ability to compete in Germany whereas §§ 1 and 36 (1) of the Act against Restraints on Competition can be applied when the competition restriction is geared towards, and the agreement is suited to, specific circumstances which influence (appreciably) the German market relationships or if a merger leads to the expectation of the creation or reinforcement of a market-dominant position in Germany; in the areas of §§ 14 and 17 of the Act against Restraints on Competition (old version in each case) - if there is no commitment of the company to the German market or whether the competition and the freedom to follow a profession in Germany could be affected (abstractly) Immenga/Mestmäcker-Rehbinder, op.cit., § 130 (2), marginal no. 49)

The Claimant appeals to a claim from §§ 20, 33 of the Act against Restraints on Competition. The prevention and discrimination prohibition of § 20 of the Act against Restraints on Competition is a specific subcase of the general abuse criteria under § 19 of the Restraints of Competition Act (BGHZ 52, 65 – *Sportartikelmesse*; Immenga/Mestmäcker-Möschel, op.cit., § 19, marginal no. 255), As the Federal Court of Justice rules in the *Ölfeldrohre* decision (GRUR 1974, 102, 103) the basic criterion is whether a German effect can be ascertained (positively). If that is not the case the Act against Restraints on Competition does not apply. The concept of the German effect depends in the individual case on the protected area of the norm affected. From the

protective purpose of the act generally towards maintaining freedom of competition and also of § 1 of the Act against Restraints on Competition it follows that the German effect must exist in the form of a detrimental effect on German free competition. The market relevant in this connection is determined by the correlation between supply and demand for the cartel goods This also means that an effect on the German market of the conduct of which the party concerned is accused is only an issue if the freedom to act – in this case of the Claimant - is impeded. With regard to the discrimination and prevention prohibition alternatively it depends both on the market in which the parties involved are and on the market in which the measures are taken (see Immenga/Mestmäcker-Rehbinder, op. cit. marginal no. 211). If international federation discriminates, the refusal or acceptance of a German or foreign company or its exclusion is subject to § 20 (6) of the Act against Restraints on Competition only if the federation's activity extends to Germany and membership of a federation is essential for the competition and the position of the discriminated company on the German market (see Immenga/Mestmäcker-Rehbinder, op.cit. marginal no. 217).

This is not the case in the two aspects named above, neither with regard to further events in 2003 nor with regard to other lost income not further specified which the Claimant considers he might have generated if he had been able to select products and events after the world championship for which he could have been available as advertising medium, whereas such potential sponsors and advertising partners did not approach him owing to the accusations or because negotiations were broken off.

None of the further events in 2003 which the Claimant specifies are in the territory of Germany. Therefore a domestic effect in the form of the restriction of the Claimant's freedom to act can hardly be considered in the territory of Germany. The competition law position of the Claimant is not at all affected, and definitely not considerably. As far as the potential participation of the Claimant in ISTAF 2003 in Berlin is concerned the Defendants correctly informed that the Claimant - contrary to his false pleadings in this respect – had indeed participated on 10.08.2003 before the analysis of the A-sample and (only) made 8th place. This has been documented by the submission of the webpage of ISTAF with the results of the 800 m race (Exhibit IAAF 48, Sheet 1571 of the file). The Claimant did not comment on this. It can therefore be assumed that the Claimant would not have wished to participate in any further races in Germany in 2003.

The Claimant did not plead any circumstances either with regard to the lost profit which he further claims which could lead to the assumption of a domestic effect. In this respect as well the freedom of the Claimant to act in Germany was not affected at all. His sponsor, the American company Nike, has stayed with him despite the doping accusations. He did not plead that sponsors from Germany were the sponsors which called off discussions with him; in this respect he did not name any sponsors with whom he had been in talks, although it would have been possible to name them if there had been any. In as far as the Claimant assumes that potential sponsors did not even contact him because of the damage to his reputation he is clearly unable to make any specific pleading. However, in as far as a domestic effect of the ban is to be ascertained it could at least be expected that the Claimant would have suggested that German companies would have considered him. Finally the Claimant could clearly have participated in the years from 2004 onwards in sporting events in Germany without any further restrictions or losses of income, such as at ISTAF 2004. After all, for German law to apply pursuant to § 130 (2) of the Act against Restraints on Competition the domestic effect must have been positively ascertained. This is not to be assumed, in addition to the lack of specific pleading and in the light of the circumstance that the Claimant is neither a German citizen nor does he live in Germany nor at least have a business centre in Germany, so that owing to the lack of applicability of the Act against Restraints on Competition the international jurisidction of the Cologne Regional Court for cartel claims through §32 of the German Code of Civil Procedure is not founded.

bb)

In as far as the Claimant wishes to file immaterial claims for compensation under tort from §§ 20, 33 of the Act against Restraints on Competition the court does not have jurisdiction because the Claimant – irrespective of the issue whether a domestic effect is also to be denied in this case- definitely not cogently pleaded a tortious act of the Defendant under competition law. A precondition for jurisdiction under §32 of the German Code of Civil Procedure is definitely that the Claimant can prove tort. In this respect a cogent statement of the facts from which a claim under tort can arise is adequate (Federal Court of Justice NJW 1996, 1411, 1413; Federal Court of Justice NJW 2002, 1425; Federal Court of Justice NJW 2003, 828, 830).

The Claimant derives his claims to immaterial compensation from the circumstance that through the announcement and the resulting worldwide publication of the result of the

A-test he was especially badly branded. However, he did not cogently plead that the Defendants were responsible for the publication or any way involved or that the announcement could be attributed to them. In as far as Defendant 1 is concerned the Claimant, as illustrated, does not himself assume that Defendant 1 was directly involved in the further events after announcement of the positive A-test by the laboratory. But in other respects as well he only utters suppositions which – although he does not know who directly made the announcement - are not sufficient to give grounds for responsibility of the Defendants. Indeed, there is much to suggest that the announcement was made by a third party, i.e. by the trainer of the Kenyan athletics team, Mr Kimani.

The Claimant himself who could easily have talked to Mr Kimani - whom he knows - about events which had taken place limits himself to vague allegations such as it is "assumed that either officials of the Defendant itself and/or officials of the Kenyan Athletics Federation *inter alia* could have sought out the press representatives to talk to them". This is not adequate to illustrate the responsibility of the Defendant for making the announcement. Conversely, Defendant 2 has illustrated that it did everything it could to observe absolute secrecy at least until events had been clarified. This is clear from its letter of 22.08.2003 to the Kenyan Athletics Federation in which an express reference was made to the possibility that the athlete could still demand a B-test and also from the letter of 26.08.2003 to Defendant 1 (Exhibit IAAF 10, Sheet 753 of the file). The fact that all parties involved including the Kenyan Athletics Federation and those responsible for the Kenyan team understood this is proved by the fact that the excuse of the Claimant (illness) why he could not run in the World Championships in Paris or Brussels at the Memorial van Damme (See Exhibit IAAF 34, sheet 1300 of the file) was so disseminated. This was the state of affairs which remained until the publication on 3.09.2003 first in the Kenyan newspaper Daily Nation and then worldwide on the Internet. This publication is clearly based on an interview with the trainer Kimani whereas a meeting with Defendant 2 is not mentioned. The circumstance that Defendant 2 is named in the title of the article and its first sentence ("Lagat failed drug test, says IAAF" and "Olympic Games 1,500m bronze medallist Bernard Lagat tested positive for drugs, the International Association of Athletics Federations (IAAF) has said") does not say that it said this in public but only that it alleges that the Claimant has tested positively for drugs. However, the article only mentions information

to the press given by Kimani. The publication in the Berliner Zeitung of 4.09.2003 (Exhibit K 4, Sheet 42 of the claim) also only refers to a comment made to the press by Kimani. Finally, even the Claimant himself assumed, as set out in the letter from his manager Templeton of 7.09.2003 to the Kenyan Athletics Federation (Exhibit IAAF 12, Sheet 763 of the file) that the information was not published either by Defendant 2 or by its member the Kenyan Athletics Federation. In this letter the trainer specifically expresses his thanks for the understanding of this sensitive matter and states that they were unhappy about the action of Mr Kimani as he had given confidential information on the case to the media. The Claimant does not give any indication why in his submissions in this proceedings he now – departing from his previous position – assumes that the Defendants or officials of the Kenyan Athletics Federation had made the announcement. He definitely does not cogently plead any direct attribution of the publication of the result of the A-test to the Defendants. This finding is not changed by the circumstance that Defendant 2 published the news on its webpage on 1.10.2003 that the analysis of the B-test did not confirm the result of the A-test which is why the Claimant was eligible to run. This is not some kind of confession that the original notification did come from the area of Defendant 2 after all. Indeed, Defendant 2 plausibly illustrated that this happened because the information had got into the public domain from third parties. In this respect Defendant 2 was acting in the interest of the Claimant.

In as far as the Claimant also grounds the responsibility of the Defendants for the announcement of the result of the A-test by stating that it is unimportant who put the news of the suspension into the public domain because it is obvious that the information could not be kept secret because that is always the case with the publication of the result of the A-test, the court does not understand the argument with regard to the allocation of responsibility. The Claimant himself campaigns against doping in sport. However, the fight against doping is not possible without tests being made on the ingestion of drugs – in whatever form. In the event that these doping samples test positive Defendant 2 has made provision in its Constitution that until a case has been clarified the matter must be handled confidentially; as the case of the Claimant shows this also works in principle. This shows that a positive doping result can also be kept secret by someone who is in the public eye. Although, as the Claimant pleads, he was only one of four athletes who had his own press conference it was

accepted in public and in no way linked with the supposition of a doping problem when he dropped out of the world championships under the pretext of illness. The fact that nevertheless publications of results of positive A-tests are sometimes made can be attributed to the media presence in sport generally and the interest of the media in the publication of news - a circumstance which may induce one or another to approach the media with an allegedly sensational publication and to be named in so doing. However, it is not an immanent part of the system of the taking and analysing of doping samples nor is the Defendant responsible for the result of the positive A-tests being made public.

2.

Cologne Regional Court does not have international jurisdiction for the compensation claims of the Claimant asserted in Motion 1) not even under § 29 of the German Code of Civil Procedure. In as far as the Claimant bases his claims on the circumstance that the Defendants breached their duties from a contractual relationship or a relationship similar thereto founded by the signature of a doping control form by using an ineffective EPO test or through the inappropriate handling and/or analysis of the doping samples taken, the German courts do not have international jurisdiction; in this respect the claims shall be dismissed as not permissible as well.

a)

However, as a matter of principle, the Panel does share the view of the Claimant that a mutual relationship under the laws of obligations was founded by both parties signing the doping control form. By declaring that he had not taken any drugs the Claimant undertook to provide blood and urine samples and also acknowledged the disciplinary power of Defendant 2 thereby. It is generally held that persons who are not members of a federation may subject themselves to its disciplinary power by contractual agreement, in particular when they, as the Claimant, want to participate in sporting events tendered and implemented in accordance with its rules in the organisation and responsibility of the federation (Federal Court of Justice NJW 1995, 583, 584). In return the Defendants carrying out the test were obliged to carry out the analysis and the steps prior thereto as carefully as possible so that the Claimant could not suffer any loss therefrom. At least as a contractual ancillary obligation there was in principle an obligation to protect the Claimant from damages, i.e. the duty to conduct in a way so that body, life, property

and other legal goods including the honour of the other party are not harmed (Federal Court of Justice NJW 1983, 2814; NJW-RR 2004, 481). In the present case this means the doping control procedure is to be so structured that it proves itself as inconspicuously as possible vis-à-vis errors or manipulations and the responsible parties at all times are expert, independent and neutral persons (Summerer in Praxishandbuch Sportrecht, part 2, marginal no. 238). Defendant 2 also undertook to permit the Claimant to participate in the sport organised by it if he participated in the doping test, provided this was not an instance of the exercise of its disciplinary power.

b)

Also regarding the place of jurisdiction pursuant to the place of performance, the first issue to be addressed is the existence of international jurisdiction provisions which could supersede the German provisions. As illustrated, Art. 5 No. 1 NYC does not apply to Defendant 2 because of its area of application so that the national jurisdiction provisions must be reviewed. As a matter of principle § 29 of the German Code of Civil Procedure is in principle applicable in this area (Federal Court of Justice NJW 1996, 1411, 1413).

In any event duties were established for the Defendants from the debt relationship which may be reviewed in principle in the jurisdiction of the place of performance. It is correct that not all contractual agreements come under § 29 of the German Code of Civil Procedure. Contractual relationships in this respect mean all obligation relationships under the law of obligations (Federal Court of Justice op. cit.;); however, certain contract-like special statutory relationships such as fault on the conclusion of a contract are given equal status to the former (Zöller-Vollkommer, German Code of Civil Procedure, § 29 marginal no. 6). It is correct that litigious agreements such as the arbitration agreement do not come under § 29 of the German Code of Civil Procedure (see Zöller-Vollkommer, op. cit., marginal no. 13). However, after the deliberations under a) the Defendants' assumption that by signing a doping control form it was only an arbitration agreement which had been concluded cannot be shared.

The Defendants had to satisfy the duties arising for them from the agreement at their respective domiciles when the debt relationship arose. As there is no agreement about

the place of performance within the meaning of § 29 (2) of the German Code of Civil Procedure the statutory place of performance under § 29 (1) of the German Code of Civil Procedure is definitive. This in turn is set out in the substantive civil law to be applied (Zöller-Vollkommer, German Code of Civil Procedure, § 29, marginal no. 24). The Panel assumes that § 269 of the German Civil Code is applicable.

However, according to the agreement between the parties it was initially not expressly agreed which law was to be applied to the agreement, i.e. whether § 269 of the German Civil Code is relevant. Contrary to the view of the Claimant, the mere fact that the Claimant was in Germany (by chance) when the out-of-competition test took place and - as a result thereof – the doping test was analysed in Cologne does not in itself have any impact, in particular given the international areas of activity of the parties concerned, not exactly activities relating to Germany. Moreover, none of the parties to this legal dispute were resident in Germany, the contractual languages were English and French involving the Swedish representative van der Sypt. However, the Panel therefore assumes after the statements given in this legal dispute that the parties subsequently made an implicit choice of law within the meaning of Art. 27 of the Introductory Act to the German Civil Code – which is possible in principle, Art. 27 (2) of the Introductory Act to the German Civil Code. In this legal dispute the Claimant appealed exclusively to German legal provisions and claimed that German law was applicable. The Defendants took up this point in their written statements, commented thereon and and did not appeal for their part to diverging legal provisions of Monegasque or Canadian law. An indication for a subsequent choice of law is the conduct of the parties in the legal dispute, e.g. the treatment of the matter under foreign law (Federal Court of Justice NJW-RR 2000, 1002, 1004). If the parties appeal purely on the basis of German legal provisions current case law considers this to be an implicit choice of German law (Federal Court of Justice NJW 1999, 950, 951; 2003, 3620; 2004, 2523). The fact that the Defendants in the end appealed to their respective domiciles in Canada and Monaco with respect to the claims asserted by the Claimant in view of the issue of the place of performance and therefore also the issue of the international jurisdiction of Cologne Regional Court is by contrast not important as the Defendants appealed expressly to the decision cited in the last hearing before the Stuttgart Regional Court which gave the grounds for its lack of international jurisdiction as the fact that pursuant to § 269 of the German Civil Code the place of performance is

at the domicile of the Defendant – in this case Defendant 2. Therefore with regard to the issue of jurisdiction they appealed to the German law of obligations.

The duties of the parties are to be fulfilled at their domicile at the time at which the debt relationship was established by signing the doping control form pursuant to § 269 (1) of the German Civil Code as there can be no other outcome in the circumstances, in particular also given the nature of the agreement concluded between the parties. In particular, the assumption of the Claimant that the Defendants themselves chose Germany as the place of performance to satisfy their contractual obligation to carry out a faultless test cannot be followed. The place at which the test was carried out was merely by chance the temporary place of residence of the Claimant in Tübingen; for this reason the evaluation was carried out in Cologne, one of the two laboratories accredited in Germany. It should also be remembered that the doping test as an out-of-competition test is not an end in itself but serves to review whether an athlete satisfies the starting conditions, i.e. makes it possible for the athletes to continue to participate in international competitions. If he refuses to submit to the test he will not be eligible for competition; if the doping test is positive he will also not qualify to start.

As ultimately it was not Defendant 1 which permitted athletes to compete, but this was solely a matter for Defendant 2, the Panel assumes that it is the duties of the latter which are relevant in this respect so that it is its domicile which is definitive as place of performance. As, when obtaining the doping sample it was the issues of the eligibility to compete and the imposition of a ban by Defendant 2 which were crucial, this duty was to be satisfied in Monaco. In any event in the case of a ban it is only the domicile of the association which can reasonably be the place of performance for its duty to perform and not the competition location or the place at which the tests were implemented (see Stuttgart Regional Court op.cit., p. 24 with further references). The latter could be definitive only for the issue of the breach of an ancillary contractual obligation.

As the place where the primary obligation was to be performed is definitive for the issue of jurisdiction under § 29 of the German Code of Civil Procedure it is irrelevant which specific claims are asserted with regard to the contractual obligation. In the case of a compensation claim the duty to reimburse will not be definitive for the determination of the place of performance. As therefore the place of performance for the primary

obligation of the Defendants is not in Germany this also applies to secondary claims such as the compensation claim filed here (Zöller-Vollkommer, op.cit., § 29, marginal no. 23, 25 "Schadensersatz"). Therefore Cologne Regional Court does not have international jurisdiction for contractual claims.

Any other jurisdiction of Cologne Regional Court pursuant to § 32 of the German Code of Civil Procedure for tortious compensation claims would not give Cologne Regional Court international jurisdiction at the same time for contractual compensation claims. Under the case law of the Federal Court of Justice the court with jurisdiction pursuant to § 32 of the German Code of Civil Procedure has to decide after the amendment to § 17 (2) sentence 1 of the Judicature Act the legal dispute taking all legal aspects into consideration with respect to jurisdiction. However, the authority of German courts to make decisions is restricted to tortious claim bases, in as far as § 32 of the Code of Civil Procedure is applied to the grounds for international jurisdiction (NJW 2003, 828,830; NJW 1996, p. 1411, 1413).

3.
In as far as the Claimant files claims in tort a distinction must be made. With regard to the alleged breach of personality rights (§ 823 of the German Civil Code) there is no international jurisdiction of Cologne Regional Court pursuant to § 32 of the German Code of Civil Procedure; in this respect the claim is not permissible. With regard to an interference in the established and exercised business operation, the Cologne Regional Court does have jurisdiction but the claim is unfounded.

a)
The Claimant did not cogently plead a compensation claim from § 823 of the German Civil Code against the Defendants owing to a breach of his personality right so that in this respect international jurisdiction of Cologne Regional Court as place of jurisdiction of the tortious act is out of the question.

aa)
In as far as the Claimant derives claims from the announcement of the result of the A-test it can be assumed - as illustrated – that the two Defendants neither caused the announcement themselves nor that the revelation (obviously) made by the trainer of the

Kenyan athletics team to the press can be attributed to them in any way. Reference is made to these illustrations**.** The Panel does assume that the place at which the tortious act was committed could have been Cologne in view of the worldwide announcement on the Internet; the place at which the tortious act is committed is all places at which the information can be retrieved for its designated purpose, irrespective of where the server is from which the information can be retrieved. Information in foreign languages can also be intended for German Internet users for its designated purpose if there are connecting factors (see Wenzel-Burkhardt, Das Recht der Wort- und Bildberichterstattung, marginal no. 10.247 with further references). It is quite legitimate to question whether the webpage of the Kenyan newspaper the Daily Nation (ON THE WEB) is directed to German Internet users for its designated purpose, but it is quite a different matter with regard to the Internet presence of the Berliner Zeitung where this information was also disseminated (Exhibit K 4, Sheet 42 of the claim).

bb)

Also in no other respect did the Claimant cogently plead compensation claims against the Defendants owing to the breach of his personality right. The application of an analytical procedure (in Cologne) unsuitable according to the allegation of the Claimant alone does not interfere with the honour of the Claimant. For even under the presumption that the Defendants were to accept wrongly suspecting some athletes of doping with an error-ridden and unscientific analytical method this does not constitute at the same time the announcement of these results. It has already been illustrated that in the view of the Panel the publication of a wrong result wrongly casting suspicion on the athlete is not immanent to the antidoping system of the Defendants. The example of the Claimant shows this; despite the effective press conference before the world championships in Paris he was able to depart unchallenged, citing his reason for not participating as an illness. If his own trainer had not gone public himself weeks later the honour of the Claimant would presumably not have been affected until the analysis of the B-sample and the (re) eligibility of the Claimant. There is nothing to suggest that publication would have been made by the Defendants before the result of the B-test had been announced.

As long as the (wrongly positive) result is only announced to the athlete, its

representatives and the national federation this does not constitute a breach of personality rights. With regard to the formalised proceedings which takes place in compliance with the Constitution of Defendant 2, with hearings and the possibility to have the B-sample analysed it can be assumed that these are privileged utterances in an area in which such utterances may be made. Utterances made to close family and friends, one's own lawyer, in a pending court case, and to authorities and in the context of petitions and complaints are largely permitted. This standard privileged status also applies to complaints in association matters. No-one can be prevented from informing the offices responsible for remedy of alleged grievances (Wenzel-Burkhardt, op.cit., marginal no. 10.26 ff., 10.37). It is the task of the Defendants to discover and pursue alleged doping offences. Therefore in this respect a tortious act – which would have founded the international jurisdiction of Cologne Regional Court – has not been cogently pleaded.

b)
With regard to a claim of the Claimant against the Defendants from § 823 of the German Civil Code owing to the interference in the established and exercised business operation the Claimant has pleaded a compensation claim in principle (with the exception of the claim to immaterial compensation). However, the claim which is permitted before the Cologne Regional Court is not founded in this respect.

aa)
The Claimant appeals to the circumstance that he was wrongly suspected of a doping offence in the context of the analysis of the A-test owing to errors made during transport of the sample, use of an inadequate activity test and an error-ridden scientifically not adequately founded test method with the place of the offence in Cologne, through which he lost income – because he had been in reality banned by Defendant 2 since the analysis.

It can be assumed that the unjustified competition ban of an athlete can in principle constitute a direct business-related interference in the established and exercised business operation. The established and exercised business operation is recognised as a miscellaneous right within the meaning of § 823 of the German Civil Code whereby it is an open catch-all term which is supposed to fill in any gaps in particular in intellectual

property. However, the content and the limits of its protection, including the illegality of any interference with the protected rights, only arise at the later stage of consideration of interests and goods with the sphere of interests specifically colliding in the individual case with others – as it the nature of an open term (BGHZ 138, 311). The protection of the owner of the business against interference is intended to secure the continuation of the activity lawfully carried out so far on the basis of the events already organised and covers everything which in its entirety constitutes the economic value of the business. Members of the free professions who do not have their own business are also protected in the event of direct interference in their professional activity (Palandt-Sprau, German Civil Code, § 823, marginal no. 127 with further references). The Claimant as a professional athlete is also covered as a matter of principle by this protective rule.

It can be assumed that the issue of a ban – or its factual imposition – can mean a direct interference in the professional activity of an athlete. In principle there is the necessary direct business-related interference only when the business operation as such is affected, i.e. the attack is directed towards the operative organism or the corporate freedom to make decisions and not just simply against removable rights or legally protected interests of the business (BGH NJW 2003, 1040, 1041). This is not the case if it leads to disruptions in the running of the business owing to a damaging event which has no connection with the business, even if a person or matter essential for the functioning of the business is affected thereby. In this case, when evaluating the interfering act in question – i.e. the imposition of a ban owing to a doping test regarded wrongly as positive – that this is such a direct interference at least with regard to Defendant 2. If the Defendant provides in its rulebook for the taking of doping samples as a condition for of eligibility it directly decides whether the athletes fulfil the conditions for eligibility and whether they can pursue their profession.

The objection of the Defendant that it did not impose the ban (on 4.09.2003) but – without any contact – it was the independent Kenyan Athletics Federation which did so which is why the former is not the correct defendant is not convincing. Indeed it can be assumed that the Claimant was prevented at least de facto after the analysis of the A-sample from taking part in the world championships. This applies irrespective of the circumstance that Defendant 2, as it documented, invited the Claimant through its manager to the 1st IAAF World Athletics Final in Monaco on 13 and 14 September 2003

(Exhibit IAAF 33, Sheet 1299 of the claim). In accordance with Rule 59 of the prevailing version of the IAAF Constitution (exhibit WADA 1, Sheet 384, 405 of the claim) in its letter of 22.08.2003 it turned to the Kenyan federation and informed it not only which steps the latter should take as against the Claimant (such as request him to provide an explanation) but pointed out, making reference to its Rules that – if the Claimant did not provide an adequate explanation by 10am on the next day – that the test would be regarded as positive and that the athlete would be suspended from then until his case had been resolved. This applied irrespective of the circumstance to which reference was made that there was a right to have the B-sample analysed. It is irrelevant whether the word "shall" in connection with this letter is to be regarded as an order to the Kenyan federation or a consequence lying in the future. In any event the letter quite clearly stated that the result of the analysis was regarded by Defendant 2 as positive within a few hours without any adequate explanation from the Claimant and that the consequence of suspension follows directly. Finally, the aforementioned Rule 59 of the IAAF Constitution states that not just Defendant 2 but the federation which is one of its members can issue the suspension (No. 1) and that Defendant 2 can do so as well when in its view the member federation has not duly issued the suspension (No. 4).

However, the Panel assumes that Defendant 1 which has under the rules also indisputably a right to participate and appeal in doping proceedings is also the correct defendant. It may start doping proceedings by means of its right of appeal and enforce a sentence on the athletes by the CAS so that it also has a direct influence on the issue of the suspension and it interferes in this way in the market of sporting events.

bb)

As it can therefore be assumed that the at least the de facto suspension of an athlete is as a matter of principle a direct result of a positive test of the A-sample, it can also be assumed that according to the pleadings of the Claimant a tortious act committed in Cologne is pleaded. According to his pleadings this is possible in three ways, by inappropriate transport (owing to non-refrigeration) to Cologne, by use of an inadequate activity test (which did not discover the urine activity due to the heat during the analysis of the A-sample) and by using an unsuitable antibody for the analysis which led to a wrongly positive evaluation of the active urine (or if appropriate also otherwise). Although the Defendants object on the grounds that the Claimant's pleadings were not

cogent in this respect, the Panel which cannot review the chemical processes from its own knowledge has to assume that to have these issues answered in principle an expert report should have been obtained – if the claim were not without grounds for other reasons – so that it must be assumed that the Claimant's pleadings were cogent. This would also be true if it were assumed from the pleadings of the Defendants that the sample material was not kept at a temperature of between 35 and 40°C in the hotel room and during transport by Dr van der Sypt but "only" at a temperature of 20°C because the Claimant also pleaded in this respect that at least a considerable refrigeration of the samples would have been necessary.

However, it is correct that the Claimant pleaded very little with respect to the lack of suitability or inadequacy of the activity test so that in principle the question of the interruption in the chain of causality arises in the context of the review of cogency. This is true in particular because both activity tests on analysing the B-sample - the proven one and the newly introduced one – came to the same conclusion, i.e. that the urine sample was "active". However, it is beyond the knowledge of the Panel making this decision whether an expert could have confirmed the disputed allegations of the Claimant by analysing the A-sample carried out compared with the B-sample so that in this respect as well the lack of cogency of the pleadings could not be assumed.

The unlawfulness to be positively reviewed in the context of the interference in the established and exercised business operation as a condition for a cogent pleadings is therefore to be affirmed also. In its preliminary indication of 22.02.2006 (Sheet 1359 ff. of the file) the Panel based its findings on the fact - if the pleadings of the Claimant should transpire to be accurate – that there was no recognisable interest of the Defendants worthy of protection to remove athletes from competition without reason on the basis of inappropriate handling of doping tests. Although the objection of the Defendants is true that when using one test method carried out on all athletes which also corresponds to the prevailing science, the unlawfulness is to be denied when balancing the interests of the parties involved. The balancing of interests, however, can only be carried out once the exact infringing action has been ascertained and recognised. Thereby it must be assumed conversely in favour of the Claimant's interests that the accusation of a doping offence can have not only serious material consequences through the ban but also constitutes a particularly serious accusation

against the nature and type of the exercise of a profession.

The pleading of the Claimant with respect to the fault of the Defendants is in principal cogent. If the reason for the faulty nature of the result is – as alleged – the inadequacy of the test method or the provisions to store and transport the samples themselves then clearly one would have to ask whether this is the own fault of the Defendants in the form of organisational fault without the need of recourse to § 831 of the German Civil Code.

cc)
However, the cogency of the pleadings and therefore also the permissibility of the claim with regard to the grounding of international jurisdiction of Cologne Regional Court through § 32 of the German Code of Civil Procedure does not refer to all damage positions from Motion 1). This quite simply does not apply in as far as the Claimant files immaterial compensation, because in this respect it cannot be assumed from his pleadings that the announcement of the positive A-test is to be attributed to the Defendants; reference is made to the illustrations here above. In this respect the claim is also to be dismissed as not permissible.

c)
However, the claim, in as far as it is permissible (with regard to the part claims of EUR 155,000 and EUR 200,000 from Motion 1) is unfounded. Despite the remark from the panel the Claimant has not cogently pleaded the amounts of his claims so that damage incurred by the alleged de facto suspension could not be ascertained. For this reason the claim had to be dismissed without any further collection of evidence.

In principle the degree to which one party bears the burden of submitting the facts depends on statements from the opposing party. In view of the fact that the Defendants dispute the grounds for and the amount of the damage positions asserted in principle evidence should have been gathered in this respect. However, the blanket pleadings of the Claimant relating to the amount of all damage positions do not allow taking of evidence as from the current status of the facts and dispute this would have amounted to a non-permissible "fishing expedition". The Claimant's attention was already drawn to these reservations both in the first oral hearing and in the context of the

aforementioned preliminary indication. The circumstance the he once again addressed this issue in his written statement of 24.04.2006 shows that he understood the remarks from the Panel. However, he did not take the opportunity in the supplementary comment to go further into the damage positions asserted in his pleading. Instead, his further pleadings only led to yet more confusion.

The details are as follows:

aa)

In as far as the Claimant files claims for the reimbursement of lost profit in the amount of EUR 155,000 he did not plead sufficiently even taken into consideration the easing of the burden of proof in § 252 sentence 2 of the German Civil Code. It is not only adequate but also necessary if the party liable to pay compensation illustrates the circumstances and proves within the parameters of § 287 of the German Code of Civil Procedure which lead to probability of profit having been made according to the usual course of matter or the special circumstances of the case. It is not only necessary but also adequate if initial and connecting facts for a estimation of the damage are pleaded (Federal Court of Justice NJW 1988, 3017; 1993, 2376; 1998, 1633, 1635; 2004, 1945). Even taking into account the circumstance that the requirements made of the illustration of the damage may not be too high, the pleadings of the Claimant are not adequate in this respect.

Even the pleadings disputed by the Defendants with respect to the individual competitions in which the Claimant would have participated in the rest of 2003 is, with the exception of the participation in the world championships in Paris, not adequately illustrated. In the statement of claim the Claimant restricted himself to listing in note form the competitions which would have been considered. There he stated with certainty that he would have participated if he had not been only eligible to compete after the evaluation of the B-sample. In the course of the legal dispute he supplemented this pleading by saying that he would also have considered participating in the ISTAF in Berlin. By contrast, the Defendants provide by submitting the webpage of the event organiser that the Claimant had already taken part there. This circumstance puts into perspective the pleadings of the Claimant which is restricted to a list, in particular, that in view of the obvious lack of clarity in his planning, a more detailed account of the further competitions he would have participated in the rest of

the year would have been necessary. This is emphasised by the fact that the Claimant also expressly pleaded in the written statement of 24.04.2006 that the final competition planning for the rest of the season after the world championships was not clear before the world championships and would have been dependent on the results at the world championships and the offers from the event organisers. This clearly shows that – in as far as specific lost profit is asserted from the non-participation at sporting events – participation was by no means certain according to the new pleadings of the Claimant. This also means that the loss of appearance money in Brussels and Moscow cannot form the basis of any claim either. In as far as Defendant 2) made an offer to the manager of the Claimant that the latter could run at the event in Monaco (Sheet 1299 of the claim) the Claimant did not file any claim for appearance money.

Therefore the further prize money pleaded in the event of gaining second place (or in the case of Monaco, first place) in the competitions, the prizes from the sponsors and the time bonus in the Memorial van Damme are not pleaded cogently either. A further factor is that the allegation of the Claimant that as a rule he would have come in second place – and also second in the world ranking list of the IAAF – was not reinforced by any further pleading of the facts. Neither the bases on which this estimate is based, e.g. events in 2003 he had already attended, nor any other data about the training condition of the Claimant, were pleaded. This in particular would have been necessary because they are not generally known facts. A further factor is hat the estimate of the Claimant with regard to chances of success have proved to be uncertain in the course of the legal dispute; for example he only gained 8th place at the ISTAF in Berlin. The fact that the Claimant had by then not been so successful as he had predicted for the future is clear from the article in the Berliner Zeitung submitted by the Claimant himself (Appendix K 4, Sheet 42 of the claim) which states that in July he only gained third place in the national championships in Nairobi.

As the Claimant had also not pleaded what prizes and prize money he would have expected if he had not gained second place it was therefore not possible to give an estimate or to take of evidence, especially as the Claimant had only named his manager as witness with respect to the individual amounts and his projected performance.

As the Claimant did not plead any facts supporting the probability of profit from the normal course of matters or the particular circumstances of the case, because he had not illustrated either initial not connection factors for an estimate of the damage, the claim had to be dismissed.

bb)

The conclusion is similar in as far as the Claimant asserted lost profit of EUR 200,000 as a damage position. Thereby it is assumed that his reputation suffered from the events which form the subject of the dispute and that he is still confronted today with those events to some extent. However, it must not be forgotten that Defendant 2 clarified in its statement of 1.10.2003 that the Claimant was not found guilty of a doping offence. This made it clear that the Defendants would not be making any further accusations in this respect. In order to make an estimate of the damages possible subject to § 287 of the German Code of Civil Procedure he would have had to plead a basis for the estimate of the alleged damages. He himself does not plead that he suffered financial disadvantages specifically through his sponsor Nike. Otherwise the income situation of the Claimant has remained completely in the dark, just as his chances for further sponsors. In particular, he did not plead at all with respect to the agreement with Nike which sponsors he could have had, and if so in what area. In as far as potential sponsors refrained from concluding agreements due to the temporary doping suspicion the Claimant could have pleaded this. He could definitely have illustrated which sponsors he intended to contact and what fees he expected at all in this respect.

However, as the Claimant refused to make further pleadings the claims had to be dismissed owing to the lack of cogency with respect to the amount.

III.

Motion 2)

Cologne Regional Court does not have international jurisdiction either with respect to the decision about the cease and desist order by the Claimant based on § 33 of the Act against Restraints on Competition because the alleged discrimination of the Claimant

by application of an inappropriate doping test for rhEPO does not have any effect within Germany. This also applies in particular because an unfair hindrance or a discriminatory act by the Defendant 1 or 2 as against the Claimant – in particular with regard to a domestic effect – has not been cogently pleaded. International jurisdiction of Cologne Regional Court based on § 32 of the German Code of Civil Procedure is not conferred hereby. This also applies in cases in which the Claimant – in line with his alternative motions – requests that the tests which take place in German are ceased. There is not domestic effect in this respect within the meaning of § 130 (2) of the Act against Restraints on Competition.

As already illustrated, the issue of whether a measure is an unfair hindrance or discriminatory is dependant principally to the nature of the measure in question. The Claimant who works as a professional athlete demands on the claim basis of § 33 of the Act against Restraints on Competition that both Defendants refrain from carrying out EPO-tests in which the test procedure used on 8.08.2003 is used, alternatively demands that those EPO-tests in which the EPO antibody AE A 5 is used are ceased. The reason he gives for this is that the test or the antibodies used are in principle faulty or prone to faults and that he is therefore exposed to the risk of wrongly being accused of a doping offence. However, it cannot be inferred from this that solely the fact that the Claimant – as all other athletes – is subjected to such doping tests as condition for participating in athletics competitions means that he is unfairly hindered or discriminated against by the Defendants. It is not disputed that the Claimant was subjected to doping tests on many occasions in the past and that in only one case did the A-sample test positive and then the B-sample did not confirm the A-test. All professional athletes are subjected annually to the same test in thousands of cases and only in a few cases are there any faulty results. It is also undisputed that the test method is constantly being further developed and applied in a refined form, as can be seen from the example for the activity test which was revised in 2003 between the evaluation of the A-sample and the B-sample. However, it is also not disputed that doping offences should be pursued and punished in the interest of fair competition. This is also in the interest of the Claimant who would otherwise run the risk of being beaten in the field by a competitor who may have been doped.

Given the above, it is not clear how the application of the test could constitute the

abuse of a market-dominant position. A company which can be guilty of abuse under § 19 (4) No. 1 of the Act against Restraints on Competition can only be one which owing to its special market power affects the market in a way significant for competition without objective justification. The uniform application of the doping test which forms the subject of the dispute to all athletes in the interest of fair competition is not without objective justification if and in as long as there is no other safer doping test which can reasonably be applied considering the interests of all involved parties. The Claimant did not plead there was such a test. Also, the uniform application of the test does not constitute an abuse of the denial of access within the meaning of § 19 (4) No. 4 of the Act against Restraints on Competition, especially as there is an objective justification for carrying out the test. The Claimant cannot reclaim an unjustified discriminatory treatment within the meaning of § 20 (1) of the Act against Restraints on Competition either: The Defendants do not treat economically similar factors unequally but they subject all athletes in the same way to the doping test. As illustrated, this is objectively justified. A breach of the hindrance prohibition for companies with superior market power (§ 20 (4), (5) of the Act against Restraints on Competition) cannot be determined, especially as this provision is principally directed towards the systematic and targeted use of predatory pricing or discounting as against small and medium-sized companies (see Bechtold, Act against Restraints on Competition, § 20, marginal no. 61 with further references). No breach of the prohibition on refusing admittance to an association as set out in § 20 (6) of the Act against Restraints on Competition can be determined either as the testing of all athletes cannot be considered to be a discriminatory objectively unjustified treatment. Conversely, what the Claimant does demand is preferential treatment by stating that he wants to participate in competitions without having to undergo a doping test subject to the general practised methods; it is obvious that the Defendants, if they were to satisfy his request, would in turn be exposed to the accusation from other athletes.

It is also not clear how the tests arranged by the Defendant of necessity outside the area of application of the Act against Restraints on Competition should have any appreciable effect in German on the Claimant who lives in the USA; the fact that a test evaluated in Germany led on one occasion to a positive result for the Claimant does not mean that an effect has to be expected in Germany in future, especially as the testing method and the test are internationally standardised and certified. Also in as far as

tests and their evaluations take place in Germany they may have an effect on the participation of the Claimant in competition anywhere in the world. However, any effect in Germany is only appreciable within the meaning of § 130 (2) of the Act against Restraints on Competition if it has a quantitative minimum which allows for the affirmation of a domestic effect. Irrespective of the difficulty to define appreciability (in practice there have been attempts to regard domestic competition restrictions as not appreciable in cases of relevant domestic turnover of up to DEM 3 to 5 million, see Bechtold, op. cit., § 130, marginal no. 15) the effects in Germany have not been pleaded in any further detail at all. The mere fact that he (also) participates in events in Germany and trains here for a few weeks in the year does not satisfy the conditions.

As a tortious act within the meaning of § 33 of the Act against Restraints on Competition is not cogently pleaded anyway, international jurisdiction of Cologne Regional Court is not founded through § 33 of the German Code of Civil Procedure.

IV.
The ancillary decisions associated with the proceedings are based on §§ 91, 101, 709 of the German Code of Civil Procedure.

After review, it can be said that the written statement of the Claimant of 12.06.2006 which was not delivered on time and which basically only contains legal information does not constitute any reason to reopen the hearing. The other written statement of the Claimant of 8.09.2006 also not submitted in time does not does not constitute any reason to reopen the hearing, § 296a sentence 1 of the German Code of Civil Procedure. The new pleadings to publish the result of the A-test in the *Jones* case and the issue of whether this athlete was doped are without significance for the decision. The case of § 156 of the German Code of Civil Procedure has also not been satisfied.

Dispute value:

Motion 1):	500.000,00 €
Motion 2):	100.000,00 €
total:	600.000,00 €

Reske Dr. Koepsel Greb

Signed

Hackert, chief court official
as deeds clerk of the court office