



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2008/A/1738 WADA v/DEB & Busch**

**ARBITRAL AWARD**

Pronounced by the

**COURT OF ARBITRATION FOR SPORT**

Sitting in the following composition:

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

**Arbitrators:** Dr Hans Nater, Attorney-at-law, Zurich, Switzerland  
Dr Martin Schimke, Attorney-at-law, Düsseldorf, Germany

in the arbitration between

**World Anti-Doping Agency**, Lausanne, Switzerland

Represented by Dr François Kaiser and Dr Claude Ramoni, Attorneys-at-law, Lausanne, Switzerland

**As Appellant**

and

**Deutscher Eishockey Bund e.V. (DEB)**, Munich, Germany

Represented by Mr Uwe Harnos, President and Attorney-at-law, Kaufbeuren, Germany

**As Respondent 1**

and

**Mr Florian Busch**, Berlin, Germany

Represented by Dr Georg Engelbrecht, Attorney-at-law, Hamburg, Germany

**As Respondent 2**

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## I. THE PARTIES

1. The World Anti-Doping Agency (hereinafter referred to as "WADA") is a Swiss private law foundation, seated in Lausanne, Switzerland and has its headquarters in Montreal, Canada. Pursuant to art 4, 1. of its Statutes, as of 11 April 2005, WADA shall promote and coordinate at international level the fight against doping in sport in all its forms including through in and out-of-competition. According to art 4, 4. of these Statutes, WADA shall *"encourage, support, coordinate and, when necessary, undertake in full cooperation with the public and private bodies concerned, in particular the IOC, IFs and NOCs, the organization of unannounced out-of-competition testing."*
2. The Deutscher Eishockey Bund e.V. (hereinafter referred to as "DEB") is the member national association for Germany of the International Ice-Hockey Federation and embraces 16 regional associations and 33 clubs playing ice-hockey in Germany. It has its seat in Munich, Germany.
3. Mr Florian Busch is an international-level German ice-hockey player and participated as a member of the German national ice-hockey team in several international competitions, such as the Ice Hockey World Championships in 2003, 2004, 2006, 2007 and 2008 and the Olympic Games in Torino in 2006.

## II. FACTS

4. According to WADA, on March 6, 2008, at 12:30 pm, Mr Kursawe, a doping control officer, appeared at Mr Florian Busch's domicile in order to perform an out-of-competition sample collection.
5. According to WADA on this occasion, Mr Busch refused to submit to sample collection. He declared that he felt disturbed by too frequent doping tests and criticized the way athletes are selected to be submitted to out-of-competition testing. The doping control officer warned Mr Busch that refusing a test could lead to severe disciplinary sanctions. He also suggested that the sample collection could occur at a place other than the athlete's apartment. The athlete refused this proposal and confirmed his refusal to be tested. Even though the doping control officer repeated several times to Mr Busch that his refusal could lead to severe disciplinary sanctions, Mr Busch confirmed his refusal and did not allow the doping control officer to enter his apartment. The doping control officer left Mr Busch's domicile at 12:50 pm, asking him to confirm his position in writing.
6. After the doping control officer had left, at about 12.54pm, Mr Busch called the German National Anti-Doping Agency (hereinafter referred to as "NADA") and informed it of the event. At 2:16 pm, Mr Busch once more called the NADA and declared that he had changed his position and wished to go ahead with the sample collection. NADA informed Mr Busch, that a repetition of the doping test was not possible because of the infringement of the principle of unannounced testing. Thereafter, he took the initiative that on March 6, 2008 at about 5:00 pm a doping test arranged by DEB and performed by Mr Kursawe took place. The sample was analysed at the IDAS Dresden and did not show any prohibited substances or prohibited methods.
7. On March 7, 2008 NADA informed and sent all relevant documentation to DEB, the institution in charge of results management against Mr Busch. On March 19, 2008 DEB

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informed NADA that it intended to sanction Mr Busch with a public warning. DEB was advised by NADA that refusing a sample collection constitutes an infringement of art 2.3 NADA Code which complies with art 2.3 World Anti-Doping Code (hereinafter referred to as WADC) and has to be sanctioned according to art 11.5.1 and 11.3.1 NADC which correspond to arts 10.4.1 and 10.2 WADC.

8. On April 9, 2008 DEB explained to NADA that the sanctions provided for by the NADC/WADC are excessive, that their application would infringe the athlete's basic rights and the principles of the rule of law, because a refusal of a doping test cannot be held equal to having been found doped. As to this issue, the NADC contains a lacuna. The fact that Mr Busch underwent a doping test in a time very close to his refusal must be considered that he withdrew from his refusal. Additionally, it has to be counted in his favour that the results of this doping test, which took place in such a close timeframe, were negative. Thus, a public warning must be seen as adequate sanction under these circumstances. Also, it should also not be possible to manipulate sample collection within five hours, although NADA objected to such opinion.
9. On April 15, 2008 NADA heard from the media that Mr Busch was sanctioned by the Missed Test Policy Panel of DEB with a public warning, with € 5.000 fine and a duty of 56 hours of community service. NADA also learnt from the media that IIHF supported the decision of DEB and would allow Mr Busch to play at the Ice Hockey World Championships in Canada, May, 2 – 11, 2008.
10. By email dated April 17, 2008 – on the other hand – the IIHF received the decision of the DEB from the DEB. The DEB sanctioned Mr Busch as follows:

*"a) official public warning having the consequence of a minimum 3-month ban in case of another violation*

*b) Fine of € 5.000,00 to a non-profit organization*

*c) 56h of community work as youth coach (7 month, 2h weekly) in the age groups starting beginners to bantam*

*d) Absorption of all proceedings and control costs."*

11. The decision of the DEB Missed Test Policy Committee communicated to IIHF by the General Secretary/Sports Director of the DEB contained the following reasons:

*"The decision was(s) particularly based on the following time frame.*

*On March 3, 2008, Florian Busch denied the doping test at 12.30 pm, but at 12:45 pm Mr. Busch was already in contact with the NADA. In this conversation he independently organized an orderly doping control sample, which was taken on March, 6, 2008 at around 5:00 pm. The doping control officer was the same person at the initial control attempt at 12.30 pm:*

*The control sample was tested by the "Institute of Doping Analysis and Sports Biochemistry" in Dresden and showed a negative test result.*

*There was no indication of a tampered sample and/or the consumption of doping concealing substances. Therefore the designated equalization of positive control samples is actually disproved.*

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*The NADA-Code also states the following: A positive A-sample can be disproved by a negative B-sample. Based on the current case, the negative test result of the taken and analysed sample has to be appreciated accordingly.*

*The actual circumstances show, that Florian Busch due to the panic reaction, initially denied the doping control, but then came to senses.*

*The decision taking committee regards this case as inadequate and improper, that the obviously not doped athlete should face the same sanctions as a positive tested athlete."*

12. On April 21, 2008, NADA – not having received the decision of the DEB – informed WADA of this case in order for it to take action.
13. WADA, by letter dated May 6, 2008, based on art 3.1 of the IIHF 2004 Disciplinary Regulations, requested the Directorate of the 2008 IIHF Mens' World Championships to order that Mr Busch was provisionally suspended as from May 6, 2008, and WADA requested IIHF to render its decision on the provisional suspension within 48 hours upon receipt of WADA's request, ie on or before May 8, 2008. Furthermore, WADA requested the IIHF Disciplinary Committee to initiate a disciplinary proceeding against Mr Busch and to sanction him with two years ineligibility for his violation of art 6.3 (a) of the IIHF 2004 Disciplinary Regulations, starting as from the beginning of the provisional suspension of Mr Busch.
14. Section 3 of the IIHF 2004 Disciplinary Regulations, as far as relevant for the request of WADA, reads as follows:

*"3.1 The Disciplinary Committee shall act upon request by an IIHF body (Statute 21), the respective IIHF Doping Control Committee, by WADA, or by a member national association. The Disciplinary Committee must receive notification of the request within 30 days of the alleged incident having taken place. A disciplinary proceeding can also be initiated at the discretion of the Disciplinary Committee without request by other parties at any time within the limitation period (Article 3.7 below). The decision is taken by the Chairman of the Disciplinary Committee.*

*3.2 The request for disciplinary proceedings must be submitted in writing to the Secretary of the Disciplinary Committee. The Secretary must inform the incriminated party and its national association that such a request has been received or, if applicable, proceedings have been initiated by the Disciplinary Committee. The parties concerned must be informed of the alleged violation or offence and provided with all relevant documents or correspondence.*

*....."*
15. In this request for disciplinary proceeding WADA counted the 30-day deadline from the "incident" in art 3.1 of the IIHF 2004 Disciplinary Regulations as starting from when "WADA was informed of the decision taken in the matter of Mr. Florian Busch by NADA on April 21, 2008."
16. IIHF, by email dated May 7, 2008 answered WADA's request saying that IIHF "has determined that it is not in a position to act on your request for reasons noted in the attached document."
17. The document attached by IIHF to its answer is called "Florian Busch Update" and reads as

follows:

*"Upon further review, German forward Florian Busch will remain eligible to compete at the 2008 IIHF World Championship for the following reasons:*

- *There is a National Anti-Doping Code in place in Germany. Within this code, there is a requirement for each sport to set up an internal disciplinary committee, independent and arm's length from the sport.*
  - *The German Ice Hockey Association (DEB) has set up such a committee which accepted and acted upon the Florian Busch case, making a decision on April 15, 2008 which was accepted completely and acted upon by the player.*
  - *There is an appeal process set out in the German Anti-Doping Code for all decisions made by these sport-specific internal disciplinary committees. Until all such appeal routes are exhausted, this matter remains a concern within Germany and the various sport and anti-doping agencies there.*
  - *As of May 7, 2008, no agency or sport body within Germany has appealed the decision of the German Ice Hockey Disciplinary Body. Until all such appeals of the German National Anti-Doping Code have been pursued and completed, the IIHF is not in a position to interfere in decisions with its Member national Associations.*
  - *The player Florian Busch thus remains eligible to compete in the 2008 IIHF World Championship in Canada."*
18. In the same email, sent by the President of IIHF on May 7, 2008, IIHF expressed its concern *"with the apparent inaccurate and incomplete information provided to" WADA "by the German National Anti-Doping Agency (NADA) which forms the basis of" WADA's "request to the IIHF".*
19. On May 7, 2008, WADA wrote a letter to IIHF stating that it assumed that the IIHF letter dated May 7, 2008 was considered as a *"decision"* in the understanding of the IIHF Disciplinary Regulations which can be appealed to CAS by WADA on the basis of art 3.9 of the IIHF Disciplinary Regulations within 21 days from its notification.
20. In the same letter WADA informed the IIHF President that it had submitted a list of questions to NADA on April 29, 2008, in order to determine whether WADA has a right to appeal to CAS against the DEB decision on the basis of the NADA Anti-Doping Code. On May 4, 2008, NADA informed WADA that DEB ready to answer the list of questions after the IIHF World Championships. WADA asked the IIHF President to transmit the list of questions to DEB in order that they may provide WADA with an answer by May 8, 2008, 10 am Canadian Eastern time. The following questions were attached to this letter to the IIHF President:

**"List of questions to DEB in the frame of the Florian Busch case"**

*1. According to the NADA Code (Art. 13.2.1 and 13.2.2), WADA has a right of appeal against final decisions rendered by German national sport federations if the athlete has passed an arbitration agreement with the national federation or with the NADA.*

*a. Does such an agreement exist?*

*b. If, yes please provide WADA with a copy of this agreement (Player's license, etc).*

*2. If no such agreement exists, is there in DEB rules any right of appeal for WADA? If yes, please provide us with a copy of the applicable rules.*

*3. If the answers to questions 1. and 2. indicate that WADA has a right of appeal, please provide us with a copy of the procedural rules (deadline, etc)."*

21. WADA, in its letter to the IIHF President, assuming that he was in direct contact with the DEB representatives, indicated that in case DEB "establishes, by means of applicable rules and reliable documents, that 1) WADA has a right of appeal under their rules or 2) WADA has a right of appeal under the NADA rules, WADA will then appeal the DEB decision to CAS." On the other hand WADA emphasized that, should "DEB be unable to establish this, or should DEB not provide WADA with an appropriate answer within this set deadline, WADA reserves its right to appeal the IIHF decision to CAS on the basis of IIHF Disciplinary rules as explained above." WADA reminded the IIHF President "that as an Olympic international federation and a signatory to the World Anti-Doping Code, IIHF shall require, as a condition of membership, that the rules of its national associations are in compliance with the World Anti-Doping Code and IIHF rules.

*On that point, we stress that a refusal is to be sanctioned by a 2-year ban in accordance with both IIHF Disciplinary regulations (art. 6.4 a and b) and the World Anti-Doping Code (article 10.4.1). This 2-year ban may be reduced to a minimum 1 year ban in case of no significant fault or negligence, or even eliminated in case of no fault or negligence. However, in the present case, the fault of the athlete has already been established by DEB. However, the sanction pronounced is not compliant. The DEB decision is therefore not in line with your rules and as stipulated in IIHF Statutes (Duties of all members), IIHF may, at any time, overrule any decision of any member national association which is inconsistent with IIHF rules."*

22. By letter dated May 8, 2008, DEB referring to IIHF President's letter of May 7, 2008, and WADA's email informed of the following:

*"1.) As of 17.12.2007/12.01.2008 German NADA and the German Ice Hockey Federation (DEB e.V.) have signed an agreement on the organisation and execution of doping controls. By signing this agreement, DEB e.V. has recognized the NADA Code as binding for our field of responsibility.*

*According to Art. 10, lit. 10.1 of the NADA Code, DEB e.V. has then established a disciplinary panel that is in charge of sanctioning (see also Art. 10.7 NADA Code).*

*This panel had instituted written proceedings against Florian Busch and, finally, taken a decision on 15.04.2008 in compliance with Art. 10.3 of the NADA Code.*

*2.) The rights to appeal and the jurisdiction are covered by Art. 13 of the NADA Code.*

*As per Art. 13.1 of the NADA Code, decisions can only be appealed under the provisions of this Art. 13, in connection with the valid code of procedure.*

*The National Court of Arbitration for Sports (nationales Sportschiedsgericht) is in charge of any appeals. It will be replaced by the "ad-hoc-Schiedsgericht des Deutschen Sportbundes (ad-hoc-Court of Arbitration of the German Sports Confederation – DSB) until the National*

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*Court of Arbitration was established. The rules of arbitration of the respective court of arbitration are applicable.*

*The kick-off event for establishing the National Court of Arbitration for Sports was held on 28.04.2008. Until today, only three (3) out of a total of 55 national Sports Federations (33 olympic and 22 non-olympic federations) have signed an agreement with the German Institute for Arbitration in Sports (DIS), which is the governing body of the National Court of Arbitration for Sports.*

*As far as the "ad-hoc Court of Arbitration of the German Sports Confederation" is concerned, please refer to the Statutes of DOSB.*

*The following persons/parties are entitled to appeal according to Art. 13.2.2 of the NADA Code:*

- a. the athlete or any person who can conclusively prove to be violated in his/her own rights by the adjudication (in our opinion, NADA is entitled to appeal)*
- b. the other party involved in the proceedings (in our opinion, DEB e.V.)*
- c. the respective International Federation (in our opinion, the IIHF)*
- d. WADA*

*3.) According to Art. 13.2, last paragraph, the decisions of the National Court of Arbitration for Sports and the "ad-hoc Court of Arbitration of the German Sports Confederation" can be appealed to CAS after having fully exhausted all national remedies.*

*4.) This means, NADA and WADA can appeal to the National Court of Arbitration for Sports or the "ad-hoc Court of Arbitration of the German Sports Confederation", independent of the existence of an athlete's agreement.*

*5.) The Statutes and By-laws of DEB e.V. do not cover any rights of WADA. This is, in our opinion, not necessary as these WADA rights are covered within the NADA Code, which both, the DEB e.V. and the athletes comply with.*

*....".*

23. On May 9, 2008, WADA, represented by Dr. Marius Breucker, attorney-at-law, Stuttgart, Germany, appealed the DEB decision of April 15, 2008 to the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation and requested the court to set aside the DEB decision and sanction Mr Busch instead with a two-year period of ineligibility because of refusal and order him to bear the costs of the proceeding and of taking a sample. The appeal was based on art 13 NADA Code read together with the letter of DEB to WADA dated May 8, 2008. With regard to the anti-doping rule violation and the sanction, the appeal referred to arts 2.3 and 11.5.1 read together with art 11.3.1 NADA Code.
24. Art 13 NADA Code, as far as relevant for the case at hand, reads as follows:

*"Article 13: Appeals*

*Appeals according to this chapter fall under the jurisdiction of the National Court of Arbitration for Sports. Until the establishment of the National Court of Arbitration for Sports*

*its jurisdiction is exercised by the Ad-hoc Court of Arbitration of the German Sports Confederation. The procedure is ruled by the arbitration rules of the respective court of arbitration.*

### *13.1 Decisions Subject to Appeal*

*Decisions made under the NADA Code or rules of a union pursuant to the NADA Code may be appealed only as set forth by the provisions of this article read together with the applicable procedural rules.*

...

*Before an appeal is commenced, any post-decision review provided in the union's rules must be exhausted and unless such internal review procedure is unreasonable for the person/organisation concerned, in particular if the internal review procedure is delayed or does not fulfil the requirements of a fair procedure under rule of law.*

### *13.2 Appeals from Decisions Regarding Anti-Doping Rules Violations*

#### *13.2.1 Jurisdiction*

*Appeals from final decisions of a national sport confederation or of NADA fall within the jurisdiction of the National Court of Arbitration for Sports, irrespective of whether the athlete belongs to an international or national testing pool if the athlete has concluded an arbitration agreement with the national union or NADA. The procedure is ruled by the arbitration and procedural rules of the National Court of Arbitration for Sports.*

*If the athlete has concluded arbitration agreements at the same time, which found the jurisdiction of the Court of Arbitration for Sport (CAS) and of the National Court of Arbitration for Sports, first the appeal must be submitted to the National Court of Arbitration for Sports.*

*The parties to an arbitration agreement, which founds the jurisdiction of the National Court of Arbitration for Sports, can agree to the immediate appeal to CAS.*

*Decisions of the National Court of Arbitration for Sports can be appealed to CAS. Appeals to ordinary courts are not admissible.*

#### *13.2.2 Persons Entitled to Appeal*

*In cases of decisions involving an athlete belonging to an international testing pool the following parties shall have the right to appeal:*

- a) The athlete ...;*
- b) The other party to the procedure which led to the decision;*
- c) The national union concerned and any other Anti-Doping Organization under whose rules a sanction could have been imposed;*
- b) The International Olympic Committee ...;*
- e) WADA.*



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*In cases of decisions involving an athlete belonging to a national testing pool the following parties shall have the right to appeal:*

- a) The athlete ...;*
- b) The other party to the procedure which led to the decision;*
- c) the international federation concerned;*
- d) WADA.*

*...".*

25. Art 2.3 NADA Code reads as follows:

*"Refusing, or failing without compelling justification, to submit to Sample collection as authorized by the NADA Code or other applicable anti-doping rules or otherwise intentionally evading Sample collection".*

26. Art 11.5.1 NADA Code provides as follows:

*"Refusal to Submit to Sample Collection or Tampering*

*For violations of article 2.3 or article 2.5 the Ineligibility periods set forth in article 11.3.1 shall apply respectively. For the rest the provisions of article 11.3.3 apply accordingly."*

27. Arts 11.3.1 and 11.3.3 NADA Code read as follows:

*"11.3.1 For the following violations of anti-doping rules;*

- presence of Prohibited Substance or its Metabolites or Markers in an athlete's bodily specimen;*
- ...*

*the sanction shall be:*

- first violation: Two years' Ineligibility*
- second violation: Lifetime Ineligibility.*

*With regard to the length of the period of Ineligibility, apart from this the particular circumstances of each case, the degree of fault and the adequacy of the period of Ineligibility with regard to the anti-doping rules violation shall be considered according to the following provisions.*

*11.3.3 If an athlete establishes in an individual case that he or she bears no fault or no negligence, then the period of Ineligibility may be reduced, but the reduced period may not be less than one-half of the minimum period of Ineligibility otherwise applicable. ...".*

28. IIHF did not answer the letter of WADA dated May 8, 2008.

29. On May 9, 2008, WADA filed an appeal with the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation requesting a sanction of a two-year period of ineligibility for

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Mr Busch because of violation of art 2.3 NADA Code, which was declared applicable by DEB.

30. The Ad-hoc Court of Arbitration of the German Olympic Sports Confederation rendered its decision on December 3, 2008 and found that Mr Busch intentionally refused to submit to sample collection, which would justify the imposition of a two-year period of ineligibility pursuant to the WADC and the German NADA Code. DEB, however, had failed to implement the NADA Code and it could not be assumed that the NADA Code had been recognized by Mr Busch, since DEB has failed to bind Mr Busch to its rules by athlete's declaration. Thus, no legal basis was given in order to sanction Mr Busch as requested by WADA. Therefore, the appeal filed by WADA was dismissed.

### III. PROCEEDINGS BEFORE THE CAS

#### 1. Written submissions of the parties

31. On May 27, 2008, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS") *"in order to safeguard its right in this matter, in particular in the event that the appeal filed by WADA before the German Court of Arbitration for Sport would not be admissible"*. WADA challenged the appealed decision of IIHF, submitting the following requests for relief:

*"1. The Appeal of WADA is admissible.*

*2. The Decision of the IIHF rendered on May 7, 2008 in the matter of Mr. Florian Busch is set aside.*

*3. Mr. Florian Busch is sanctioned with a two-year period of ineligibility starting on the date on which the CAS Award will enter into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Florian Busch) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

*4. WADA is granted an award for costs."*

32. Pursuant to arts R32, R37 and R44.3 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code"), WADA requested that this appeal procedure be stayed until the National German Court of Arbitration for Sports renders its final decision on the appeal filed by WADA and pending before the National German Court of Arbitration for Sports. WADA held that the German Court decision was to be rendered on the same context of facts as the IIHF decision appealed before the CAS and that it was *"in the interest of the fight against doping that decisions rendered on similar facts by different bodies shall be consistent."*
33. On May 30, 2008, Counsel to the CAS requested IIHF to inform the CAS Court Office whether IIHF agrees to suspend the CAS proceedings until the German National Court of Arbitration for Sport has rendered its decision. By letter dated June 6, 2008, President and Secretary General of IIHF answered as follows:

*"As the President of the IIHF noted in the IIHF E-Mail the IIHF – due to lack of competence – was and is not in a position to impose at this stage any sanction against Respondent 2. The*

*IIHF, therefore, contends that CAS is not competent to hear a claim filed by Appellant against the IIHF at this stage, but that rather Appellant and/or the German Anti Doping Agency should pursue this case in Germany in accordance with the applicable rules.*

*The IIHF has no reason to prevent Appellant and/or the German Anti Doping Agency from filing an appeal with the German National Court of Arbitration for Sports and is not interested to being involved, in parallel, in CAS proceedings that are based on the same subject matter. In IIHF's view it would rather be more effective to wait and see what the outcome of the proceedings with the German National Court of Arbitration for Sports will be. In the IIHF's view it may well be that once that decision will be known, Appellant may withdraw the present claim.*

*For these reasons and without prejudice to any right of defence, in particular the right to raise the defence of lack of jurisdiction, and subject to the next sentence, the IIHF herewith agrees to have the present proceedings stayed until the German National Court of Arbitration for Sports has rendered a final and enforceable decision (i.e. until possible appeals filed against the decision have become final and enforceable). The IIHF expects that due to the stay of the present proceedings, Respondents do not have to appoint any arbitrator at this stage and that until continuation of the proceedings no court fees or other fees will have to be advanced.*

*...".*

34. By letter dated June 9, 2008, Counsel to the CAS informed the parties that the proceeding was stayed until the German National Court of Arbitration for Sports has rendered its decision.
35. On December, 16, 2008, WADA filed the statement of appeal in the case at hand against the award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation dated December 3, 2008. WADA submitted to CAS the following prayers for relief:

**"Request for relief**

*WADA hereby respectfully requests the CAS to rule that:*

*1. The Appeal of WADA is admissible.*

*2. The award of the "Ad-hoc-Schiedsgericht des DOSB" rendered on December 2, 2008 in the matter of Mr. Florian Busch is set aside.*

*3. Mr. Florian Busch is sanctioned with a two-year period of ineligibility starting on the date which the CAS Award will enter into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Florian Busch) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

*4. WADA is granted an award for costs."*

36. Since WADA's request mentions the date of December, 2, 2008 as the date of the award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation, but appendix 11 bears the date December 3, 2008, the Panel understands WADA's prayers for relief as referring to the award of appendix 11 of its statement of appeal and therefore, to the award rendered (in writing) on December 3, 2008.
37. On December 18, 2008, Counsel to the CAS asked the parties for their agreement to

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consolidate this procedure with the procedure *CAS 2008/A/1564 WADA v/IIHF & Busch*, as proposed by WADA, based on the close context of the facts of the two cases, and to have them decided by the same panel of arbitrators.

38. By letter dated December 23, 2008, DEB asked for an extension of the deadline for the nomination of its arbitrator and stated that, according to its understanding, the award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation is final and not appealable. DEB asked CAS to dismiss the appeal of WADA. In a further letter dated the same day DEB requested an extension until January 15, 2009 of the deadline to inform submit its position in relation to the proposed consolidation of the two CAS procedures. Since WADA did not object, this new deadline was granted by Counsel to the CAS on December 24, 2008.
39. By letter dated January 13, 2009 IIHF informed the CAS that *"IIHF does not agree to consolidate the two procedures since we believe that the elements of dispute in the two cases are distinctly different."*
40. As a consequence of this IIHF letter the procedures *CAS 2008/A/1564 WADA v/IIHF & Busch* and *CAS 2008/A/1738 WADA v. Deutscher Eishockey-Bund e.V.*, later joined by Mr Busch, were to be treated as separate cases.
41. By letter dated January 20, 2009 WADA proposed to the CAS and the other parties in both procedures to have the same panel appointed. IIHF agreed by letter dated January 27, 2009. DEB and Mr Busch did not react within the set deadline or a second deadline of two days, thereafter. The CAS having informed the parties so by letter dated January 29, 2009, considered the non-reaction as DEB's and Mr Busch's tacit agreement to the decision of both cases by the same panel.
42. When composing the CAS Panel, Counsel to the CAS by letter dated February 4, 2009 drew the attention of the parties to the remarks made by the arbitrator nominated by DEB and Mr Busch, Dr Martin Schimke in the "Acceptance and Statement of Independence" form. There Dr. Schimke stated. *"I have been appointed Co-Arbitrator in a current CAS-case pending by WADA. I regularly provide legal advice to the German Professional Ice Hockey League (DEL), most recently in connection with the cooperation agreement between DEL and the "Deutsche Eishockey Bund e.V." (DEB). This involved warnings to the DEB due to alleged non- and improper performance of obligations laid down in the said cooperation agreement. In this regard, it cannot be excluded that DEL would retain me to also act externally (officially) towards the DEB in the future."* There was no challenge of the independence of Dr Schimke by the parties within the set deadline of seven days after the ground of challenge has become known.
43. On February 2, 2009 WADA filed its Appeal Brief in the case at hand containing a statement of the facts and legal arguments accompanied by supporting documents, and repeated its prayers for relief from its statement of appeal.
44. WADA's submissions, in essence, may be summarized as follows:
  - IIHF as the international federation governing ice-hockey is a signatory of the WADC.
  - DEB is the German national federation for ice-hockey and provides by §§ 1.3 and 1.5.1 lit 1 of the DEB Statutes that IIHF statutes, bylaws, regulations and official rules are an integral part of the DEB statutes.

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- Mr Busch is an international ice-hockey player and member of the German national team.
- In order for Mr Busch to participate in competitions organized by IIHF, Mr Busch on December 13, 2003, December 20, 2004, April 22, 2006, April 26, 2007 and May 1, 2008 completed and signed an IIHF "Player Entry Form" and agreed thereby to abide and observe the IIHF Statutes, Bylaws and Regulations. The same forms were signed by the DEB. Both, thus, regularly confirmed that Mr Busch was "*under jurisdiction*" of DEB.
- Mr Busch "*is therefore bound to abide by and comply with DEB rules and regulations, including the rules and regulations of IIHF, which are incorporated by reference into DEB's rules (in this respect see CAS 2007/A/1370 & 1376 FIFA & WADA v/CBF, STJD & Dodô, §§ 71-72)*".
- The Ad-hoc Court of Arbitration of the German Olympic Sports Confederation only analyzed sanctioning according to and compliant with the NADA Code. WADA does not contest the findings of this court that "*DEB failed to implement the NADA-Code and that this set of rules was not applicable*" in the case of Mr Busch. WADA holds, however, that the Ad-hoc Court of Arbitration of the German Sports Confederation "*erred in not applying to Mr. Florian Busch the rules and regulations of IIHF, which are integrated into DEB's regulations. For the avoidance of doubt, WADA submits that IIHF regulations are applicable to all players bound to comply with such rules at all time, and not only during IIHF events.*"
- Therefore, the IIHF regulations are applicable in the present case. DEB regulations may also be applicable, inasmuch as they do not conflict with IIHF rules and regulations.
- On the date of the violation of anti-doping rules by Mr Busch the 2003 IIHF Statutes and the 2003 IIHF Bylaws were in force. On the date of the appealed decision (December, 3, 2008), the 2008 IIHF Statutes and Bylaws were applicable.
- Referring to general principles of Swiss law "*procedural rules enter into force immediately and apply also to cases that may be governed on the merits by a former version of law*". WADA adduces precedents of CAS jurisprudence having applied this principle. WADA holds, that "*any procedural issues, such as the admissibility of the appeal by WADA or the deadline to appeal, shall be governed by the 2008 IIHF Statutes and 2008 Bylaws*".
- On the merits, due to the principle of the prohibition of retroactive application of laws, with the exception of the principle of *lex mitior*, the 2003 IIHF Bylaws and the 2004 IIHF Disciplinary Regulations apply.
- The Ad-hoc Court of Arbitration of the German Olympic Sports Confederation based its jurisdiction on the express agreement in writing of the parties dated May, 8, 2008.
- In a letter dated May 8, 2008, DEB confirmed that NADA and WADA were entitled to appeal the DEB decision in the case of Mr Busch to the Ad-hoc Court of Arbitration of the German Sports Confederation. DEB further recognized that "*the decisions of the National Court of Arbitration for Sports and the "ad-hoc Court of Arbitration of the German Sports Confederation" can be appealed to CAS after*

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*having fully exhausted all national remedies*". Thus, DEB expressly agreed that WADA was entitled to appeal to CAS against the award of the latter arbitration court.

- The statement of this award that it is "*final*" confirmed "*that the legal remedies available to WADA according to the German sports regulations have been exhausted*." WADA's appeal to CAS, thus, is admissible according to art R47 of the Code.
- WADA refers to Bylaw 1407 of the 2008 IIHF Bylaws (as in force from July 2008) entitling WADA to have at all times "*the right to appeal and impose additional sanctions in accordance with the WADA Code*" when a player has been sanctioned for an anti-doping rule violation by a "*Member National Association or other authority*". The award at hand may therefore be appealed to CAS "*according to the IIHF Bylaws in force at the date of such award*".
- German law recognizes WADA's right of appeal against decisions by a "*national reviewing body*" such as the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation as per art 13 WADC due to having signed art 4 UNESCO Convention against Doping in Sport.
- DEB rules and regulations do not provide for a specific deadline for submitting an appeal to CAS. Thus, art 55 2008 IIHF Statutes apply. WADA has observed the 21 days deadline and has also submitted its appeal brief timely. WADA's appeal, thus, is admissible.
- Mr Busch has violated bylaw 1407 of the 2003 IIHF Bylaws. This provision is applicable to Mr Busch "*as the IIHF Bylaws are an integral part of DEB regulations*".
- Mr Busch's refusal is established as shown by the statement of appeal. Mr Busch did not have any compelling justification. "*Therefore, the violation by Mr. Florian Busch of articles 1407 of the 2003 IIHF Bylaws, 6.4 (a) of the IIHF Disciplinary Regulations and 2.3 of the World Anti-Doping Code is established, as rightfully held by DEB and the "Ad-hoc-Schiedsgericht des DOSB."*
- The sanction to be imposed according to arts 6.4 (a) and 6.4 (b) of the IIHF 2004 Disciplinary Regulations for Mr Busch's anti-doping rule violation is a two-year period of ineligibility. A reduction of this period is possible, if exceptional circumstances defined by the regulations are given, but the reduced period of ineligibility could not be less than one year.
- For the period to be reduced an athlete must show "*that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relationship to the doping offence.*"
- The fact that Mr Busch asked to undergo to a doping test later on that day does not constitute a circumstance which could justify a reduction of the otherwise applicable sanction. In the time between 12:30 and 17:00 Mr Busch would have been able to undertake steps in order to mask the use of a prohibited substance ingested by him. Furthermore, postponing an out-of-competition test adversely affects the chances of detecting possible prohibited substances taken by the tested athlete. Thus, the ordinary two-year suspension was applicable.

45. On February 12, 2009, IIHF informed the CAS in the case *CAS 2008/A/1564 WADA v/IIHF & Busch* that it had decided not to participate in the procedure. IIHF repeats its arguments that *"it was not in a position to impose any sanctions on Mr Busch due to lack of competences in the IIHF Statutes & Bylaws and IIHF Disciplinary Regulations."*

*The relevant provisions which enable the IIHF to review decisions taken by its Member federations or any other competent body within the territory of its Member federations have now been introduced to the IIHF Statutes & Bylaws. This Statutes & Bylaws revision was implemented at the IIHF General Congress in Montreal, Canada at the end of May 2008. As a consequence, the IIHF will, in future, be entitled to review decisions such as the one taken by the German Ice Hockey Federation in the Busch Case.*

*Given the fact that the IIHF was not competent to review the decision taken by the German Ice Hockey Federation in the Busch Case, the IIHF neither wishes to be involved nor to take a position in this matter."*

46. On February 19, 2009 DEB filed its Answer to the Appeal and requested CAS to rule that:

- "1. The complaint is turned down.*
- 2. The plaintiff bears the costs of the procedure."*

47. DEB's submissions may be summarized as follows:

- DEB opposed the consolidation of the two cases.
- The decision of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation was final, thus, no appeal to CAS is admissible. This follows from the text of number 10 of the award which reads as follows: *"This award is final, with reservation of § 1059 ZPO"* (German Civil Procedure Code).
- § 1059 ZPO relates to an application to an ordinary court to set aside the award of a court of arbitration and mentions only six reasons for such right to address an ordinary court, the first four reasons upon reasoned application, the last two upon statement of the court:
  - a) One of the parties was not legally capable to conclude the arbitration agreement or the parties have concluded an arbitration agreement which is considered to be invalid according to the applicable law;
  - b) The applicant was not informed sufficiently of the nomination of an arbiter, of the arbitration procedure or of any other reason which hindered him/her to use legal tools;
  - c) The award relates to a dispute not covered by the arbitration agreement or arbitration clause or contains decisions transgressing the limits of the arbitration agreement;
  - d) The composition of the arbitration court or its procedure did not correspond to a provision of the respective book of the ZPO or to the admissible party agreement and given that such issue had an influence on the award;
  - e) The matter of the dispute is not apt to arbitration under German law;

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f) The recognition or execution of the award would lead to a result which violates the public order (ordre public).

- In the case at hand none of the above reasons is given; apart from that an application to set aside the award needed to be submitted to an ordinary court;
- The letter of DEB dated May 8, 2008 referred to by the Appellant, only repeated the text of art 13 NADA Code (version 2006) and cannot be interpreted as any part of an arbitration agreement between the parties; there existed no arbitration agreement between WADA and the German Institute of Arbitration in Sports (DIS) or with regard to the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation at that moment.
- DEB referred to a correspondence of June 9, 2008 to the legal office of the German Olympic Sports Confederation, attached to its Answer to the Appeal before CAS, which shows that only at that moment it declared ready to have the jurisdiction of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation examined instead of the National Court of Arbitration of Sports according to art 13 NADA Code, which has not yet been established; DEB also drew the attention of this legal office to the fact that the German Sports Confederation (DSB) did not exist anymore and was merged with the National Olympic Committee (NOK) to the German Olympic Sports Confederation (DOSB); further to that, Art 13 para 1 sentence 1 of the NADA Code provides that for the arbitration procedure, the arbitration rules (Schiedsordnung) of the court shall be applied after the conclusion of an arbitration agreement between the parties. Such arbitration agreement did not exist at that time and continues not to exist at the date of the DEB Answer to the Appeal before CAS. The DEB's readiness in principle to accept the jurisdiction of the (non-existent) Ad-hoc Court of Arbitration of the German Olympic Sports Confederation did not extend to acceptance of the court's sphere of jurisdiction including its arbitration rules (Schiedsordnung).
- DEB referred to a subsequent letter to the same legal office, dated July 10, 2008 and also attached as exhibit, which confirmed that *"an arbitration agreement fulfilling all formal needs and corresponding to the high requirements of the Supreme Federal Court of Germany to this end was not concluded between the parties"*.
- DEB submits the Constitution Order of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation dated September 12, 2008, which was signed by both parties and which referred to application of the arbitration rules of the court, adopted at a time, when the German Sports Confederation still existed, and on book 10 of the ZPO. Apart from this, the court could act upon its own discretion.
- § 11 of the Arbitration Rules (Schiedsordnung) of the Ad-Hoc Court of Arbitration of the German Olympic Sports Confederation, attached as exhibit, reads as follows: *"Effects of an award: The award is final and has the effects of a court decision entered into force between the parties"*.
- The award of the Ad-hoc Court of Arbitration of the German Sports Confederation did not include a provision deviating from this § 11 of the Arbitration Rules of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation, but decided accordingly as can be seen from number 10 of the award. There is also no respective agreement between the parties.



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48. WADA, by letter dated March 2, 2009, and DEB, by letter of the same day advised that they did not request a hearing to be held. WADA requested, however, that the award be rendered simultaneously with the award in the case *CAS 2008/A/1564 WADA v/IIHF & Busch*. DEB repeated that there continued to be no arbitration agreement between the parties founding the jurisdiction of the CAS. In the opposite, the parties have agreed that the award of the Ad-hoc Court of Arbitration of the German Sports Confederation shall be final.
49. On March 9, 2009 Mr Busch filed a Request for Intervention in this case and asked the CAS Panel to accept the application for intervention as being in time with reference to the fact that Mr Busch, due to a change of his domicile, had received the submissions including the exhibits produced by WADA only on 24 February 2009 and had never officially received the Statement of Appeal of WADA in the present case. Also that CAS had neither informed Mr Busch of the possibility of intervention, nor did the CAS invite Mr Busch to intervene. Further to that, Mr Busch required CAS to decide by Preliminary Order:

*"that CAS has no jurisdiction to hear the appeal filed by WADA, and the statement of appeal is not admissible."*

50. Mr Busch submitted the following requests for relief:

*"The Second Respondent hereby respectfully requests the CAS to rule that:*

- 1. Mr. Busch is accepted as Second Party.*
- 2. The Appeal of WADA is dismissed.*
- 3. The costs of the arbitration, to be determined and served on the parties by the CAS Court Office, shall be borne by WADA.*
- 4. WADA is ordered to pay the Respondents' legal and other costs incurred in connection with this arbitration."*

51. Mr Busch's submissions are as follows:

- The CAS is not competent to decide on the case, since there is manifestly no valid arbitration agreement between the parties.
- WADA has appealed the decision of DEB dated April 15, 2008 with the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation. This arbitration court was not an institutional one, foreseen in the Statutes of DEB, but had been chosen by the parties *"via a special "ad-hoc" arbitration agreement, by the way without any participation of Mr. Busch"*.
- There is such agreement between WADA and DEB, confirmed by the Constitution Order of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation dated September 12, 2008.
- There was no agreement between WADA and DEB through the letter of DEB dated May 8, 2008 to allow WADA a special appeal to CAS. The prior correspondence was superseded by the jointly agreed Constitution Order dated September 12, 2008. The Ad-hoc Court of Arbitration of the German Olympic Sports Confederation only held in its award *"that it was competent to decide the case (as agreed by the parties with*

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*letter of 8 May 2008, the Constitution Order and once again expressly in the beginning of the hearing on 28 November 2008), but has certainly not confirmed an extraordinary admissibility of a further appeal by WADA with CAS."*

- According to section III.13 of the Constitution Order the parties wished to apply the Arbitration Rules of the German Olympic Sports Confederation (DOSB-Schiedsgerichtsordnung) and in addition the provisions of the 10<sup>th</sup> book of the German Civil Procedure Code (ZPO) (arts 1025 – 1066), which regulate the arbitration procedure.
- Pursuant to art 11 Arbitration Rules of the German Sports Confederation and confirmed by section 10 of the award dated December 3, 2008 the award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation is final and has binding effect, *"as it is a final ("rechtskräftige") decision rendered by a state tribunal (Articles 1055, 322 ZPO)"*. Therefore no appeal with CAS against that award is admissible. *"The only exception for challenging the award was a request under the restricted preconditions pursuant to Article 1059 ZPO with the German Higher Regional Court (Oberlandesgericht)"*. WADA did not use such remedy.
- WADA gets entangled in a contradiction by reasoning a request for stay in the parallel arbitration CAS 2008/A/1564 WADA v IIHF & Busch by holding *"that decisions rendered on similar facts by different bodies shall be consistent"* and *"on the other side when now challenging the fact that the national decision, searched by WADA, is final and binding."*
- Mr Busch was neither under jurisdiction of DEB nor of IIHF, thus, neither DEB Anti-Doping Regulations nor IIHF rules were applicable to him.
- By means of attaching Mr Busch's Response in the parallel arbitration, Mr Busch declared that neither the IIHF Statutes nor other IIHF Regulations, nor a specific arbitration agreement prove such right to appeal by WADA.
- Multiparty arbitration requires a valid arbitration agreement with all parties, the Second Respondent has signed, however, only the IIHF Player Entry Form which is limited to IIHF Championships and *"valid only for players to get "a right of entry to or participation" (Entry Form lit.b and i) and to become "eligible to participate in an IIHF Championship" (Rule 204 IIHF By-laws)"*.
- National events fall under the jurisdiction of national rules and regulations and are not covered by the IIHF Entry Form declaration. *"This is true especially for any national disciplinary regulation of doping control."*
- Art 47 2003 IIHF Statutes does not provide a right for WADA to appeal against decisions of IIHF bodies.
- WADA, in its appeal, cannot go beyond its request with IIHF. WADA, by letter dated May 7, 2008 has only requested IIHF to provisionally suspend Mr Busch and to initiate a disciplinary proceeding against him. WADA is not allowed to skip such internal disciplinary proceeding not initiated by IIHF by starting a CAS procedure. The CAS, if it finds the appeal to be admissible, can only decide on the initial requests of WADA.

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- IIHF cannot suspend players in the case of refusal to submit to sample collection, but only players who's A sample has tested positive and who take part in international games and competitions (arts 6.2 read together with 6.4 a) 2004 IIHF Disciplinary Regulations). Furthermore, such suspension is only possible if there is in question an infringement of the IIHF Statutes, Bylaws or Regulations (art 1001 2003 IIHF Bylaws).
- Doping controls can be decided by IIHF only for IIHF competitions (art 1400 2003 IIHF Bylaws). Despite of art 1403 2003 IIHF Bylaw there no special provision exists (IIHF Doping Control Regulations) apart from the Bylaws and Disciplinary Regulations providing for sanctions for doping.
- Outside of the IIHF competitions the IIHF Council could order out-of-competition or out-of-season doping controls only on players of IIHF member national associations or players under the control of their member national associations (art 1401 para 2 lit b and c 2003 IIHF Bylaws). Referring to the award of the Ad-Hoc Court of Arbitration of the German Olympic Sports Confederation (sections 8.1, 8.3), the Second Respondent was neither a member of DEB, nor under control of DEB.
- WADA had no right to request the initiation of an IIHF disciplinary proceeding, because the Second Respondent, not being under the jurisdiction of IIHF, could not and had not violated an IIHF anti-doping rule. Irrespective of this, also, the deadline of 30 days from the incident would have been missed by WADA, since knowledge of the incident is not required (art 3.1 IIHF Disciplinary Regulations).
- The appeal of WADA against the decision of DEB dated April 15, 2008, was not addressed to an institutional national arbitration court, foreseen by art 11 DEB Statutes or art 13.2.1 NADA Code, but to a special arbitration court based on a special ad-hoc agreement, and without participation of the Second Respondent. WADA had agreed to such ad-hoc arbitration agreement with DEB, then confirmed by the Constitution Order of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation dated September 12, 2008, duly signed by the parties and the arbitrators.
- Contrary to the finding of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation Mr Busch has not committed any anti-doping rule violation, in particular under IIHF jurisdiction. The doping control officer was asked in vain by Mr Busch to explain to him the potential consequences for a refusal. *"Apparently the officer himself did not know the provisions of the NADA-Code, at least he was not willing to give such necessary explanation."* Also Mrs Ulrike Spitz in the NADA office, called by Mr Busch after the officer had left, could not explain the rules to him or assist otherwise. The doping control officer violated his obligations under appendix 2 section 2.2 NADA-Code.
- The NADA-Code was not binding on Mr Busch, since he was not under the jurisdiction of DEB, and consequently not under the jurisdiction of the NADA.

52. DEB agreed to this intervention by letter dated March 20, 2009

53. WADA requested the CAS by reply dated the same day to rule that:

*"1. Mr. Florian Busch is allowed to participate in the proceeding CAS 2008/A/1738 as a*

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*party.*

*2. The requests of relief of Mr. Florian Busch are dismissed.*

*3. WADA hereby further confirms its requests for relief as per its Appeal filed on February 2, 2009."*

54. In its reply dated March 20, 2009 WADA contested Mr Busch's submissions that he was not under the jurisdiction of DEB or IIHF by listing, with exhibits, 85 games of the German national ice-hockey team at which Mr Busch took part for DEB since 2006. In the period between November 2007 and May 2008 Mr Busch played at least 14 games with the DEB national team. Since the beginning of his DEB national team membership, Mr Busch had completed and signed IIHF entry forms for several competitions, thereby stating that he was under the jurisdiction of DEB. Furthermore Mr Busch did not contest the DEB decision of April 15, 2008. Mr Busch's alleged lack of knowledge of the consequences of a missed test and his alleged unsuccessful attempts to get an explanation from the doping control officer is contradicted by the latter's report and the DEB decision and Ad-hoc Court of Arbitration's award. Further to that Mr Busch is an experienced international-level athlete, who took part in World Championships and Olympic Games and "*who even complains of having been subject to too many out-of-competition doping controls.*"
55. The Panel by letter to the parties dated March 24, 2009 informed the parties of its decision to admit Mr Busch as Second Respondent.
56. Upon request of the First Respondent he was authorised by the CAS to submit to CAS the complete case file before the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation. The complete case file was submitted to CAS on April 20, 2009. Apart from the documents already included in the parties' submissions, the file consists of a complete version of the NADA-Code, of an extended arbitration request (appeal) dated May 28, 2008, including 15 attachments, of a further extended arbitration request (appeal) dated May 30, 2008, including attachments already part of the CAS file, and of three further letters of the Second Respondent dated June 9, 2008, June 12, 2008 and June 20, 2008 all of them concerning the constitution of the arbitration court. A further exchange of letters before the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation (July 3, 2008, July 9, 2008, July 11, 2008, July 14, 2008, July 15, 2008) related to the joint nomination of one arbitrator by DEB and Mr Busch. A letter dated July 15, 2008 of Mr Sturm, the attorney of Mr Busch, made clear that Mr Busch considered the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation not to be competent to deal with him and did not subject to this proceeding. This letter is followed by a last letter relating to the composition of the court (July 16, 2008). A letter dated September 16, 2008 of the president of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation contains the Constitution Order of the court as well as the Procedural Order N° 1. Both orders were agreed to by WADA by letter dated September 25, 2008, which extended its appeal by letter dated September 30, 2008. By this letter WADA *inter alia* withdrew its request to sanction the athlete due to the fact that Mr Busch had declared through his attorney that he feels not to be subject to sanctions of DEB and is not ready to accept the jurisdiction of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation. Attached to this letter are to be found: The agreement between NADA and DEB concerning the organisation and performance of doping controls dated December 12, 2007 and January 01, 2008; a decision of the Disciplinary Committee of the German Athletics Federation in another case of refusal, where the respective athlete was sanctioned by two-year period of ineligibility; and one further such case of sanction for refusal

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in Germany by reference to the national NADA anti-doping report 2007. Party letters dated September 29, 2008, October 2, 2008 and October 9, 2008 referred to the acceptance of the Constitution Order and the execution of Procedural Order N° 1. Procedural Order N° 2 dated November 6, 2008 set the date for the hearing and ruled on evidence and hearing procedure. On October 20, 2008, DEB submitted its answer to the appeal requesting the dismissal of the appeal and containing two attachments with regard to a cooperation agreement between DEL and DEB dated December 23, 2005. By letter dated November 11, 2008 DEB informed the court that Mr Busch continued to refuse to sign a DEB-athletes agreement concerning the fight against the misuse of drugs, the text of which is attached to this letter. Party letters dated November 22, 2008 and November 27, 2008 related to appearance and statement of witnesses for the hearing. It follows from the last letter that Mr Busch and Mrs Rummel have been advised by the attorney of Mr Busch not to appear as witnesses before the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation. The last document of this file is the award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation dated December 3, 2008. DEB requested the CAS Panel to include the whole file in the CAS file which decision was deferred by the Panel to the hearing in order to have the opinion of the other parties heard before.

## 2. The hearing

57. A hearing was held on April 22, 2009 at the CAS premises in Lausanne. All the members of the Panel were present. The parties raised no objection regarding the constitution of the Panel, in particular did not raise any objections with regard to the independence of Dr Martin Schimke, who reported on one phone call for advice he had received from DEL since he had signed the CAS Acceptance and Independence form (see para 42 above).
58. The following persons attended the hearing:
  - For WADA Dr François Kaiser, its attorney, assisted by Mr Yvan Henzer.
  - For DEB its president and attorney Mr Uwe Harnos.
  - Mr Florian Busch and his attorney Dr. Georg Engelbrecht, assisted by Mr Klaus Sturm, local attorney of Mr Busch.
59. With the consent of the parties, the Panel authorised the hearing of the witness summoned by WADA, Mr Steffen Kursawe, by telephone for this case in the hearing for the parallel case CAS 2008/A/1564. The witness summoned by Mr Busch, Mrs Maria-Theresia Rummel, was allowed to stay in the court room after her witness statement. Mr Uwe Harnos, president of the DEB and attorney, took part at the examination and cross-examination of Mr Kursawe and Mrs Rummel.
60. The hearing was conducted in English, but the Panel, with the consent of the parties allowed flexibly for the use of German, where a person could not express him/herself in English. In such case a member of the Panel provided a summary in English. Each witness heard by the Panel was instructed by the President of the Panel regarding his/her obligation to testify truthfully subject to the consequences provided by the law. Each witness was examined and cross-examined by the parties as well as questioned by the Panel. Mr Busch was heard concerning the facts of the case as a party. The parties were then given opportunity to present their case, submit their arguments and answer the questions posed by the Panel. They focussed on the issue of jurisdiction of the CAS, on a detailed description of the incident, and on the legal basis for the sanction eventually to be imposed as well as any reasons for reduction based on the specific circumstances of the case.

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61. The Panel informed the parties that it will rule on its jurisdiction together with the merits. Thus, the request of the Second Respondent, raised in its Response dated March 9, 2009, to decide by Preliminary Order that the CAS has no jurisdiction to hear the appeal filed by WADA was dismissed since the Panel found that the question of its jurisdiction was thoroughly linked to the merits of the case. No party objected to include the complete file of the case before the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation.

#### IV. CAS JURISDICTION AND ADMISSIBILITY

##### 1. The IIHF Player Entry Form

62. The Panel wishes to emphasize that DEB is a member of IIHF. According to section 21 of the IIHF 2008 – 2011 IIHF Statutes and Bylaws, which became applicable from July 2008 and which corresponds to section 11 of the IIHF 2003 – 2008 Statutes and Bylaws, applicable in the period before, *“IIHF member national associations are obliged to abide by the Statutes, Bylaws, Regulations and decisions of the IIHF and to undertake not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute arising and to submit any such dispute to the jurisdiction of the IIHF as specified in the IIHF Statutes, Bylaws and Regulations”*.
63. Indeed, through § 1.3 read together with § 5.1 lit 1 of its 2006 Statutes, which were in force on all relevant dates, DEB has implemented this obligation. DEB there confirms *“to be a member of the IIHF, which Statutes, Bylaws and Regulations (§ 1.5 lit 1) are recognized as obligatory by DEB and its members. DEB declares that the rules enumerated in § 1.5 lit 1 are part of the DEB Statutes”*. § 1.5 lit 1 DEB 2006 Statutes enumerates as such rules the *“Statutes, Bylaws, Regulations and the Official Rules Book of IIHF”*.
64. One of the key issues attached to the membership in IIHF is the delimitation of jurisdictions and mutual recognition of member national associations as provided for by section 10 of the IIHF 2003 – 2008 Statutes and Bylaws until July 2008 and section 17 of the IIHF 2008 – 2011 Statutes and Bylaws from July 2008. This provision reads as follows:
- “The member national associations of the IIHF shall recognize each other as being solely empowered to control ice and/or in-line hockey in their respective countries; therefore, they undertake that neither they nor any of their members will in any way have relations with non-associated bodies or one of their members, except as may be permitted by Statutes and Bylaws or with special permission of the IIHF President for limit time periods.”*
65. By having granted the DEB full membership status, IIHF has found that DEB is *“an ice hockey association that operates independently of any other organisation, controls solely ice hockey, meets minimum participation standards as specified in Bylaw 202 and has taken part in an IIHF World championship in the senior men category.”* On the one hand, full membership entitles the member national associations to participate in all activities and affairs of the IIHF, on the other hand, membership in the IIHF *“includes acceptance by such member national associations, their constituent bodies, clubs, players, members, officials and any person or body whatsoever or howsoever associated of the final and binding authority of the IIHF”*.
66. The IIHF Statutes, thus, create a direct link between themselves, the final and binding authority of the IIHF, their member national associations and the players of their member

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national associations. There is no matter of doubt that only a player falling under the jurisdiction of DEB can represent Germany in an IIHF event. Mr Busch is such a player, since he – for his first time – at the age of 18 years played in the German men's team at the W 20 I A IIHF Championship, which took place from December 14 – 20, 2003 in Berlin/Germany. Mr Busch played 85 games with the DEB national team between November 2007 and May 2008.

67. IIHF, at the occasion of an IIHF Championship, requests a player to sign a Player Entry Form. By signing such form, the player confirms *inter alia* the following:

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

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

....

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

68. The wording of lit l of the form makes clear that the temporal and material scope of the IIHF Player Entry Form is not limited to the respective event itself, in the same way as the sphere of activity and authority of IIHF goes well beyond IIHF events and covers obligations towards WADA under the WADC, such as out-of-competition and out-of-season controls, which by matter of definition cannot and must not take place during IIHF events. From such perspective, it is the objective explicatory value the text of the declaration has, seen from the perspective of an uninterested party. The Panel, thereby, considers the fact that due to the seat of IIHF in Switzerland and the applicability of Swiss law arbitration clauses or arbitration agreements must meet the requirements of art 178 of Switzerland's Federal Code on Private International Law of December 18, 1987. Arbitration agreements which contain provisions with regard to the essential elements of an arbitration agreement which are unclear or contradictory (so called "*pathological clauses*") are to be interpreted in an objective manner which provides for neutrality with regard to the results of the interpretation (see eg W. Wenger, Ch. Müller, Commentary to art 178 Code on Private International Law, 1545 at numbers 52 f with further references). If a party, like in the case at hand, argues having understood a clause in a different manner, the principle of confidence is to be applied. This means that the respective will of the parties is to be established as it could be and must have been understood *bona fide* by the respective addressee of a declaration (see Wenger/Müller, 1546 at number 55 with further references). From such perspective, the players sign to abide and observe the IIHF Statutes, By-laws and Regulations, and, in particular, decisions by the IIHF including disciplinary measures in general. They subject themselves to exclusive jurisdiction of IIHF appeal procedures and, after their exhaustion, to the jurisdiction of the CAS not only for the resolution of any dispute arising in connection with the IIHF Championship and Statutes, By-laws and Regulations, but also with regard to disputes not necessarily in any connection with the IIHF Championship and related aspects of the IIHF Statutes, By-laws and Regulations. This follows from the use of the pair "*and/or*" in the text of

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lit 1 and from the general wording of the first phrase of lit 1. Neither the IIHF Player Entry Form nor the IIHF Regulations the Player Entry Form is referring to contain any element that could be construed as to exclude the jurisdiction of the CAS.

69. The general wording chosen by IIHF is consequent given the broad objectives IIHF pursues according to sections 2 and 4 of the 2008 – 2011 IIHF Statutes and Bylaws. Section 4 of the 2008 – 2011 IIHF Statutes and Bylaws reads as follows:

**"4. Recognition by the IOC**

*The IIHF is recognized by the International Olympic Committee (IOC) as the only governing body for international ice hockey."*

70. Section 2 provides for the following IIHF objectives:

*"The objectives of the IIHF are*

- *to govern, develop and promote ice hockey and in-line hockey throughout the world*
- *to develop and control international ice hockey and in-line hockey*
- *to promote friendly relations among the member national associations*
- *to operate in an organized manner for the good order of the sport*
- *to maintain the integrity of the sport in relation to international competition*
- *to organize and control international competition*
- *to promote and actively participate in the fight against the use of doping in hockey and in-line hockey.*

*The IIHF will take all necessary measures to attain the following:*

- *to conduct its activities in accordance with its Statutes, Bylaws and Regulations*
- *to arrange sponsorships, media coverage, license rights, advertising and merchandising in connection with all IIHF competitions*
- *to establish and maintain clear jurisdiction over ice hockey and in-line hockey internationally*
- *to establish uniform international regulations and official playing rules*
- *to support the development of young players*
- *to support the development of coaches and game officials*
- *to organise all events and competitions of the IIHF*
- *to control international transfer of players*
- *to establish contacts with other sports federations and organizations*



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- *to plan, implement, evaluate and monitor information and education programs for drug-free sport."*

71. Only two of the ten measures enumerated above for IIHF to undertake are in clear connection with IIHF competitions/events. All other measures, and all seven objectives listed in section 2 of the 2008 – 2011 IIHF Statutes and Bylaws cover issues of general relevance for the sports of ice hockey and in-line hockey.
72. These general observations are relevant also, and in particular, for IIHF's commitment to the world-wide fight against doping in sport. As a signatory to the WADC, IIHF is bound by art 23.2.1 WADC 2009 and was bound by art 20.3 WADC 2003 at the relevant time. Art 20.3 WADC 2003 required the IIHF, as an international federation, to adopt and implement anti-doping policies and rules which conform to the WADC; to require as a condition of membership that the policies, rules and programs of national federations are in compliance with the WADC; to require all athletes and athlete support personnel within its jurisdiction to recognize and be bound by anti-doping rules in conformance with the WADC; to require athletes who are not regularly members of the IIHF or one of its member national federations to be available for Sample collection and provide accurate and up-to-date whereabouts information if required by the conditions for eligibility established by the IIHF or, if applicable, the major event organization; to monitor the anti-doping programs of national federations; to take appropriate action to discourage non-compliance with the WADC; to authorize and facilitate the international observer program at international events; and to withhold some or all funding of its member national federations that are not in compliance with the WADC.
73. Mr Busch signed such IIHF player entry forms on December 13, 2003, on December 20, 2004, on April, 22, 2006, on April 26, 2007 and on May 1, 2008. The Panel holds that the fact that Mr Busch has signed such player entry forms nearly every year since 2003 does not mean that the legal effect of each such player entry form is limited in time to up to no more than one year. The Panel finds, moreover, that IIHF, for administrative reasons, is also asking players, who had already previously signed such player entry form, at each IIHF Championship or IIHF event, to repeat such signature in order to guarantee that all players participating at a current IIHF Championship or IIHF event have signed an IIHF player entry form. Since IIHF can not know whether a player having been entered for an IIHF Championship or IIHF event will also be entered for the next IIHF Championship or IIHF event, or due to an injury or weakness in performance in a given year will be entered only at the next following or at a later IIHF Championship or IIHF event, IIHF can fulfil its out-of-competition and out-of-season-control commitments towards WADA only by considering athletes having once been entered by a member national association for an IIHF Championship or IIHF event as falling under IIHF jurisdiction – in parallel to the jurisdiction of the respective member national association – as long as they remain active players eligible for a future entry by their member national association to such future IIHF Championship or IIHF event.
74. The IIHF Player Entry Form, in the view of the Panel, fulfils the basic requirement for a valid arbitration clause or arbitration agreement. They *"make clear the parties' consent to arbitration, and ... define the scope and limit of that consent."* *"They cover precisely the subject matter the parties intend be submitted to arbitration."* They provide for the designated dispute resolution method and for exclusivity. Also the recommended elements of an international arbitration clause are fulfilled by reference to CAS Code such as the place of arbitration, the method of selection and number of arbitrators and the language of the arbitration (see eg P. D. Friedland, Arbitration Clauses for International Contracts. Bern 2004,

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40f; 46 f; similarly K. P. Berger, *International Economic Arbitration*. Deventer, Boston, 1993, 121 – 132; Th. E. Carbonneau, *The Law and Practice of Arbitration*. Huntington, New York, 2004, 24 f; M. Rubino-Sammartano, *International Arbitration Law and Practice*. The Hague et al 2001<sup>2</sup>, 219 – 224; P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*. London 2005, 59 – 71 numbers 2-001 – 2-035; R. D. Fischer, R. S. Haydock, *Drafting an Enforceable Arbitration Agreement*. in: D. Campbell (gen ed), *The Arbitration Process*. The Hague et al 2002, 29 – 67 (48 - 56). They suffer neither from inconsistency, uncertainty nor from in operability (see eg A Redfern, M. Hunter, N. Blackaby, C. Partasides, *Law and Practice of International Commercial Arbitration*. London 2004, 165 – 168, numbers 3-67 – 3.72).

75. WADA, thus, in the parallel case *CAS A/2008/1564 WADA v/IIHF & Busch* chose the correct remedy and addressed the IIHF Disciplinary Committee in order to reach a WADC-compliant decision for ice-hockey. The “*Florian Busch Update*” attachment to the IIHF decision dated May 7, 2008 misled WADA, however, to start parallel negotiations with DEB concerning the settings of an appeal process in Germany based on the NADA Code, in order to have the criteria of exhaustion of internal remedies fulfilled. An “*incident*” in the understanding of art 3.1 IIHF 2004 Disciplinary Regulations, even if it were a decision of a member national association, does not require any appeal on the member national association’s level.

## 2. The Ad-hoc Arbitration Agreement

76. DEB by letter dated May 8, 2008 informed WADA that the National Court of Arbitration for Sports (nationales Sportschiedsgericht) provided for by art 13.2.1 NADA Code did not yet exist and that pending that court’s establishment the Ad-hoc Court of Arbitration of the German Sports Confederation was in charge of any appeals. Since this was not an institutional arbitration court, foreseen in the DEB Statutes or NADA Code, but an ad-hoc arbitration court to be chosen by the parties based on a special “*ad-hoc arbitration agreement*”, WADA had to agree on the terms of this arbitration agreement with DEB and with Mr Busch.
77. No agreement was reached with Mr Busch. Mr Busch’s attorney, Klaus Sturm, finally declared by letter dated July 15, 2008 and addressed to DEB, that Mr Busch will not participate in the procedure and cannot be bound by the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation’s decision, because he is not subject to the Arbitration Rules of the Ad-hoc Court Of Arbitration of the German Olympic Sports Confederation and did not consent to it. This letter was made known to WADA and the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation as authorised by Mr Busch. WADA, accordingly, when having accepted the Constitution Order of that court by letter of its attorney Dr. Marius Breucker dated September 30, 2008, withdrew its additional prayer for relief for sanctioning Mr Busch, submitted on May 28, 2008.
78. The Ad-hoc Court of Arbitration of the German Olympic Sports Confederation declared its jurisdiction based on express acceptance by the parties. It held: “*First of all, it follows from an agreement in writing dated May 8, 2008. The jurisdiction of the Ad-hoc Court of Arbitration is then confirmed by the Constitution Order signed by the parties on September 22 and 27, 2008, respectively (cf in particular number 8 of the Constitution Order). The jurisdiction of this arbitration court has also been expressly accepted by the parties at the hearing on November 28, 2008.*”
79. The Panel, having studied the letter of DEB to WADA dated May 8, 2008 and the letter of Mr Breucker on behalf of WADA to the legal office of the German Olympic Sports Confederation dated June 20, 2008, finds that there was no agreement concluded between WADA and DEB

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on May 8, 2008. Mr Breucker understood the letter of Mr Harnos of DEB as an offer to initiate an arbitration procedure at the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation, which was accepted by Mr Breucker on behalf of WADA through initiating this procedure. The Panel finds, however, that the DEB letter was just an answer to the questions raised by WADA through IIHF. The second to last paragraph of the DEB letter reads as follows: *"We have been trying our best to answer all your questions as comprehensively as possible. Should you have any further questions, please do not hesitate to contact us again."* Instead of coming back to DEB, Mr Breucker initiated the arbitration procedure by Appeal dated May 9, 2008 and, thus, without such agreement.

80. The lack of such agreement dated May 8, 2008 did not hinder the jurisdiction of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation based on the Constitution Order and on the oral acceptance by the parties at the hearing. But, based on this obvious error in law with regard to the legal relevance of the DEB letter, dated May 8, 2008, WADA's then attorney signed the Constitution Order of September 12, 2008 on September 29, 2008, which did not contain any reference with regard to a possible appeal to CAS.
81. Number 13 of the Constitution Order of September 12, 2008 referred for all procedural questions, with the exceptions of numbers 14 and 15, to the application of the Arbitration Rules of the Ad-Hoc Court of Arbitration of the German Olympic Sports Confederation and on book 10 of the German Civil Procedure Code (ZPO). Apart from this, the court could act upon its own discretion.
82. § 11 of the Arbitration Rules (Schiedsordnung) of the Ad-Hoc Court of Arbitration of the German Olympic Sports Confederation reads as follows: *"Effects of an award: The award is final and has the effects of a court decision entered into force between the parties"*. The award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation dated December 3, 2008 did not include a provision deviating from this § 11 of the Arbitration Rules of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation, but decided accordingly by number 10 of the award, which reads as follows: *"This award is final under reservation of § 1059 ZPO"*.
83. It is a general understanding in arbitration law, reflected by the German legal order, that the *"award issued by the arbitrator is a final and binding decision, except in those arbitrations where the parties agree that the award will be non-binding. There is no appeal of a binding arbitration award."* (see eg R. D. Fischer, R. S. Haydock, *Drafting an Enforceable Arbitration Agreement*, in: D. Campbell (gen ed), *The Arbitration Process*. The Hague et al 2002, 29 – 67 (39); Th. E. Carbonneau, *The Law and Practice of Arbitration*. Huntington, New York 2004, 505).
84. The Panel, thus, holds that the award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation is final and binding, like a final decision rendered by a state tribunal. The award being final does not only relate to exhaustion of the legal remedies available to WADA according to the German sports regulations but extends also to art R47 of the CAS Code. Therefore no appeal against that award to the CAS is possible. Given the fact that the parties did not otherwise agree, the only exception for challenging the award was a request under the restricted preconditions pursuant to Article 1059 German Procedure Code (ZPO) with the German Higher Regional Court (Oberlandesgericht). WADA did not use such remedy.
85. Thus, the Panel declares to have no jurisdiction in this case. The appeal of WADA is inadmissible.

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**V. Costs**

86. Arts R65.1 and R65.3 of the CAS Code provide that, subject to arts R65.2 and R65.4, the proceedings shall be free; that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
87. As a general rule the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. Nevertheless, given the letter of DEB, dated May 8, 2008, which was the origin of the present proceeding and caused WADA to appeal to CAS, and considering that Mr Busch was sanctioned by CAS in the parallel case *CAS 2008/A/1564 WADA v/IIHF & Busch* for his refusal to submit to doping control, which were the facts also for this proceeding, the Panel, therefore, finds it equitable not to order WADA to contribute to the costs incurred by DEB and Mr Busch.
88. Thus, the Panel rules that all parties shall bear all of their own legal fees and other expenses incurred in connection with this arbitration.

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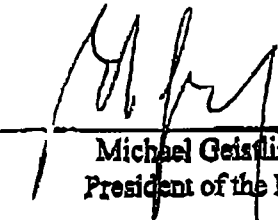
### ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of WADA against the decision of the Ad-hoc Court of the German Olympic Sports Confederation, dated December 3, 2008 is declared inadmissible due to lack of jurisdiction of CAS.
2. This award is pronounced without costs, except for the non-reimbursable Court Office fee of CHF 500 (five hundred Swiss Francs) already paid and to be retained by the CAS.
3. All parties shall bear their own legal and other costs.
4. All other motions or prayers for relief are dismissed.

Done in Lausanne, on 23 June 2009

### THE COURT OF ARBITRATION FOR SPORT

  
\_\_\_\_\_  
Michael Geistlinger  
President of the Panel