

Transcript

VI-6 W 1/22 [Kart]



Announced according to protocol on
20.1.2022

...., judicial employee (mD)
as clerk of the court
registry

Düsseldorf Higher Regional Court

IN THE NAME OF THE PEOPLE

Verdict

In the interim injunction proceedings

of Ms **Brenna Huckaby**,
United States,



Salt Lake City, Utah



Applicant for the injunction and complainant,

Rechtsanwälte Wieschemann, Harpener,
Hellweg 89, 44805 Bochum,

against

the **International Paralympics Committee e. V.** represented by the Governing Board,
Adenauer Allee 212 - 214, 53113 Bonn,

Respondent to the order and to the complaint,

Procedural agent:

Lawyers



the 6th cartel senate of the Düsseldorf Higher Regional Court, at the oral hearing on
20 January 2022, by the Presiding Judge at the Higher Regional Court Prof. Dr Egger,
the Judge at the Higher Regional Court Spiecker and the Judge at the Higher Regional
Court Dr Kühneweg

found to be right:

1. On the immediate appeal of the plaintiff in the injunction, the order of the Regional Court of Cologne of 20.12.2021- 33 O 277/21 is set aside.

The defendant is ordered - with the remainder of the application for an injunction being dismissed - to allow the plaintiff to take part in the competitions "*Para Snowboard, Banked Slalom SB-LL2, female,*" and "*Para Snowboard, Snowboard Cross SB- LL2, female*" during the sporting event Beijing 2022 Paralympic Winter Games at the suggestion of the U.S. Paralympics Snowboarding Association.

2. The defendant bears 75% of the costs of the injunction proceedings, the plaintiff 25%.
3. The amount in dispute for the injunction proceedings shall be set at 30.000 Euro

A.

The parties dispute the right of the plaintiff to participate in the Paralympic Winter Games in Beijing, which begin on 4 March 2022.

The plaintiff, who was born in 1996, had to undergo an amputation of her right leg including the thigh in 2010. She has been internationally successful in para snowboarding since 2015. In the snowboard cross and banked slalom disciplines, she won silver and gold at the World Championships in 2015 and two gold medals in 2017. At the Paralympic Games in 2018, she won a gold medal in both disciplines.

The respondent is the representative of all national Paralympic committees in the world. Its purpose, in addition to the promotion of disabled sports worldwide, is inter alia the organisation of the Paralympic Summer and Winter Games, which take place every four years. It is organised as a registered association with its seat in Germany.

A legally dependent division of the defendant is the international professional association for the sport of Para Snowboard ("World Para Snowboard").

For the sport of Para Snowboard, the respondent has issued the "World Para Snowboard Rules and Regulations 2021/2022" through World Para Snowboard. They contain general participation and qualification regulations that apply to all competitions recognised by World Para Snowboard. These include the Paralympic Winter Games, the WPSB World Championships, the WPSB World Cups and the WPSB Continental Cups. Clause 304 of the World Para Snowboard Rules and Regulations 2021/2022 sets out minimum qualification requirements that athletes must meet. According to this, athletes who are to be entered in Paralympic competitions must, among other things, be classified by World Para Snowboard. In addition, Clause 304.13 stipulates that for competitions held separately by gender, only men are eligible for men's competitions and only women are eligible for women's competitions. Third gender cases will be assigned to one gender or the other on a case-by-case basis.

In Para Sport, athletes are divided into different classes, depending on the degree of their impairment, and basically compete in their assigned class against athletes of the same class. The aim of the so-called "classification" is to determine which Para athletes can take part in Para Sport competitions at all and to ensure that, as far as possible, only athletes with comparable impairments compete against each other. This is to create fair competition conditions and equal competition opportunities as far as possible.

For Para Snowboarding, the classes "SB-LL1", "SB-LL2" and "SB-UL" are provided for separately for the gender male and female. According to the definition of the classes, athletes are to be classified in the SB-LL1 class if they have a significant impairment in one or both legs, as this is the case, for example, with an amputation above the knee. In contrast, snowboarders who have a lesser impairment in one or both legs are classified in the SB-LL2 sport class. A typical example of the SB-LL2 class is an amputation below the knee. Snowboarders in the SB-UL class have impaired balance due to an upper limb impairment. All Para Snowboard competitions in the Banked Slalom and Snowboard Cross categories will be held on the same course regardless of sport class or gender.

According to the World Para Snowboard classification system, the Claimant is classified as SB-LL1. In the 2021/2022 winter season, the Claimant achieved times in her SB-LL1 class that would have led to top rankings in both the men's SB-LL1 and women's SB-LL2 competitions.

The injunctive plaintiff is affiliated with the US National Paralympic Snowboard Association, which in turn is a member of the injunctive defendant.

In June 2019, the respondent decided on the composition of the programme and the medal competitions for the Paralympic Winter Games in 2022. It was decided that there would only be medal competitions in the women's Para Snowboard in the SB-LL2 class. The reason for this was that too few participants would probably qualify for the women's competitions in the SB-LL1 class. At the Para-Snowboard World Championships in 2019, for example, only two female athletes competed in the SB-LL1 class. For this reason, the respondent combined the women's SB-LL1 and SB-LL2 sports classes at three World Cups in the 2020/2021 season.

The programme set by the respondent for the 2022 Paralympic Winter Games is reflected in the "Beijing 2022 Paralympic Winter Games Qualification Regulations" of December 2020. They first contain general conditions of participation, which include, inter alia, the signing of an agreement in which the athletes accept all conditions of participation of the respondent (cf. p. 7 of the regulations, "IPC Conditions of Participation Agreement"). Only qualified athletes who *meet* the sport-specific classification rules will be eligible to participate (*"Only qualified athletes that meet the sport-specific classification rules and have a designated classification status (as defined below per each sport) will be eligible for entry in the Beijing 2022 Paralympic Winter Games."*). The selection of athletes will initially be based on sport-specific qualification. Further places will be awarded to under-represented national federations. In addition, a further admission procedure, the so-called "Bipartite Invitation", is intended for the sport of Para Snowboard as well as for some other sports. Invitations to the Games shall be awarded by the Respondent and the relevant International Federation at its discretion to Participants who are eligible to compete in a particular Class. The award shall normally ("typically") be made in accordance with the following principles:

- Ensuring the participation of top athletes who, due to exceptional circumstances, did not have the opportunity to qualify by other means;
- Ensure representation of athletes with high support needs;
- Ensure sufficient representation in medal competitions to guarantee the viability of the sport;
- Enabling greater representation by gender.

Matches shall be awarded by the Respondent and the relevant International Federation at its discretion to Participants who are eligible to compete in a particular Class. The award shall normally ("*typically*") be made in accordance with the following principles:

- Ensuring the participation of top athletes who, due to exceptional circumstances, did not have the opportunity to qualify by other means;
- Ensure representation of athletes with high support needs;
- Ensure sufficient representation in medal competitions to ensure the viability of the sport;
- Enabling greater representation by gender.

In addition, the defendant in the injunction can use unused participation places next to the "Bipartite Invitation" procedure at their own discretion (p. 8 "Beijing 2022 Paralympic Winter Games Qualification Regulations": "*Redistribution of unused Qualification Slots*"). The selection of those athletes who may participate in the Paralympic Games is initially not the responsibility of the respondent, but of the national Paralympic committee of the respective country. This committee also proposes athletes who are eligible for a "Bipartite Invitation". Accordingly, the approval or rejection of the proposed athlete by the defendant and its World Para Snowboard department is also issued to the national federation.

According to the "Beijing 2022 Paralympic Winter Games Qualification Regulations", a total of six competitions will be held at the Paralympic Winter Games 2022 in sport of Para Snowboard for men in the Banked Slalom and Snowboard Cross, separated into the classes SB-LL1, SB-LL2 and SB-UL. For women, two competitions, "Banked Slalom SB-LL2" and "Snowboard Cross SB-LL2", will take place. 70 men and 32 women are eligible to participate. 42 places will be awarded to male athletes and 16 to female athletes, depending on their places on the world ranking list. 11 male and 7 female places will be allocated for the purpose of adequate representation of all National Paralympic Federations. Under the "Bipartite Invitations", 17 male and 9 female athletes will be designated. According to the given timetable, the application process for the "Bipartite Invitations" will start on 10th of January 2022 ends on 7th of February 2022. The latest date for the nomination of athletes for the Paralympic Winter Games in Beijing is the 18.2.2022.

In an email dated September 13th 2021, the US Federation sent a request to World Para Snowboard to allocate the claimant a qualification place in the men's competitions in the SB-LL1 category by way of a so-called "Bipartite Invitation".

The application was rejected by email dated October 27th 2021 on the grounds that the applicant, as a woman, was not eligible to compete in the men's competitions.

With her application for an interim injunction, which was initially received by the Regional Court of Bonn on 25th November 2021, the plaintiff asserted that the defendant was obliged to admit her to the men's competitions in the SB-LL1 class, or alternatively to the women's competitions in the SB-LL2 class, at the Paralympic Games.

The plaintiff argued that the ordinary courts had jurisdiction. The extraordinary urgency of the matter resulted from the fact that the application deadlines for the Paralympic Games 2022 were imminent. The Olympics, which only take place every four years, are of outstanding personal and economic importance to her as a 26-year-old athlete. She earns her living as a professional athlete in Para Snowboarding and generates income through sponsorship contracts and bonuses from [REDACTED] annually. She covets participation in one of the scheduled competitions via the "Bipartite Invitation" procedure.

The rejection of the application of September 13, 2021 discriminates against her in an inadmissible manner on the basis of her gender and her disability. The objectives of sporting competition and fair competition pursued by the defendant do not justify the discrimination.

On January 18th, 2022, the U.S. Professional Association filed an application with the Respondent on behalf of the Claimant for admission to compete in Para Snowboarding at the Beijing Paralympic Games in 2022 for the SB-LL2 Women's Class.

The plaintiff for the injunction has requested,

1. that the defendant allows her to participate in the Para Snowboard, male, Banked Slalom SB-LL1 and Para Snowboard, male, Snowboard Cross SB-LL1 competitions during the Beijing Paralympic Winter Games sporting event 2022 at the suggestion of the U.S. Paralympic Snowboarding Association, and in case that such permission is conditional upon participation and athletic qualification in the Men's Banked Slalom SB-LL1 and Snowboard Cross SB-LL1 Qualification Events, to permit her to participate in such Qualification Events,

alternatively

2. to allow her to participate in the Para Snowboard, Banked Slalom SB-LL2, female, and Para Snowboard, Snowboard Cross SB-LL2 competitions during the Beijing Paralympic 2022 Winter Games on the proposal of the U.S. Paralympic Snowboarding Association, and in the event that such permission is conditional upon participation and athletic qualification in the Para Snowboard, Banked Slalom SB-LL2, female, and Para Snowboard, Snowboard Cross SB-LL2 qualifying events, to permit her to participate in such qualifying events,

most alternatively

3. to grant a request from the U.S. Paralympic Snowboarding Association for a place at the Beijing 2022 Paralympic Winter Games in its favour under the bipartite commission invitation allocation method, taking into account the Court's interpretation of the law.

The respondent to the injunction applied for,

dismiss the application for an interim injunction.

The plaintiff argued that the application was inadmissible because the declaration of commitment to be signed by the claimant (“IPC Eligibility Agreement”) provided for the jurisdiction of an arbitral tribunal.

Furthermore, the urgency required for the issuance of an interim injunction was lacking. Since June 2019 it had been certain that there would be no competition in the SB-LL1 class for women at the Paralympic Winter Games 2022. The interim injunction applied for was also inadmissible because it led to an anticipation of the main action. A special economic hardship of the plaintiff that could justify the issuance of a performance order was not apparent.

The plaintiff was also not entitled to the claim asserted on the merits. The plaintiff in the injunction was not a member of the defendant in the injunction and could therefore not assert a claim to participation. The decision on possible participation was not primarily the responsibility of the defendant, but of World Para Snowboard. The plaintiff did not fulfil the requirements for participation.

After referral to the competent cartel chamber of the Regional Court of Cologne, the latter rejected the application for an interim injunction by decision of December 20, 2021. In its reasoning, the Regional Court stated that the application was inadmissible because there was no ground for an injunction. The plaintiff had refuted the assumption of urgency of its application by its own conduct. The main application and the first auxiliary application also led to an inadmissible anticipation of the main action. The second auxiliary request had no enforceable content.

The plaintiff's immediate appeal, filed in due time, is directed against this, with which it continues to pursue its motions already filed in the regional court proceedings, repeating and deepening its arguments.

The defendant seeks the dismissal of the immediate appeal. In the course of the appeal proceedings, the defendant did not deny with knowledge that the plaintiff was earning her livelihood through her activities as an athlete.

According to its rules, there were no competitions for which the applicant could qualify. Assignments are made only within assigned sports classes, according to all procedures provided by the qualification rules. The classification was intended to create a system that minimised the impact of impairments on athletic performance and ensured that the athlete's success was determined by ability, fitness, strength, endurance, tactical skill and mental concentration. The aim of the classification was to ensure that, as far as possible, athletes with comparable impairments and a comparable degree of impairment competed against each other in order to create fair competition conditions and as equal a chance as possible to compete. Therefore, the individual performance times of the plaintiff were irrelevant for the decision.

When weighing up the interests, it had to be taken into account that the issuing of the requested decision would have an impact on the competition of the women in the SB-LL2 class or the men in the SB-LL1 class. The admission of the injunctive plaintiff could also lead to other athletes not receiving a "Bipartite Invitation". The injunctive respondent fears further similar lawsuits.

B.

The immediate appeal is admissible pursuant to § 567 I Nr.2 ZPO and is also well-founded with regard to the first auxiliary request, because the plaintiff is entitled to the issuance of the requested interim injunction according to §§ 935, 940 ZPO.

I.

The admissibility of the application is not precluded by the arbitration agreement submitted by the respondent.

1.

The most recent "IPC Athlete Eligibility Agreement - Confirmation of Agreement" submitted by the defendant to the plaintiff, which contains on its page two a arbitration agreement ("Acceptance of Binding Arbitration") excludes the Paralympic Games from its scope of application.

The submitted Athlete Eligibility Agreement begins on its first page with general terms of the agreement ("Agreement Terms"). The "Agreement Terms" is, based on the design of the heading in terms of typeface and size, a preamble that applies to the agreement as a whole. This is confirmed by the opening sentence of the "Agreement Terms", according to which the Agreement is an important document which regulates the participation of the athletes in all competitions of defendant and World Para Sport with the exception of the Paralympic Games and Paralympic Winter Games (*„This Eligibility Agreement ... is an important document ... that governs my participation in all IPC and World Para Sport competitions excluding the Paralympic Games and the Paralympic Winter Games ...“*). According to its wording, the opening sentence refers to the entire agreement. The exclusion of the Paralympic Winter Games from the scope of the agreement thus also applies to the arbitration clause following on page two of the agreement.

2.

Furthermore, the injunctive defendant cannot successfully invoke the arbitration agreement because it is invalid. The arbitration clause, by which the athletes submit exclusively to the jurisdiction of a panel designated by the injunctive defendant, unreasonably disadvantages the injunctive plaintiff.

It is generally recognised that in the field of international sport, arbitration agreements in favour of a specific arbitral tribunal are necessary to ensure a uniform approach with regard to the rules of sport law (BGH, judgement of 7.6.2016, KZR 6/15, marginal no. 59 - Pechstein with further references). However, in order to make the athletes' fundamental rights to the granting of justice and freedom of occupation as effective as possible, the requirements for the independence and neutrality of the arbitral tribunal must not be set too low (BGH, Judgment of 7.6.2016, KZR 6/15, marginal no. 62 - Pechstein).

The clause at issue does not meet these requirements. The determination of the members of the arbitral tribunal shall be at the sole discretion of a panel of arbitrators to be nominated by the respondent. Objective selection criteria that could ensure an independent and neutral assessment of the respective disputes are not mentioned in the arbitration clause. Accordingly, a critical examination of all legal aspects of the

dispute to be decided is not ensured (see also LG Frankfurt, judgment of 2-067.10.2020, O 457/19, NJOZ 2021, 382, 383, marginal number 17 following, with further references).

II.

The application for an interim injunction is justified with the first auxiliary application, the main application is to be dismissed.

1.

The plaintiff in the injunction has according to § 19 I GWB combined with § 33 I GWB a right to admission to the Paralympic Winter Games Beijing.

The denial of admission to the Paralympic Games 2022 constitutes an abuse within the meaning of § 19 I GWB. § 33 I GWB obliges the respondent to the injunction to eliminate the impairment. In the case of dispute, this must be done by admitting the plaintiff in the injunction to the Paralympic Games 2022.

a)

It can remain open whether the claim is (only) to be derived from the general clause of § 19 GWB, because the plaintiff in the injunction, as the end consumer, can only rely on this provision, or whether, in addition, the standard example of § 19 II Nr.1, 1. Alt. GWB, also applies because the plaintiff, as a professional sportswoman, is unfairly hindered in her capacity as an entrepreneur.

Athletes who market their sporting performance - e.g. through sponsorship - engage in an independent economic activity and are thus undertakings in the sense of antitrust law (cf. Bundeskartellamt, Decision of 25.2.2019, WuW 2019, 277, 283, marginal number 81). Thus, the plaintiff in the injunction claimed that it carried out an independent economic activity with its sponsoring contracts. Whether this is the case can be left open, because the general clause of § 19 I GWB also protects against discriminatory practices towards end consumers (The German Federal Court of Justice (BGH), judgment of KZR7.12.2010, 5/10, BeckRS Leitsatz2010,31040,3 u. Rn. 54-Entega II; Immenga/Mestmäcker/Fuchs, 6. Auflage 2019, § 19 GWB, Rn. 64a; MüKo, WettbR/Wolf, 3. Auflage 2020, § 19 GWB, Rn.27

b)

The plaintiff in the injunction has legal standing. It is irrelevant that according to clause 4.3 of the statutes of the defendant ("IPC Constitution") exclusively its members, i.e. the national Paralympic associations, are entitled to participate in the activities of the defendant. In the case of a violation of the prohibition of abuse under cartel law, the existence of a contractual relationship between the market dominator and the affected party is irrelevant (cf. also on pre-contractual obligation and monopoly association: BGH, judgement 13.10.2015, II ZR 23/14, NZG 2015, 1282,1284, marginal number 22 with further references).

c)

With regard to the admission of athletes to the Paralympic Games, the defendant has a market dominant position as their promoter and organiser.

Thus, an international sports federation organised according to the "one-place principle" is dominant with regard to the admission of athletes to the sports competitions organised by it (BGH, judgement of 7.6.2016, KZR 6/15, headnote b) - Pechstein). This also applies to the respondent to the injunction, which is a monopolist on the relevant market for the organisation of Paralympic Games.

The monopoly position is not called into question by the fact that the defendant's dependent World Para Snowboard department participates in the admission procedure. The defendant must accept the decisions and rules of its own sub-division. Moreover, the defendant in the injunction issued the "Beijing 2022 Paralympic Winter Games Qualification Regulations", which are relevant for the admission procedure, in its own name ("International Paralympic Committee").

d)

The non-nomination of the injunctive plaintiff for the Paralympic Winter Games 2022 constitutes an abuse of its dominant position by the injunctive defendant because it unfairly hinders the injunctive plaintiff.

aa)

The decision of the respondent to the injunction to deny the plaintiff the right to participate is subject to review by state courts.

It is true that the scope of judicial review of measures under association law is limited with regard to the autonomy of associations protected by fundamental rights (Art. 9 (1) German Constitution). Thus, when reviewing decisions of associations, restraint is required and a margin of discretion is to be granted (cf. OLG Frankfurt a. M., judgment of 18.7.2000, 11 U (Kart) 36/00, BeckRS 2000, 30123045). However, the Senate's power of control extends to freedom from discrimination. This is because third parties, in contrast to members of the monopoly-type association setting the rules, cannot have a say in the rules, even though these rules affect them in interests worthy of protection, such as the exercise of their profession. The interest in an objectively appropriate content is to be protected by the fact that the appropriateness of rules of so-called monopoly associations is reviewable by state courts from the point of view of good faith, both with regard to relations with members and non-members (cf. BGH, judgement of 28.11.1994, II ZR 11/94, NJW 1995, 583, 585 - Reitsport; OLG Frankfurt a. M., judgement of 18.7.2000, 11 U (Kart) 36/00; BeckRS 30123045).

Contrary to the view expressed by the respondent, not only individual decisions of the association based on association standards, but also the association standards themselves are subject to judicial review.

bb)

Based on these standards, the refusal of admission of the plaintiff to the Paralympic Winter Games unreasonably hinders her.

- (1) The refusal constitutes a substantial hindrance to the plaintiff in the injunction in the exercise of her sporting activity. The concept of hindrance is to be understood broadly and covers any market conduct that has objectively disadvantageous effects for the person concerned (see BGH, judgement of 14 July 1998, KZR 1/97, marginal no. 22, juris with further references). This is the case here. The refusal of the defendant to admit her deprives the plaintiff of the opportunity to participate in the Paralympic Games in Beijing.

(2) Not admitting the applicant to the Paralympic Games 2022 is inequitable.

Whether an impediment is unfair is determined on the basis of an overall assessment of all interests involved, taking into account the objective of the Act against Restraints of Competition, which is aimed at safeguarding of performance competition and in particular the openness of market access (vgl. BGH, Urteil vom 17.12.2013, KZR 65/12, NVwZ 2014, 817, 821, Rn. 51 – Stromnetz Heiligenhafen; MüKo, WettbR/Wolf, 3. Auflage 2020, § 19 GWB, Rn. 33). The starting point for the balancing of interests is the principle derived from the entrepreneurial freedom of action that the prohibition of abuse does not in principle prevent the norm addressee from organising its business activities at its own discretion in a way that it considers economically reasonable and correct (BGH, judgement of 31.1.2012, KZR 65/10, NJW 2012, 2110, 2112, marginal no. 29). However, due to special circumstances, the interest of those affected by the conduct of the market dominator may prove to take precedence over the freedom of the norm addressee in individual cases. When evaluating conflicting interest, the stronger the position of the dominant undertaking on the relevant market or the greater the dependency of the market opponent, the higher the requirements for the protection of the interests pursued by the dominant undertaking (see BGH, judgement of 31.1.2012, KZR 65/10, NJW 2012, 2110, 2112, marginal number 30; cf. also MüKo, WettbR/Wolf, 3. Auflage 2020, § 19 GWB, marginal no. 33).

Legitimate purposes of a sports association in the admission decision to be taken by it are in any case the protection of the integrity of sport, the practice of sport in accordance with the rules, the protection of the health and safety of the athletes, equal opportunities for the athletes, the honesty and objectivity of the competition as well as the ethical values of sport (cf. ECJ, judgment of 18.7.2006, C-519/04, EuZW para2006,593,43. - Meca-Medina). When awarding participation places for a sporting event of particularly high importance, the fair and non-discriminatory award of participation places is in the interest of all participants and the public. In addition, the association's autonomy and its interest in legal certainty and reliability of the conditions of participation must be taken into account.

In contrast, the athlete's interest in a fair and non-discriminatory individual decision with regard to participation in a sports event that is of particular importance to him or her personally is at stake.

Based on these principles, there is an unfair obstruction of the plaintiff in the injunction. If one were to follow the view of the defendant in the injunction, according to which its rules and regulations do not permit any exception, an unfair obstruction would already follow from the rules and regulations. In any case, as a monopoly association, the defendant did not sufficiently take into account the interests of the plaintiff in the injunction when making its decision.

In the specific case, the plaintiff has an outstanding interest in participating in the Paralympic Games. She has shown and credibly demonstrated that she earns her living from her sport. She essentially lives from bonuses and sponsorship. The Paralympic Games are the most attractive competition in sporting and financial terms.

The plaintiff is an athlete who has been extremely successful in the past and who has already proven in this winter season that, based on her performance, she could also consistently or at least predominantly achieve top rankings in competitions for men in the SB-LL1 class or women in the SB-LL2 class. This can be established on the basis of a comparison of the injunctive plaintiff's times with those of the men in the SB-LL1 class and the women in the SB-LL2 class, since the same competition course is used in all international para snowboard competitions, irrespective of gender and classification. It is undisputed that the claimant would have qualified for the Paralympic Games 2022 through her performances if she had been classified in either the men's SB-LL1 or women's SB-LL2 class.

The particularity of the dispute lies in the fact that the protective purpose of the admission rules and in particular of the classification system is not affected. The plaintiff in the injunction does not seek any unjustified sporting advantages. She is in comparison to both the men in class SB-LL1 and the women in class SB-LL 2 at a disadvantage in terms of physical performance. In the sport of para snowboarding contested by the claimant, men are typically more powerful due to the athleticism required and in particular also the maximum and rapid strength in the lower extremities. The same also applies to the women in the SB-LL2 class in comparison with the SB-LL1 class of the plaintiff. This already follows from the description of these sports classes, according to which classification in SB-LL1 requires a significant impairment of the lower limbs, such as an amputation above the knee, while classification in class SB-LL2 requires a lesser (*"less significant"*) impairment of the lower limbs, such as an amputation below the knee. Even if the defendant in the injunction is basically correct

in arguing that the various sports classes are not readily comparable in terms of performance, the senate is convinced that this is the case in the case of the plaintiff in the injunction by way of exception. This is because the plaintiff's impairment

corresponds to the standard example of amputation above the knee mentioned by the defendant himself, which justifies classification in class SB-LL1. According to the defendant's own definition, this weighs more heavily than the impairments that result in a classification in class SB-LL2.

The interest of the plaintiff in the injunction is not opposed by any interests of equal rank of the defendant in the injunction.

Rather, the rejection contradicts the principles set out in the "Beijing 2022 Paralympic Winter Games Qualification Regulations". According to these regulations, the qualification rules laid down are first and foremost intended to ensure that athletes who are among the world's best have the opportunity to pursue their sport at the highest level (cf. P. 3 Pont 1 "Qualification Methods: "...To ensure that the world's leading athletes receive the opportunity to perform at the highest level,..."). It also states that the fundamental ethical concept of non-discrimination should be upheld (cf. P.3 Point 2 "Qualification Methods": "...to uphold the fundamental ethical concept of non-discrimination, ...").

The fact that the plaintiff does not fulfil the general eligibility requirements of the "Beijing 2022 Paralympic Winter Games Qualification Regulations", according to which athletes can only compete in the assigned sports class are entitled to participate does not justify the rejection. It is true that the respondent correctly states that the classification system serves the legitimate purpose of determining which Para athletes can participate in Para sport competitions at all and of ensuring that, as far as possible, only athletes with comparable impairments and a comparable degree of impairment compete against each other in order to create fair competition conditions and, as far as possible, equal competition opportunities. The background to this is that Para athletes have very different impairments and different degrees of severity of impairments. Therefore, the admission regulations for the Paralympic Games rightly assume in principle that athletes are only eligible to participate in the respective sports classes in which they are classified. This serves in particular to protect the weaker participants. As already explained, however, the plaintiff in the injunction is not in need of protection. In the specific case, her exclusion leads to an unfair disadvantage for the reasons mentioned above.

The defendant has also not shown that the health protection of the plaintiff justifies its refusal. This could be the case, for example, if a different - more difficult - route were provided for the male athletes in the SB-LL1 class or for the female athletes in the SB-LL2 class than for the women in the SB-LL1 classes. However, this is not the case.

There are also no other indications that the health protection of the plaintiff would prevent her from participating in competitions for men in the SB-LL1 class or women in the SB-LL2 class.

As far as the defendant in the injunction claims that the participation of the plaintiff in the injunction would be contrary to the interest of the other athletes classified in the respective men's SB-LL1 or women's SB-LL2 class, this is not comprehensible. These athletes have a considerable advantage over the plaintiff with their physical conditions, be it as a man or as a less physically impaired woman. There is no legitimate expectation on the part of the other athletes that only athletes of the same classification will participate in their competitions. The athletes' trust is only worthy of protection with regard to the fact that the respondent ensures fair competition conditions in the sense that they do not have to compete against athletes with physical advantages. The idea of performance is inherent in international competitive sport. Incidentally, a merging of the SB-LL1 and SB-LL2 women's classes has already been tested at various competitions in the past.

It is understandable that the respondent to the injunction is interested in rules that are as clear and reliable as possible. However, it must be taken into account that the measure sought by the plaintiff in the injunction to enforce her right to participate represents the least possible interference in the autonomy of the defendant in the injunction. The plaintiff is not seeking the scheduling of (further) additional competitions, but only the participation in competitions that have already been scheduled via an invitation procedure that has not yet been completed ("Bipartite Invitation"). In any case, the "Bipartite Invitation" quotas have not yet been exhausted.

Apart from the classification, the admission of the plaintiff would meet the criteria for the award of the "Bipartite Invitation". These provide for the participation of top athletes who, due to exceptional circumstances, did not have the opportunity to qualify in any other way. This would also take into account the idea of a stronger representation of women formulated there. This also corresponds to the overarching goal of promoting gender parity as envisaged by the injunction defendant in its provisions. Women are strongly underrepresented in the plaintiff's sport in particular.

This may be due to the fact that there are significantly fewer female para-snowboarders than male para-snowboarders participating in international competition. However, the plaintiff in the injunction is an internationally successful athlete whose participation in the Paralympic Games is in line with the defendant in the injunction's goals of promoting performance and women, especially since she has already won medals at the Olympics.

The respondent has not sufficiently taken into account that even according to its own rules there are several opening clauses that allow for an appropriate consideration of cases of hardship. For example, unused participant slots can be allocated at the discretion of the respondent independently of the "Bipartite Invitation" procedure (p. 8 "Beijing 2022 Paralympic Winter Games Qualification Regulations": "Redistribution of unused qualification slots").

Furthermore, exceptions to the classification rules for athletes of the third gender is provided for. From digit 304.13.4 it becomes clear that the question of the classification of the sexes it is possible, to have an individual case decision, in which the third gender (transgender) is assigned to the gender "man" or "woman", although there is no separate starting class in these cases either. It is therefore possible for "gender non-conformists" to compete with women or men. This example shows that the general rules of the respondent also provide for discretionary decisions.

2.

Due to the unfair disadvantage of the plaintiff, she must be admitted to the women's competitions in the SB-LL2 class.

The main application for admission of the injunctive plaintiff to the men's competitions in the SB-LL1 class must be rejected.

a)

The plaintiff's main application for admission to the men's class SB-LL1 lacks the need for legal protection.

In this regard, the plaintiff stated at the hearing that she would now primarily seek admission to the women's SB-LL2 class.

This is in line with the latest proposal from the rightholder's national snowboard association in its letter of January 18th 2022. This shows that the rightholder's US association has abandoned its initial request for the rightholder to be admitted to the men's SB-LL1 competitions.

b)

The defendant is to be sentenced on the alternative request of the plaintiff in the injunction, to admit the plaintiff to the women's competitions in the SB-LL 2 class. In addition to the declared interest of the plaintiff and her US association, this is supported by the fact that this also means the least interference with the defendant's association autonomy. It is undisputed that the defendant in the injunction and its members and committees have already discussed the possibility to merge the classes SB-LL 1 and SB-LL 2 for the women's para Snowboard. This was already tested in World Cup competitions last season. The defendant in the injunction has not shown that difficulties arose during the World Cup competitions due to the merging of the classes.

3.

There is also a ground for the requested admission by way of interim injunction. The plaintiff for the injunction has explained and made credible that it is urgently dependent on the immediate fulfilment of its claim.

a)

The Paralympic Games begin on 4th march of 2022. If the plaintiff were to be referred to the main court proceedings, her opportunity to participate would be thwarted.

b)

The plaintiff in the injunction has not refuted the urgency of the regulation it seeks by its own conduct. The plaintiff in the injunction and its association took all reasonable measures in good time to enable the plaintiff in the injunction to participate in the Paralympic Games 2022.

aa)

The fact that she did not take action in 2019, when the injunctive defendant determined that there would be no competitions in the injunctive plaintiff's class, does not rebut urgency.

In this respect, it is irrelevant whether the plaintiff - as she claims - was not yet entitled to assume that her participation in the Paralympic Games was at risk at that time. For the plaintiff in the injunction does not object to the fact that in her sports class, due to the expected low number of participants. She is seeking admission to another sports class.

The admission requirements for the Paralympic Games 2022 were only determined in December 2020. At this point in time at the earliest, the plaintiff was able to realise that there would be no general admission of female athletes of the SB-LL1 class to one of the other competitions. Taking this into account, it was obvious for her to ask her national federation to apply for a special admission for her via the "Bipartite Invitation" process provided for in the rules and regulations of the defendant. This was also seen as such by her national federation, as evidenced by the application dated September 13, 2021 in which the latter initially requested the admission of the injunctive plaintiff in the men's competitions of the SB-LL1 class. The application was also made several weeks before the formal opening of proceedings on the first October 2022.

bb)

The urgency is certainly not refuted by the fact that the plaintiff filed an application for an interim injunction after the negative decision of October 21, 2021 and November 25, 2021, i.e. after about four weeks. In this context, it must be taken into account that the negative decision was not issued to the plaintiff but to its national US association and that the message had to be sent to it first. In the further course, the plaintiff, who lives in the USA, had to seek legal advice in order to finally seek legal protection before a German court through a German lawyer.

4.

The fact that the main issue is anticipated here does not prevent the claim. Anticipation of the main action is acceptable if the plaintiff is threatened with not insignificant competitive disadvantages without the fulfilment of the claim (MüKo, WettbR/Wolf, 3rd edition 2020, § 19 GWB marginal no. 208). In this case, it is unreasonable to expect the plaintiff to wait for a decision on the merits because this would frustrate the legal protection and make it impossible for it to participate in the 2022 Paralympic Games.

The plaintiff in the injunction has comprehensibly explained the considerable importance of participation in the Olympic Games for her personally. In addition to her idealistic interests, she also has a considerable economic interest in participating.

In contrast, the interests put forward by the defendant in the injunction must be considered subordinate. The respondent to the injunction has not presented any facts that give rise to concern about a concrete disadvantage for the competition or for himself. Admitting another participant to a competition that still has free places is easily possible from an organisational point of view. The sole fear on the part of the defendant of the injunction that further athletes could assert a claim for admission on the basis of the senate decision does not justify refusing to allow the plaintiff of the injunction to participate.

III.

The decision on costs is based on § 92 ZPO.

