Arbitration CAS 95/142 L. / Fédération Internationale de Natation Amateur (FINA), award of 14 February 1996

Panel: Mr. Stephan Netzle (Switzerland), President; Mr. Odd Seim-Haugen (Norway); Mr. François Carrard (Switzerland)

Doping of a swimmer (salbutamol)
Special status of salbutamol in the FINA rules
Omission to declare the use of such substance to the testing agent
Damage claim for breach of contract and infringement of personality

1. **The FINA Medical Rules provide for the application of the "strict liability" standard as an effective instrument in the fight against doping. The concept of "strict liability", as it is used in doping cases, does not imply an intentional element. There is no link between sanction and intent.**

2. **The substance salbutamol has an exceptional status in the FINA doping list: it is not completely banned; its inhalation is explicitly permitted, subject to prior notification to the relevant authorities. Therefore, the mere presence of salbutamol is not conclusive proof of a doping offence.**

3. **The failure to mention salbutamol in the doping test form may create the assumption that there is a doping offence. In the present case, the swimmer had clearly established that he had suffered from asthma for many years; that from the beginning of his sports career, the relevant medical authorities had been repeatedly informed of his use of medication containing salbutamol; that in prior doping tests, the swimmer had declared his use of salbutamol and been found negative; and that there were no indications that he had taken salbutamol other than by inhalation. These specific and exceptional circumstances justify acceptance of the swimmer's numerous records, reports and notifications about his asthma treatment as a sufficient equivalent to the declaration in the test form. Accordingly, there is no doping offence in this case.**

4. **Dismissal of the damage claim: FINA did not commit a fault or act in bad faith when it began a doping procedure after salbutamol was identified because no medication containing salbutamol had been declared in the test control form.**

In the spring of 1989, L. started having respiratory symptoms. They frequently occurred in conjunction with sports exercises. His doctor diagnosed fatigue-related asthma as the origin of the

symptoms and prescribed him a medicine in the form of inhalation containing salbutamol. The name of the medicine was Ventoline.

In March 1995, L. participated in a training camp of the national team in Cyprus. The last exercises of the camp were held on 15 March 1995. 16 March 1995 was a rest-day with only the return flight on the programme.

L. declared that he took two usual salbutamol inhalations on 15 March 1995. On 16 March 1995, as there were no exercises and he had no other symptoms, he took no inhalations during the day.

On 16 March 1995, L. and the other members of the training group got up at 6 a.m., travelled to the airport by bus and took the plane at about 9 a.m., local time. The plane arrived at destination before 5 p.m., local time. After their arrival, the test group of the National Antidoping Committee met the athletes and invited K. and L. to a doping test.

The test controller asked L. which medication he had taken in the previous ten days. L. mentioned that he had taken Berocca multivitamin products. The test controller wrote "Berocca" on the form. After that, L. signed the form at the request of the test controller.

On 19 April 1995, the Swedish test laboratory which had examined L's A-sample informed FINA that the sample contained salbutamol. The laboratory expressly mentioned that the report of salbutamol was *"... due to that the athlete has not declared any use of this drug"*. The test in itself could not give any indication as to the way salbutamol had entered the body of L. (inhalation or injection). FINA immediately informed the national Swimming Association of the matter.

According to L., on the following day, the national Swimming Association sent FINA a statement on his disease, prepared by the doctor who had been treating him, and a copy of the prescription on the basis of which he had purchased his medicine. The national Swimming Association informed FINA that it was not necessary to examine L.'s B-sample, because he was regularly taking Ventoline.

On 24 April 1995, FINA's Medical Committee gave a statement to the FINA Executive. In its statement, the Medical Committee maintained that the use of salbutamol for medicinal purposes was acceptable and it recommended sending L. and the national Swimming Association a "Warning Letter".

On 8 June 1995, a hearing organized by the FINA Executive was held in Jerusalem. L. was represented by the General Manager of the national Swimming Association and did not personally attend the hearing. According to L., he did not appear personally because he was training and considered that his presence was not necessary since adequate documentation on his use of salbutamol for medicinal purposes had already been forwarded to FINA on his behalf.

On 23 June 1995, the Honorary Secretary of the FINA, sent a fax to the General Manager of the national Swimming Association stating the following:

> *"Please be informed that the FINA Executive, in accordance with FINA Rule MED 4.17.4.1, has sanctioned [L.] of the [national] Swimming Association with two years suspension for the positive result of the*

banned substance salbutamol found at the occasion of FINA out-of-competition doping control. The suspension begins on March 16, 1995 and ends on March 16, 1997".

FINA Rule MED 4.17.4.1 provides for the following sanction:

"*Anabolic steroids, amphetamine-related and other stimulants, caffeine, diuretics, beta-blockers, narcotic analgesics and designer drugs:*

- *2 years for the first offence, and subject to subsequent testing at the discretion of the Bureau.*
- *Life ban for the second offence*".

On 28 June 1995, the national Swimming Association forwarded an appeal to the FINA Bureau, stating that L. had *"used since 1991 regularly medication for his asthmatic disease (...). A written medical notification of this disease and medication has been forwarded in 1993 to the national Anti Doping Committee".* The letter concluded: *"We refer to all documents concerning this case which shows that L. cannot be punished according to existing rules and regulation".*

The FINA Bureau informed L. by fax as follows:

"Please be informed that your appeal against the FINA Executive decision of 23 June 1995 to suspend you for two years starting from 16 March 1995 has been rejected by the FINA Bureau in a mail vote concluded on 27 July".

When L. learned of the decision, he allegedly stopped his preparation for the European championships and had no more training sessions.

On 1 August 1995, the General Manager of the national Swimming Association was informed by FINA's Honorary Secretary that L. could participate in the European championships because the decision of the FINA Bureau was not enforceable before a possible decision by the Court of Arbitration for Sport.

L. resumed his training for the European championships after a total training break of six days.

On 11 August 1995, L. appealed against the decision of the FINA Bureau.

In his appeal, L. requested that the CAS overturn the decision taken by the FINA Executive and confirmed by the FINA Bureau and, in addition, that the CAS enjoin FINA to pay him damages for a breach of contract, infringement on his personality and for loss of earnings due to the damage caused to his professional activity.

The same day, L. asked the CAS to impose a stay of execution on the decision made by the FINA Bureau concerning his suspension. On 15 August 1995, the President of the Appeals Arbitration Division of the CAS issued an Order suspending the FINA Bureau decision of 27 July 1995 until the competent Arbitration Panel had pronounced its award.

On 22-27 August 1995, L. participated in the European championships in Vienna.

L. set out further arguments concerning his damage claims in a complementary writ dated 29 September 1995 and claimed compensation for moral damages.

LAW

1. The appeal was submitted in time and in compliance with the provisions of the regulations (art. C 10.5.3 of the FINA Constitution which provides that: "*An appeal against a decision by the Bureau shall be referred to the Court of Arbitration for Sports (CAS), Lausanne, Switzerland, within the same term as in C 10.5.2.*" and art. C10.5.2 of the FINA Constitution which provides that: "*An appeal shall be submitted to the Honorary Secretary of FINA not later than one month after the sanction has been received by the member or individual sanctioned*").

2. The case presented by L. consists, in fact, of two parts which are differently regulated in the Code of Sports-related Arbitration ("the Code"), namely Appeal Arbitration Proceedings, (art. R47 ff.) with respect to L.'s appeal against the decision of the FINA Bureau to uphold the sanction, and Ordinary Arbitration Proceedings, (art. R38 ff.) with respect to L.'s claim for damages.

3. The competence of the CAS is based on art. C 10.5.3 of the FINA Constitution which is quoted above and on art. R47 of the Regulations of the CAS (as amended on 22 November 1994) which provides that: "*A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body*".

4. The competence of the CAS, in particular regarding the damage claims, is, moreover, explicitly recognized by the parties. It would be confirmed, in addition, were this necessary, by their approval of the CAS Order of procedure of 12 October 1995.

   Thus, the CAS is competent to review the decision made by the FINA Bureau and to examine the damage claims.

5. In accordance with art. R58 of the Code which provides that: "*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports body is domiciled*", art. R45 of the Regulations of the CAS which provides that: "*The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such choice, according to Swiss law....*", and with CAS Order of procedure, the Panel will apply Swiss law.

6. The parties did not authorize the Panel to decide ex aequo et bono.

7. The applicable rules in this case are the FINA rules, i.e. FINA Handbook, including the FINA Constitution and rules, in particular the Medical Rules, and the FINA Guidelines for Doping Control allegedly approved by the FINA Bureau on 5 September 1994 and issued in November 1994 (a new version was published in June 1995).

8. The applicable procedure in this case is the appeal procedure provided for by art. R47 et seq. of the Code which in art. R57 refers to R44.2 and R44.3.

I. Appeal

9. Both parties agree that the FINA rules and the FINA Guidelines for Doping Control ("FINA Guidelines") are applicable. The Panel will examine whether the behaviour of L. constitutes a doping offence according to the relevant FINA rules. If a doping offence has been established, the question remains whether the sanction was consistent with the applicable law.

10. L. accepted the result of the laboratory test, namely that the substance salbutamol was found in his body. However, he claims that he was suffering from asthma and used Ventoline, which contains salbutamol, by inhalation. L. cites the FINA Guidelines which explicitly permit the use of salbutamol by inhalation.

11. FINA alleges that L.'s use of salbutamol was not notified to the IOC Medical Commission or the FINA Medical Commission, as required by the FINA Guidelines, and that the appellant had not mentioned the medication Ventoline in the "Declaration of medication taken recently" which was filled out during the doping test. According to FINA, these duties of notification and declaration must be strictly followed. Otherwise, the detection of salbutamol is considered a definitive case of doping, since the principle of "strict liability" excludes any excuses other than prior notification to the relevant medical authority and the "declaration of medications taken" in the doping control form. Generally, FINA does not accept the defence that a banned substance has either been taken unintentionally or even given without the competitor's awareness.

12. The FINA Medical Rules ("MED") provide for the application of what is generally characterized as a "strict liability" standard as an effective instrument in the fight against doping. The CAS panels have always supported the application of such "strict liability" standard in other doping cases (see, e.g., TAS 94/129: "*The Panel (...) considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard")*. But if such a standard is to be applied, it must be clearly articulated.

13. The use of the term "strict liability" in the context of doping could be misleading: under the term "strict liability", one should understand a concept of liability similar to that of civil liability, without fault in tort, or comparable to product liability cases (see, e.g., HONSELL, Schweizerisches Haftplichtrecht, Zürich 1995, 2 f.). It does not raise the issue of guilt (or the "presumption of guilt") with respect to the applicability of disciplinary sanctions.

14. The concept of "strict liability", as it has been used in doping cases, does not imply an intentional element. (see, e.g., DALLÈVES, Doping, in: International Conference Law and Sport, Lausanne 1993, 111). Like the rules of most sports federations, FINA's MED 4.3 provides that: "*The identification of a banned substance and/or any of its metabolites in a competitor's urine or blood sample will constitute an offence, and the offender shall be sanctioned*". There is no tie between sanction and intent. The sanction is an inevitable consequence, if a doping offence has been established. Whether a severe sanction such as a two year ban may be imposed on an athlete without examining the issue of guilt and intent is not undisputed, particularly in view of art. 28 of the Swiss Civil Code (Personality rights) and art. 18 of the Swiss Penal Code (requirement of intent) (see, e.g., BADDELEY, L'association sportive face au droit, Basel and Frankfurt 1994, 240-244; VIEWEG, Doping und Verbandsrecht, NJW 1991, 1515; and DALLÈVES, Questions juridiques relatives au dopage, in Chapitres choisis du droit du sport, Geneva 1993, 119 ff.).

15. In this case, however, the question of intent is not at stake: the appellant neither contests having taken salbutamol nor does he assert having taken it unintentionally. He asserts only that the mere identification of salbutamol in his urine sample is in itself not sufficient to constitute a doping offence.

16. It is a basic legal principle, that no sanction may be applied unless an offence has been proved. This is also true for doping offences (see, IOC Medical Code, Chapter II: Guidelines for Sanctions and Penalties, p. 10 § 6: "*Such sanctions must be applied to both the guilty athlete and any support personnel associated with a proven doping offence*". See also: International Conference Law and Sport, Lausanne 1993, p. 115-116). The principle of strict liability does not exempt FINA from establishing a doping offence. On the other hand, it allows FINA to deal with the question of intent once a certain substance or act has been characterized as doping. In this case, the only issue is to determine under what conditions the identification of salbutamol may be considered as doping, and whether these conditions were met in L.'s case.

17. MED 4.3 provides that: "*The identification of a banned substance and/or any of its metabolites in a competitor's urine or blood sample will constitute an offence, and the offender shall be sanctioned*". According to MED 4.5 a substance is "banned" if it is included in the relevant FINA doping list periodically reviewed by the FINA Medical Committee.

18. The FINA doping list in force on 16 March 1995 (the date of the doping control) is part of the "FINA Guidelines for Doping Control". The doping list refers to salbutamol as follows (see p. 35 of the FINA Guidelines):

> "*The use of only the following beta 2 agonists is permitted by inhalation:*
> *salbutamol*
> *terbuline*
>
> *Any team doctor wishing to administer these beta 2 agonists by inhalation to a competitor must give written notification to the IOC Medical Commission*".

19. Usually, the mere identification of a banned substance is sufficient to establish a doping offence. However, salbutamol is different and has an exceptional status in the FINA doping list: it is not completely banned; its inhalation is explicitly permitted. Therefore, the mere presence of salbutamol is not a conclusive evidence of a doping offence (see also IOC Medical Code, Guidelines for sanctions and penalties, p. 10, which in such cases advise the interpreters of the Code: "*to be prepared to grant the benefit of the doubt in cases which, on credible evidence, afford the benefit of a reasonable doubt, (...)*"). Furthermore, inhalation may be permitted only if there is a medical necessity. This requirement is not expressly mentioned in the FINA rules but it is a strict consequence of FINA Guidelines, p. 22, last para. and p. 35, third para.

20. FINA asserts that salbutamol is permitted – and thus, that there is no doping offence – only if there was a prior notification by the team doctor. According to the FINA Guidelines, p. 35, last para.: "*Any team doctor wishing to administer these Beta 2 Agonists by inhalation to a competitor must give written notification to the IOC Medical Commission*". Such notification contributes to prove the medical necessity of the use of salbutamol. However, although a formal notification prior to a doping control is a strong evidence, it is in itself not conclusive: FINA is fully entitled to doublecheck, challenge and reject a formal notification in case of any abuse. Thus, since the mere submission of a notification form is in itself not sufficient, the medical necessity alone may constitute an exemption with respect to salbutamol. Furthermore, the Panel agrees with FINA that the admissibility of *a posteriori* notification of the medical necessity of salbutamol would encourage abuse and weaken the fight against doping. The duty of prior notification may serve as a strong deterrent against some forms of possible cheating. Therefore, the Panel agrees with FINA that one should not admit any evidence to prove medical necessity otherwise than through prior notification. The Panel also considers that the prior notification of a banned substance may lead to an exemption only if provided such an exemption is expressly stated in the relevant doping list (as is the case in FINA's doping list).

21. FINA also asserts that the absence of a declaration of salbutamol in the doping test form would also constitute a doping offence.

MED 4.11, last phrase, states that:

"*The competitor's name, country, code number and the event will be entered into the form, as well as any medication taken by the competitor during three days prior to the competition*".

Moreover, the FINA Guidelines (p. 14) state very clearly:

"*Q.: Why do I need to «Declare medication taken recently»?*

A.: The «Declaration of medication taken recently» section of the form helps the laboratory when they do their test of your sample. Everything you take, even vitamins and herb teas, should be written on this list. If you keep a list of what you are taking with you always, you can write their proper names on the form".

22. It should be noted that a declaration in the test form (which has not been designed for the salbutamol-issue in particular, but for all kinds of substances) is not in itself sufficient to turn a banned substance into a permitted one. If a certain banned substance has been identified, a prior declaration in the test form still does not justify the use of such substance. There is no

difference if the identified substance is salbutamol: if salbutamol has been found, the declaration itself neither gives evidence that its use was medically indicated nor does it show that it was applied by inhalation. The declaration essentially serves the purpose of supporting the laboratory in analysing the test sample. The absence of a declaration does not in itself constitute a doping offence. However, the Panel agrees with FINA that failure to comply with the duty to declare a certain medication in the test form may indeed raise serious doubts about the medical necessity to use that medication and even lead to the assumption that there was a doping offence. However, there may be exceptional limited situations in which such would not be the case, e.g. if a competitor can demonstrate that the use of salbutamol had been well known by the relevant medical authorities and that only exceptional and understandable circumstances led to his omission.

23. Thus a doping offence with respect to salbutamol is established if the following three requirements are met:

(1) salbutamol has to be identified in a competitor's urine or blood sample (MED 4.3),

(2) the use of salbutamol is not justified by medical necessity (see also FINA Guidelines, p. 22, last para.), such as for the treatment of asthma and respiratory ailments (see, e.g., FINA Guidelines, p. 35, third para.), which may, as a rule, be established only by prior notification,

(3) salbutamol has not been taken by inhalation (FINA Guidelines, p. 35, second to last para.).

(1) Identification of salbutamol in the test sample

24. As a principle, the burden of proof of doping rests with FINA. The first element, namely the identification of salbutamol, has clearly been proven by the relevant testing result (Appellant's exhibit 12). L. did not contest the result. He even waived his right to a B-test. If it was not salbutamol, this would inevitably lead to the stipulated sanction.

(2) Medical necessity

25. If salbutamol has been identified in a competitor's test sample, there is prima facie evidence of a doping offence (see KUMMER, art. 8 of the Swiss Civil Code, N 362 ff.). Consequently, the exception of the medical necessity of the permitted use of salbutamol has to be proven by the competitor (see GULDENER, Schweizerisches Zivilprozessrecht, p. 326).

FINA has contested neither L.'s asthma disease nor his need to take salbutamol to exercise and to compete. FINA asserts, however, that L. failed to notify the relevant medical authority about the use of salbutamol in advance.

(2.1) Prior notification

26. L. presented several medical records and other documents which showed that he suffered from asthma and had to take salbutamol to be able to exercise and to compete. However, these documents had been issued after the doping test. The Panel has already stated that, in principle, only prior notification of the medical necessity of the use of salbutamol is admissible evidence.

27. FINA's instructions with respect to notifying the relevant authorities are not very clear. Firstly, the said instructions are explicitly directed at team doctors. This indicates that the notification duty was clearly designed for competition situations. Out-of-competition, the competitor does not necessarily have to be supervised by a team doctor. The duty of notification may not, simply by interpretation, be shifted onto the competitor (or onto another person not even mentioned in the FINA doping rules). Thus the respective instruction does not adequately fit out-of-competition situations. The Panel recommends that FINA clarifies MED 4.16 (Out-of-competition controls) with respect to the duty of notification.

28. Secondly, the said instructions do not require notification of every single application of salbutamol. In the case of asthma, this would have impractical consequences. The aim of the duty of notification is to inform the relevant medical authorities that salbutamol has been prescribed for medical reasons. If the permitted use of salbutamol is well known to the relevant medical authority, there is no need to ask for additional notifications.

29. Thirdly, the instructions do not clearly state to whom the notification had to be addressed. On p. 22, the FINA Guidelines provide for communication: *"to the FINA Medical Committee either directly or through your federation (who will then transmit the information to FINA)"*. On p. 35, the IOC Medical Commission is named as an address. In its answer, the FINA acknowledges that a notification to the FINA Medical Committee *"would have been acceptable"*. In the new version of the FINA Guidelines published in June 1995, the IOC Medical Commission was replaced by *"the relevant authority"*.

30. The primary goal of the duty of notification is to certify the medical necessity of the prescription of salbutamol. This goal is certainly attained if the notification has been placed with an unbiased and recognized medical authority that has jurisdiction over a certain athlete (i.e. the medical committees of the national or the international federation or the IOC Medical Commission or the National Antidoping Committee).

31. L. had been subject to several doping tests carried out by the national Antidoping Committee as well as by the FINA. The national Antidoping Committee explicitly declared that:

"[L.] has given samples which were positive to salbutamol. He was not punished because he had given a written doctor's notification of the need of the use of inhaled salbutamol for medical purposes (asthma bronchial) to [national] Antidoping Committee".

The national Olympic Committee also confirmed that:

"both the [national] Antidoping Committee and the Medical Commission of the [national] Olympic Committee are aware of the medication used by [L]. For medication, [L] has used Ventoline, the use of which has been medically motivated and prescribed by a competent expert medical doctor".

32. Furthermore, at least two doping controls were carried out before 1995, in which L. was found negative although he had taken Ventoline containing salbutamol. During the hearing, the representative of FINA confirmed that this would not have been possible if the competent medical authority had not been in possession of a prior notification of salbutamol. There is clear evidence that prior to the doping test of 16 March 1995, the national Antidoping Commission was fully informed about L.'s need to take Ventoline.

33. Therefore, it is clearly established that L. suffered from asthma, that in general, there was a medical necessity to use salbutamol and that the relevant medical authority (namely the national Antidoping Committee) was informed well in advance of the doping control in question.

34. Under these circumstances, it can be left open whether the FINA itself was also in possession of a notification of L. medical status. However, before and after the test on 16 March 1995, L. was tested at least twice under the direct supervision of FINA. In both cases, L. mentioned Ventoline on the test form and was found negative. Following the argumentation of FINA, the mere indication of Ventoline on the test form would have been insufficient if no prior notification of L.'s medical status had been submitted to FINA.

(2.2) Declaration of medication taken recently

35. The Panel has held that the failure to mention salbutamol in the "medication taken recently"-section of the doping test form may create the assumption that there was a doping offence (No. 42). In addition, a competitor must be well aware that such a failure may involve him into a formal doping procedure with all its deplorable side-effects. It is therefore very difficult to understand why L. as a competitor of the highest level failed to comply with one of his most important professional duties and was not able to present any excuses for his negligence other than fatigue and forgetfulness.

36. However, it is well known that L.'s record indicated that he had suffered from asthma and that he had to take, by medical prescription, medication containing salbutamol, which he had to inhale. Such conditions had been known by the national sports and antidoping authorities for quite a while. Furthermore, L. had been subject to several doping tests during which he complied with the relevant declaration duties. In view of all the above circumstances, which are quite exceptional and specific to L.'s case, and since on the other hand, the Panel has no reason to believe that there was no medical necessity to use Ventoline, it considers L.'s previous records, reports and notifications as sufficient to make up for the failure to declare Ventoline on the control form in this particular doping test.

(3) Inhalation

37. If the medical necessity of the use of salbutamol has been established, there remains the question of whether L. had taken salbutamol by inhalation. As a principle, such evidence must be demonstrated by the competitor, because he seeks an exception to be applied (art. 8 of the Swiss Civil Code). However, since L. does not have the exact test result at his disposal, i.e. the dose of salbutamol in the particular sample, there is no direct evidence that he used salbutamol by inhalation. On the other hand, if a competitor can present clear evidence that he suffered from asthma, that the medication containing salbutamol was a recognized medication against asthma and that the relevant prescription provided the use of that medication by inhalation, there is a strong assumption that there was no use of salbutamol other than by inhalation.

38. L. has demonstrated his suffering from asthma and that his prescription provided for the inhalation of Ventoline. FINA has not objected nor demonstrated evidence (or even asserted) that L. had taken Ventoline in a prohibited way. Under these very particular circumstances, the Panel is sufficiently convinced that L. did not apply salbutamol other than by inhalation.

39. As a result, it is established that the use of salbutamol by L. was medically indicated, that the relevant medical authorities were informed about that medication in good time and that there is no reason to believe that L. took Ventoline other than by inhalation. Therefore, these necessary prerequisites of a doping offence under the FINA doping rules have not been fulfilled in the present case. Consequently, no sanction should be imposed. Thus, the two year sanction imposed on L. must be lifted. Under these circumstances, there is no need to examine, whether the FINA doping rules themselves comply with the applicable (i.e. Swiss) law.

II. Damage claims

40. L. alleges that the unjustified sanction by FINA deprived him of grants from the national Olympic Committee and from the national Ministry of Education and from a bonus provided by a sponsorship contract with E., and that the sanction had prevented six sponsorship contracts from being concluded. In addition, L. claims that because of the negative publicity of the doping procedure his personality's rights were violated.

L. bases his compensation claim on breach of contract and infringement of personality.

41. FINA rejects any liability for damages under both contractual and tort rules. In particular, it states that L. was unable to establish the existence of damage, that it did not break its rules by conducting a doping procedure and that there was no causal link between the alleged damage and the doping procedure.

42. In L.'s opinion, FINA violated its contractual duties towards him when it imposed a sanction although he had not committed a doping offence. However, under Swiss law, the relationship

between a federation and its members is not considered a contract (HEINI, Das Schweizerische Vereinsrecht, p. 44; BADDELEY, L'association sportive face au droit, p. 102). If there is no particular contract between a federation and a (direct or indirect) member, the Swiss courts have consistently held that the rules of contractual liability will not apply if the member claims damages from the federation (ATF 121 II 354). Instead, only the rules on tort (art. 41 of the Swiss Code of Obligations) are applicable.

43. Art. 41 of the Swiss Code of Obligations reads as follows:

"Whoever unlawfully injures another, whether wilfully or negligently, shall be liable for damages".

Therefore, the following four prerequisites have to be established by the plaintiff before damages can be awarded, namely:

- damage;
- causal connection;
- unlawfulness;
- negligence.

Damage and causal connection

44. Damage is the involuntary diminution of one's net worth. Swiss courts define damage also as the difference between the state of one's assets before and after the damaging event (ATF 116 II 444; 115 II 481; 104 II 199; HONSELL, Schweizerisches Haftplichtrecht, Zürich 1995, p. 4; KELLER, Haftplicht im Privatrecht, Bern 1993, p. 52). Lost profits are recoverable under Swiss law (OFTINGER/STARK, Schweizerisches Haftplichtrecht I, § 2 N 14). The amount of damages has to be established by the plaintiff (art. 41 I of the Swiss Code of Obligations).

45. Damages can be recovered only for the harm caused by the tortfeasor's conduct or by the act or state of some person, animal or thing for which the tortfeasor is responsible. To decide whether the tortfeasor's conduct played a sufficient part in bringing about the harm, the courts, applying the theory of adequate causation, examine the course of events as a whole. The theory of adequate causation implies that the chain of causation has not been interrupted by independent causes or by events for which the tortfeasor need not assume responsibility. If the harm results from an extraneous cause of this kind, the effect under Swiss law is to exonerate the alleged tortfeasor in whole or in part (ATF 117 V 382; 107 II 243 f.). With respect to lost profits, the plaintiff must establish a sufficient likelihood that he would have had a certain profit if the alleged unlawful act had not occurred (OFTINGER/STARK, *op. cit.*, § 2 N 14).

(a) with respect to the grants

46. L. alleges that he would have received a grant from the national Olympic Committee of 40,000 FIM and a coaching grant from the national Ministry of Education if he had reached fifth rank at the 1995 European championships in Vienna. In addition, he would have got an extra bonus of 2,500 FIM based on his sponsorship contract with E., if he had placed in the A-final of the same event. Because of the negative effects of the doping procedure he would not have been able to carry out his training as planned.

47. The Panel notes that L. was not able to present any evidence with respect to the amount of the grants and the exact conditions under which the grants are given other than his own statement. Furthermore, L. confirmed that he was given a grant of 20,000 FIM although he could not reach the fifth or sixth rank. Therefore, L. has not established that the distribution of grants by the national Olympic Committee and the national Ministry of Education depended only on the ranking at the European championships in Vienna.

48. Even if these grants had been exclusively linked to the results achieved at the 1995 European championships, the Panel cannot accept the claim that the doping procedure had such a decisive impact on L.'s preparation that he was not able to reach the fifth or sixth rank or qualify for the A-final at all. L. alleges that after the decision of the FINA Bureau, he became depressed and interrupted his schedule for six days and was unable to complete his most important training week before the championships. The Panel doubts that a training break of six days (for which L. has not presented any evidence) could have such an impact on L. An athlete's performance depends not only on his short-term training schedule but also on a number of other, more relevant factors, such as the athlete's general condition, his physical and mental state during the competition and, of course, the performance of his opponents. No references have been made to such factors. On the contrary: L. performed well in the 4 x 100 m relay at the same championships, which indicates that he must have been in good condition then.

49. Even if the alleged training break of six days were to have had a negative effect on L.'s performance, it must be stated that he was in no way compelled by the procedure to interrupt his preparation, since, at that time, he had not exhausted all the remedies provided by the FINA rules.

50. Furthermore, it is difficult to assess L.'s potential in 1995. The Panel finds it difficult to draw any conclusions from the data gathered in training. L. has not proved that he regularly reached at other competitions in 1995 a rank which was comparable to fifth place at the 1995 European championships.

51. Therefore, neither the existence nor the amount of any damage nor a causal connection between the doping procedure and the alleged loss of grants and sponsorships have been established: L. has proved neither that it was the doping procedure that prevented him from placing fifth, sixth, or eighth at the European championships nor that a fifth or sixth rank would have been sufficient to receive a grant higher than 20,000 FIM.

(b) with respect to the swimming school contracts

52. L. asserts that he lost 15,000 FIM because his 20,000 FIM contract with O. was cancelled and replaced with a 5,000 FIM contract with a local subsidiary of O. The company supports a swimming school for children. During the hearing, L. admitted that such payment covered all costs related to the school and only about 5,000 FIM would have remained as L.'s share.

53. The Panel states that L. was not able to present sufficient evidence with respect to the O.-contracts. It is questionable whether the termination of this contract was lawful. At least under Swiss law and in view of art. 6 II ECHR (presumption of innocence), it would be quite critical to cancel a sponsorship contract only because of the initiation of a doping procedure, i.e. before a sanction has become enforceable. There was no evidence presented with respect to the question of whether O.'s termination was lawful.

54. Furthermore, if O. terminated its sponsorship contract with L. because it feared a negative effect of the doping procedure on the company's image, the Panel wonders why the subsidiary of the same company had no such problems.

55. L. did not give sufficient evidence of the damage suffered by the termination of the O.-contract, and the Panel is not convinced that the doping procedure was a valid reason to cancel that contract.

(c) with respect to the failure to conclude further sponsorship contracts

56. L. claims that because of the doping procedure he and his agent were not able to conclude at least six sponsorship contracts. L. has not presented any written evidence. L.'s agent testified as a witness that he had contacted six companies and that negotiations had been started. He also stated that *"the practice is to talk and if they want to make a contract I send a letter"*. The agent did not present any draft of a sponsorship contract or letter or other document confirming any potential sponsor's interest. The Panel has no available evidence that these negotiations ever exceeded the stage of informal conversation. Furthermore, there were no clear statements as to the sponsorship amounts that would have been discussed. Under these circumstances, L. has not established any likelihood that, without the existence of the doping procedure, one of these contacts could have led to a firm sponsorship contract.

57. According to art. 42 II of the Swiss Code of Obligations, the judge may determine the damage if the plaintiff is unable to claim an exact amount. However, art. 42 II of the Swiss Code of Obligations does not allow the judge to award compensation if there is no damage (HONSELL, *op. cit.*, p. 59) or if the other prerequisites for damages such as causal connection are missing. Since L. has not established the existence of any damage, there is no reason to make any further assessment.

(d) moral damages

58. Under Swiss law, moral damages resulting from infringement of one's personality (art. 28a of the Swiss Civil Code and 49 of the Swiss Code of Obligations) are awarded only for grave and lasting infringements.

Art. 49 of the Swiss Code of Obligations reads as follows:

"Where individual inherent rights are injured, the damaged person may, where there is fault, claim compensation for damage sustained and, where the particular seriousness of the injury and of the fault justify it and has not been compensated otherwise, claim payment of a sum of money as reparation".

Although L.'s case was discussed in the media, it is not established and no evidence has been presented that this led to a lasting negative image. Also his right to compete as a swimmer, which is covered by the personality rights according to art. 28 of the Swiss Civil Code (see, e.g., BUCHER, Natürliche Personen und Persönlichkeitsschutz, N 467), was not affected, since he was never restricted from training or from participating in competitions. Furthermore, the documents submitted by L. show that he remained part of the national Swimming team and that he received a grant from the national Olympic Committee. Also, the mere fact that L. became involved in a formal disciplinary procedure does not, under Swiss law, justify the awarding of moral damages even if such a procedure had been initiated erroneously (see, e.g., BREHM, Berner Kommentar, art. 49 of the Swiss Code of Obligations, N 27), which is not the case.

59. L. claims that there was a particular infringement of his personality because of FINA's public announcement of the case. He alleges that he was informed first about his suspension by the local radio station on 27 June. FINA says that it announced its decision in a press release on 27 June, as well. The same day, the national Swimming Association organized a press conference which L. attended. However, the sequence of the public statements can be left open, since there is no indication of how L. was affected by FINA's information policy.

Unlawfulness

60. Extracontractual liability requires an unlawful act (i.e., the violation of a rule of conduct to protect, directly or indirectly, a private individual's rights. See, e.g., OFTINGER/STARK, *op. cit.*, § 4 N 1 ff.).

61. L. claims that FINA violated his rights when it initiated a doping procedure and imposed a sanction because of his taking salbutamol.

62. The Swiss Supreme Court has held repeatedly that it may be considered as an unlawful act and lead to compensation if a court or an opposing party are proceeding in bad faith (see, e.g., ATF 117 II 396; 113 Ia 107; 102 II 35). However, bad faith requires that the court acted in a

completely arbitrarily, blatantly, unsustainably, unreasonably or abusively manner (ATF 117 II 396).

63. It has not been contested that the doping test was carried out correctly and in accordance with the relevant FINA rules. The test result was accepted by both parties. When salbutamol was identified in the test sample, it was consistent with the FINA rules that L. was found positive. Since there was no indication about salbutamol on the test form, FINA was not obliged to investigate on its own initiative whether L. might claim a certain exemption. It is likely that no doping procedure would have been carried out at all if L. had filled out the test form properly. L. was aware of the fact that his omission was the decisive reason for the doping procedure. FINA did not commit a fault when it then proceeded as provided by its doping rules: it imposed a sanction and informed the athlete concerned, his federation and the public. FINA did not act in bad faith.

64. It is true that although FINA may have been informed of L.'s need to use salbutamol, at least the FINA Bureau received this information before it decided on the appeal. However, when the FINA Bureau came to its conclusion that only prior notification and prior declaration were sufficient evidence, such a conclusion was neither arbitrary nor absolutely unreasonable and can therefore not be considered as an unlawful act.

65. In a recent decision (ATF 121 II 350), the Swiss Supreme Court held that because of the monopoly position of national and international federations governing a particular sport, there exists a mutual duty of confidence between an individual athlete and a federation, even without any direct membership or contractual relation (see also, SATTIVA SPRING, Les fédérations à but idéal en droit suisse, Lausanne 1990, p. 184). A breach of trust may be considered as an unlawful act and leads to liability of the federation (ATF 121 II 355, "Vertrauenshaftung"). However, only acting in bad faith may be considered as a breach of trust. In the case before us, there is no indication that FINA acted in bad faith or broke any duties of confidence when it carried out a doping procedure as provided in complete accordance with its own rules.

Negligence

66. Since no breach of contract and no illegal conduct by FINA has been established, there is no need to examine whether FINA acted in bad faith or in a negligent manner when it carried out the doping procedure and imposed a ban on L.

On the other hand, the Panel has to emphasize the fact that the entire doping procedure – with the consequences it implied for L. – had to be initiated mainly because of L.'s own negligence. Had he not failed to report Ventoline in the test form, it is likely that there would have been no procedure.

Result

67. L. has not established that he suffered a financial loss nor that a possible loss was caused by the doping procedure. In addition, FINA has not committed any unlawful act by initiating a doping procedure when L. failed to declare his taking of Ventoline on the doping test form. Furthermore, the FINA Executive and the FINA Bureau did not act in bad faith or abusively when it decided against L. and imposed the sanction provided in the FINA rules. Therefore, the necessary prerequisites to award damages are not present.

The Court of Arbitration for Sport rules:

1. The appeal by L. of 11 August 1995 against the FINA Bureau's decision of 27 July 1995 is upheld.

2. The decision taken by the FINA Executive on 23 June 1995 and confirmed by the FINA Bureau on 27 July 1995 imposing a two-year suspension on L. is quashed.

3. The damage claims requested by L. are rejected.

(...)

6. The award is immediately enforceable.