1-8 W 23/25
17 O 115/25 LG Essen

Hamm Higher Regional Court Order

In the preliminary injunction proceedings

IDDA GmbH, represented by its Managing Director Lukas Dehne, Twiedelftsweg 22, 28279 Bremen,

Applicant and complainant,

Authorized representative: Dr. Schackow & Partner Rechtsanwälte PartG mbB, Domshof 17, 28195 Bremen,

against

the Recreational Scuba Training Council Europe e.V., represented by the board Oliver Mielke, Jürgen Hitzler, Gaetano Occiuzzi and Marc Caney, c/o International Aquanautic Club GmbH & Co. KG, Frintroper Str. 18, 45355 Essen,

Defendant and respondent,

Authorized representative: WTL Rechtsanwaltskanzlei, Further Straße 3, 41462 Neuss,

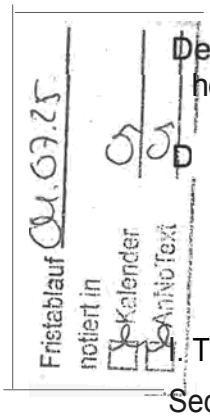
the 8th Civil Senate of the Higher Regional Court of Hamm on 20.06.2025

by the presiding judge at the Higher Regional Court Dreßel, the judge at the Higher Regional Court Dr. Henke and the judge at the Higher Regional Court Hornung:

On the immediate appeal of the applicant dated 28.05.2025, the decision of the 17th Civil Chamber of the Regional Court of Essen of 14.05.2025 (Ref.: 17 O 115/25).

The defendant is prohibited from treating the applicant as an excluded member until the final conclusion of the main proceedings, subject to a fine of up to 250,000.00 G and, in the event that this cannot be collected, an administrative detention order to be enforced against the president of the defendant, Mr. Oliver Mielke, and is obliged to allow the applicant to retain all her membership rights in the defendant without restriction until then.

The defendant shall bear the costs of the proceedings in both instances.



The amount of the proceedings for the appeal procedure is set at up to 40,000.00€ .

Reasons:

I. The applicant's immediate appeal is admissible, in particular it is admissible pursuant to Section 567 (1) No. 2 of the German Code of Civil Procedure (ZPO) and was filed on May 28, 2025 after the contested decision was served on May 15, 2025 within the two-week emergency period pursuant to Section 569 (1) ZPO, and is substantiated on the merits. The Regional Court unjustifiably dismissed the applicant's application for a preliminary injunction *with* the contested decision of 14.05.2025 and the order of non-relief of 06.06.2025. The application is

- also taking into account and assessing the submission in the defendant's statement of 17.06.2025 together with the annexes - admissible and justified.

1. The preliminary injunction application, which in any case meets the requirements of the principle of certainty pursuant to Section 253 (2) no. 2 ZPO after the clarification in the statement of 18.06.2025, is partly directed at a protective order to prohibit the treatment of the applicant as an excluded member of the defendant and partly at a performance order for the preliminary anticipation of the main case by leaving the membership rights in place and in this respect is analogously admissible pursuant to Sections 935, 940 ZPO and also admissible in other respects.

a) The defendant argues without success that the applicant lacks a general need for legal protection due to a lack of urgency. She seeks the prohibition of her treatment as an excluded member and the provisional granting of her association membership rights with the defendant until the final decision in the main action on her exclusion as a member of the defendant. Irrespective of whether the action filed on June 6, 2025 with the request for a declaration of the continuation of membership in the main action contains the appropriate legal protection objective, an effective provisional further exercise of the applicant's membership rights can only be achieved with the presently requested content of the application for provisional legal protection. In this context, the applicant rightly points out that, according to the case law of the Senate, legal defects in an exclusion resolution automatically lead to its invalidity or nullity (see Senate, judgment of 01.03.2021 - 8 U 61/20, juris para. 46), so that preliminary legal protection is successful if, on summary examination, the invalidity or ineffectiveness of the resolution to exclude the association member can be assumed. This is the case here.

b) The Senate has local, factual and functional jurisdiction to decide on the immediate appeal. Irrespective of whether the defendant - according to the applicant's submission, which is disputed by the defendant - is a monopoly association, to which antitrust regulations may in principle also apply, according to the parties' substantive submission, there are no antitrust issues in dispute that could justify the jurisdiction of the Düsseldorf Higher Regional Court - Cartel Senate pursuant to Section 22 (2) JuZuVO NRW. This is because the applicant's claim does not arise directly from antitrust law, even according to her submissions.
/competition law provisions, in particular not from a claim under antitrust law for inclusion or a mirror-image claim to remain under Sections 33 (1), 20 (5) GWB (see OLG Düsseldorf, judgment of October 1, 2014, VI-U (Kart) 6/14, juris para. 93), but follows from its membership law or Sections 826, 249 BGB. Even if Section 20 (5) GWB could also be used analogously in this respect in the context of Section 826 BGB (cf. still on Section 27 GWB old version BGHZ 63, p. 282, 285= NJW 1975, p. 771; BGHZ 93, p. 151,
154= NJW 1985, 1216), this does not justify the application of the provisions listed in Section 22 (2) JuZuVO NRW (Sections 57, 73, 83, 85, 86 and 87 GWB).

2. On the merits, the applicant has substantiated a claim for an injunction and a ground for an injunction for the provisional prohibition of her treatment as an excluded member and the retention of her membership rights with the defendant pursuant to sections 935, 936, 940, 920 (2), 294 ZPO.

a) To the extent that the defendant is not a monopoly association, contrary to the applicant's assertion, the claim for an injunction results from her existing and not effectively terminated membership status (Section 38 BGB in conjunction with Art. 9 para. 1 GG and Section 3 of the defendant's articles of association).In connection with Art. 9 (1) GG and § 3 of the defendant's articles of association), or in the case of the claimed provisional continuation as a member of the defendant as a monopoly association from §§ 826, 249 BGB (see BGH, NJW 1999, p. 1326, 1327) or § 826 BGB in connection with § 20 (5) GWB analogously. § Section 20 (5) GWB by analogy (see BGHZ 63, p. 282,
285= NJw 1si7s, p. 771; BGHZ 93, p. 151, 154= NJW 1985, 1216).

aa) On summary examination, the applicant has credibly demonstrated that she was a member of the defendant at the time of her exclusion by the defendant. This is already evident from the undisputed facts, without it being relevant whether the former shareholder-managing director Dirk Wondrak acquired shares in the applicant at the time in a formally effective manner or in breach of § 15 para. 3 GmbHG. Then the applicant was not only indisputably managed and treated by the defendant as an ordinary member for years (including invitations to and participation in members' meetings, invoicing and payment of membership fees); rather, the defendant did not make any statements in the earlier proceedings between the parties Ref. 4 O 81/20 Landgericht Essen with procedural and substantive legal effect that the claimant is a member of the defendant as IDDA, irrespective of a specific name affix such as "international disabled divers association" or "international discovery divers association", in accordance with the claim in section I) 3) of the statement of claim. This is in fact the content of clause 1. of the court settlement of the parties dated April 9, 2020, which was formally concluded there in accordance with Section 278 (6) ZPO and in the heading of which IDDA GmbH, represented by Mr. Wondrak, is listed (Annex ASt 14). On the one hand, this results in the substantively legally binding effect of the settlement agreement between the parties in accordance with Section 779 (1) BGB, which the defendant cannot successfully counter with the submission from the pre-trial letter from his procedural representatives dated 22.11.2024 (Annex ASt 5) that the settlement on the part of the defendant

was concluded as a gesture of goodwill and to avert any disadvantages. In addition, clause 1 of the court settlement, which corresponds to the claim at the time, has the procedural title effect of Section 794 (1) no. 1 ZPO.

It is undisputed that Dirk Wondrak's share in the applicant was subsequently withdrawn with final effect. It is undisputed that Mr. Lukas Dehne is now the managing director of the applicant and is entered in the commercial register of the Local Court of Bremen HRB 30467. On summary examination, the Senate therefore has no doubt that the applicant, with its current shareholder and representation relationships, was a member of the defendant at the time of the exclusion decision of 14.05.2025 and the confirmation by the defendant's appeal committee.

bb) The applicant has made it credible as predominantly probable that the resolution adopted at the defendant's general meeting on May 14, 2025 on agenda item 7 to exclude the applicant from the defendant with immediate effect is void or ineffective in the version of the decision of the Appeals Committee on summary examination for several reasons.

(1) Even in the context of the limited review competence of ordinary courts with regard to the autonomy of the association, an effective resolution requires compliance with the statutory provisions and compliance with the provisions of the association's articles of association as well as compliance with essential principles of the rule of law. Resolutions passed in violation of statutory provisions or mandatory provisions of the articles of association are null and void (see Senate, judgment of 24.06.2013, 8 U 125/12, juris, para. 61; Senate, judgment of 09.05.2016, 8 U 141/12; Senate, judgment of 01.03.2021, 8 U 61/20, juris; Scheuch, in: Reichert, Handbuch Vereins- und Verbandsrecht, 15th edition, chapter 4 para. 935 ff.). The burden of proof for the formal and material effectiveness of association resolutions lies with the association because it derives rights for itself from the resolution. This also applies in the case of a negative declaratory action brought by a member of the association because the change of party role associated with this type of action does not lead to a change in the burden of presentation and proof (Schmidt, in: Münchener Handbuch des Gesellschaftsrechts, vol. 7, 6th ed,
§ 95 para. 30). However, it is initially up to the plaintiff member to specify the points which, in his view, constitute a procedural error. Otherwise, unreasonable demands would be placed on the defendant's submissions,

whereas the plaintiff members are not significantly impaired in the exercise of their rights by the imposition of such a burden of proof. In addition, it must be examined with regard to each procedural error whether it is relevant according to the so-called relevance theory. Following decisions in stock corporation law, the Federal Court of Justice also emphasizes the question of the relevance of the procedural error for the exercise of the individual's participation rights in association law instead of the causality criterion (relating to the result of the vote). It is therefore necessary to ask whether an objectively judging member could have reached a different decision if the resolution had been handled correctly (BGH, judgment of July 2, 2007, II ZR 111/05, juris, para. 44).

(2) Measured against this standard, the resolution adopted on agenda item 7 of 14.05.2025 to exclude the applicant from the defendant with immediate effect is "null and void" on summary examination due to undisputed facts or facts made credible as predominantly probable due to formal, but in any case material defects, even after review by the appeal committee in the internal legal protection proceedings.

(a) In the original decision of May 14, 2025, according to the credible facts of the case, the applicant was denied the right to be heard under Article 103 (1) of the Basic Law and the other voting members were denied the information required for the decision on the exercise of their vote (see BGH, judgment of November 12, 2001, II ZR 225/99, WM 2002, p. 179, juris, for the AG; Scheuch, in: Reichert, Handbuch Vereins- und Verbandsrecht, 15th ed., chapter 4 para. 944). The applicant has substantiated and made credible by affidavit that the reasons listed in writing by the respondent's ethics committee for the exclusion as a member requested at the general meeting were not made available to her in advance despite several requests, but that the paper (Annex A to the minutes of 14.05.2025), which comprises a total of just under 2 pages in English and German, was "scrolled through" within around three minutes without explanations during the discussions in the digital general meeting before the vote was taken. As a result, it was not possible to ensure that the applicant had the opportunity to comment on the content in a manner that met the basic requirements of a fair procedure, nor that the other voting members were informed of the specific allegations made against the applicant and forming the basis of the application for exclusion as a member.

In his statement of 17.06.2025, the defendant merely denied in general terms that he had violated the applicant's right to be heard. According to the aforementioned distribution of the burden of presentation and proof as well as the interplay of the burden of presentation (Greger, in: Zöller, ZPO, 35th edition, Section 138 para. 8 et seq. with further references), this is not sufficient for an effective denial of the very substantiated submission of the applicant regarding the course of the general meeting.

(b) In this approach, the procedural sequence provided for in Art. 4.3.2, 4.4.1 of the respondent's Articles of Association (first warning, information and comment period no later than 15 days before the exclusion takes effect) was also not observed. The fact that the applicant and the respondent have been in correspondence since summer 2024 on the question of the applicant's effective membership does not replace the opportunity to comment on the allegations made by the Ethics Committee in this regard, but also comprehensively further, in the procedure provided for in the Articles of Association.

(c) The Senate leaves open whether this procedural violation has been remedied by the fact that the applicant had the opportunity to be heard or to submit a written statement to the Appeal Committee in the internal appeal proceedings pursuant to Art. 4.4.2 of the Articles of Association and made use of this opportunity by submitting a comprehensive written statement on the Ethics Committee's report on May 25, 2025 (Annexes ASt 22 and 23). Doubts exist in this respect against the background that the purpose of granting the right to be heard is to give the other side the opportunity to review the decision again, taking into account the submissions of the person concerned. In the present case, the applicant has not received a formal and verifiable decision from an appeals committee that can be individualized in terms of its composition and the date and manner of its decision-making in accordance with Art. 4.4.2, 4.4.3 of the Articles of Association, which would indicate that the defendant has at least dealt with the content of the applicant's arguments in the internal appeal proceedings. Rather, the applicant was only informed of the Appeals Committee's decision on May 30, 2025 (Annex ASt 24) and received an undated letter addressed personally to its managing director on June 4, 2025, ending with "Appeals Committee", according to which "all six points raised by the Ethics Committee and commented on by IDDA GmbH have been re-examined" and in which the rejection of the appeal was justified as follows:

"The *core, but not the* only one, *of the* appeal *decision is based on the development and history of IDDA's ownership. Membership of RSTC Europe* is based *on a company, not an individual, which is why the company's history had to be reviewed.*

According to the information received, the function of IODA has changed, *the ownership structure has changed and even the composition of the company has changed.* Oe/now there are zvree *entities claiming the name IDDA.* This *has never been "verified or brought to the attention of the* Board of Directors *or the General Assembly of RSTC Europe by* c/the *IDDA in accordance with Article II, Section 3. f of the Articles of Association."*

The letter fails to provide a substantive discussion of the reasons set out in detail by the applicant in its letter dated 25.05.2025 as to why, in particular due to the settlement of the parties dated 09.04.2020, the further evidence requested by the defendant for the applicant's effective membership of the defendant under the current company with the current organs was not required. The letter is just as silent on the other five reasons put forward in the Ethics Committee's letter and the applicant's admission in this regard, as well as on a proportionality assessment with regard to the warning provided for in the Articles of Association as a milder means, as is the exclusion decision of 14.05.2025 itself. Against this backdrop, there is much to suggest a lack of reasoning leading to the invalidity of the decision and a violation of the principle of the right to be heard.

(d) In any case, the decision to exclude the applicant from the defendant does not stand up to a substantive review.

(aa) In view of the grounds for exclusion listed in Art. 4.3.1 to 4.3.5, the failure to provide proof of membership, which forms the core of the exclusion, does not constitute a suitable reason for exclusion in legal and factual terms. In this respect, the defendant's reference to Art. 3.1 sentence 2 of the Articles of Association, according to which the *decision to accept or reject an application for membership* is not relevant in this respect.

does not require any justification and is made at the sole discretion of the General Meeting, as the present case does not concern the resolution to admit the applicant as a member, but to exclude her, the standard of which is based solely on Art. 4.3, 4.4 of the Articles of Association. For the reasons set out above, despite Wondrak's assertion that he continued to be a member of the defendant as a private individual instead of the applicant, there was no reason for the defendant to request the applicant to prove her formal membership, especially not with regard to Wondrak's share in the company, which was indisputably not originally acquired in a formal manner. In the correspondence between the parties since summer 2024 - also through their current procedural representatives - the claimant has made it clear why, following the effective determination of her membership in the defendant through the court settlement of 09.04.2020 and the validly resolved redemption of Mr. Wondrak's shares and the takeover of the applicant's shares and management by other persons, since 2022 Mr. Lukas Dehne, no other proof of her membership was required, in particular not the submission of a non-existent share purchase agreement of Mr. Wondrak. Instead of dealing with the content of this correct submission, the defendant initially proceeded in a legally ineffective manner with the construct of "pending ineffective membership", which is not provided for in association law and the articles of association, and then excluded the applicant without a factual basis that meets the requirements of the articles of association. Insofar as, as stated in the Ethics Commission's letter, the dispute about the effective membership between the applicant and Wondrak burdens the respondent, the latter cannot avoid clarifying this issue by excluding the applicant instead of rejecting Wondrak's request as legally unfounded.

(bb) The other five reasons listed in the Ethics Committee's paper, which are only touched on in the Appeals Committee's letter in a non-substantive half-sentence, are equally incapable of supporting the applicant's exclusion on summary examination. Annex A to the minutes of the general meeting states the following verbatim:

"Summary of the relevant reasons:

1. harmful behavior towards *the RSTC*

o IDDA GmbH has repeatedly engaged in confrontational communication with the RSTC and seirten

This *is often accompanied by threats of* zecfit/fc/ier *steps and oily escalations.*

o OiiBse *proceedoweiso* bee/nträc ff/gf *the* Aröe"/tsfähigke/t *öee Verbenda" and creates* a be/astenda *atmosphere for members and partners.*

e.g. unclear and potentially unprofitable memberships .....(see above)

3. Reputa/ionsscf'*ädenfor* r/en RSTC

o /OOA *GmbH is accused of the unlawful use of* t/zheöerrechtf/ich gesch'ützf *Tauahstendards, which is niafit compatible with the* values *of the RSTC.*

o *If the companies are not compliant*, *this* constitutes a *breach of ethical standards*. *and* recfi//iche Sfandazds.

4. Financial burden and use of resources

o *Since* 2020*,* Oer *RSTC* has paid *mnd EUR 15,öoo* to *courts and anaMcoates in The costs for the disassembly of rifit IDDA GmbH*.

o *Continued legal disputes would result in additional costs and would reduce the focus of the company.*

of the association from its aipenf/icfzen *tasks.*

5. Unresolved license, ooma/n *and naming rights*

o *Up to now, it has not been possible to trace a recfitsverbin "dliche Klämng to license, Öomain and name rights* between *IDDA GmbH and Alpha ITC GmbH/ProTec ader Öirk Wondrak.*

o *This does not* mean *that /OD@ GmbH can operate internationally as a Taucfi association.*

6. Irregularities in both rxei/ing *of Insfrufifiifior Brevets*

o As *this* is being discussed by everyone *in the* media*, it is already damaging the RSTC. EUROPE. Even if there* is no *legally binding evidence that Intrnctor brakes have been used* without *being tested."*

Apart from the fact that the managing director of the applicant commented comprehensively on these five points in his letter of 25.05.2025 without any *data* in the letter of the Appeals Committee showing any discussion of this argument, the five further reasons set out in writing are not in themselves sufficient to justify the exclusion of the applicant:

The damaging behavior alleged in paragraph 1 and the confrontational communication of the applicant remain completely generalized without any concrete example and are therefore not admissible.

The reputational damage feared by the defendant under point 3 due to the accusation of unlawful use of copyrighted diving standards made against the applicant - also without any discernible substance - does not constitute grounds for exclusion either. The defendant himself admits in the second indent to this point that this only constitutes grounds for exclusion "if the allegations are confirmed." The defendant does not set out the factual basis for a suspicion similar to a termination on suspicion.

The fact that the applicant has in the past and is currently involved in legal disputes with the defendant regarding the exercise of its membership rights and that this also gives rise to costs to be borne by the defendant in accordance with section 4 clearly does not constitute a suitable reason for exclusion, but rather the exercise of legitimate interests.

The unresolved use of license, domain and name rights by the applicant cited in point 5. is again a general aspect which, in view of the brief statement of reasons, apparently concerns the question of whether the applicant or Wondrak as a member may use these rights. However, according to the above, this does not justify the exclusion of the applicant, but rather the probable clarification of the question in her favor and to the detriment of Wondrak.

Finally, the "irregularities *in the awarding of instructor brevets"* listed under point 6. are also an accusation that remains just as generalized and for which there is no legally binding evidence according to the Ethics Commission's own written submission. The fact that "openly discussed" rumors are already sufficient to damage the reputation of the defendant can clearly not be to the detriment of the applicant without any evidence of irregular conduct.

b) Contrary to the opinion of the Regional Court in the contested decision and in the decision not to grant injunctive relief, the applicant has made a prima facie case for an injunction as predominantly probable, whereby it is not relevant to the decision whether the defendant is a monopoly association or not.

If - as in the present case - a claim for an injunction arises, the requirements for the specific submission on the reason for the injunction are less strict than in other cases, according to the case law of the Senate. It must be conceded to the contested decision that the submission in the application regarding the grounds for the injunction (p. 11 with reference to Section I, 2., i.e. pp. 2-3) initially remained rather brief and general. However, with the further substantiation in the grounds of the immediate appeal of June 5, 2025 and in the pleading of June 10, 2025, the applicant has sufficiently substantiated the particular urgency, regardless of whether the applicant could actually or at least theoretically operate its line of business under the umbrella of the alternative umbrella organizations EUF or CMAS listed by the defendant. In its decision not to grant injunctive relief, the Regional Court overstretched the requirements for the submission on the grounds for the injunction in the summary proceedings for the preliminary injunction. With the detailed and credible submission in the statement of grounds of appeal and the subsequently submitted statement of 10.06.2025, the applicant has sufficiently substantiated the grounds for the injunction.
and made credible. It is undisputed that she can continue to use her
The applicant is currently no longer able to carry out the commercial activities of the defendant's umbrella organization with its licenses, names and domains in the context of diving in cooperation with the diving instructors and customers contractually associated with it, after the defendant published the notice that the applicant may no longer advertise with its licenses, names and domains. This would mean that the applicant would lose its only business object, without it being relevant to what extent it has already suffered a loss of sales in the few weeks since the exclusion. The defendant's argument that the applicant could in future conduct her business under the umbrella of one of the two other umbrella organizations mentioned does not hold water either, irrespective of the factual details disputed between the parties. This is because the diving instructors and customers of the applicant have consciously decided to enter into contractual relationships with the applicant acting under the umbrella of the defendant with its services specifically offered under the corresponding license. There is no evidence to support the hypothesis that diving instructors and customers would follow the applicant under the umbrella of another association. On the contrary, the applicant must fear that they would look for another provider under the umbrella of the defendant. For further details, the Senate refers to the written submission of the applicant dated 05.06.2025 and 10.06.2025 made credible by Annexes ASt 16 to ASt 36.

c) With regard to the legal consequences, the Senate exercised its discretion under Section 938 (1) ZPO, taking into account the limits of Section 308 (1) ZPO, to prohibit the exercise of membership rights and to provisionally leave them in place. The threat of administrative remedies arises from section 890 (2) ZPO.

II. The decision on costs is based on Sections 567 et seq. and 97 (1) ZPO.

III. A decision on the admission of the appeal on points of law is not required against the background of Sections 574 (1) sentence 2, 542 (2) ZPO.

As a precautionary measure, the Senate would like **to** point out **that an appeal** against the present interim injunction**, which is possible without time limit and** admissible pursuant to sections 936 and 924 of the German Code of Civil Procedure (ZPO), could be lodged with the **Regional Court of Essen under case no. 17** O **115/25.**

Dreßel Dr. Henke Hornung