

CASE COMMENT

Is the Pechstein Saga Coming to an End? German Federal Court of Justice Ruling on Claudia Pechstein v International Skating Union, June 2016

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Summary and background

Speed skater Claudia Pechstein is one of the most highly decorated German athletes of all time with five Olympic gold medals, four additional Olympic and numerous world championship medals.

In early 2009, Pechstein was tested for doping prior to a speed skating event in Norway. The tests showed an increased level of reticulocytes (immature red blood cells), which a Disciplinary Commission of the International Skating Union (ISU, the respondent) considered as a proof of doping and subsequently banned Pechstein for two years.

The decisions by the Court of Arbitration for Sport and the Swiss Federal Tribunal

Pechstein and the German Skating Union (Deutsche Eisschnelllauf-Gemeinschaft (DESG)) appealed the decision of the ISU Disciplinary

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Commission before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, on the basis of an arbitration agreement signed by Pechstein prior to the event in Norway. In November 2009, the CAS dismissed the appeal.¹ Pechstein subsequently challenged the CAS decision before the Swiss Federal Tribunal (SFT) on the basis of Article 190(2) of the Swiss Private International Law Act (PILA), the SFT being the competent court to review decisions by an international arbitral tribunal situated in Switzerland, yet under very limited circumstances.²

Pechstein's challenge was dismissed in February 2010.³ A motion for revocation based on allegedly new medical evidence was dismissed by the SFT in September 2010.⁴ With that, Pechstein had exhausted all legal remedies available to her in Switzerland.⁵

Re-litigating the Pechstein case in front of German state courts

More than two years later, in December 2012, Pechstein filed a claim before a German first-instance state court, the Regional Court in Munich ('LG München'), against the DESG and ISU for damages in the amount of €4.4m (US\$6.1m at the time), submitting that the two-year doping ban handed down against her in 2009 was illegal. Pechstein filed her claim irrespective of the arbitration agreement she had signed in 2009, which provided that any dispute between her and the ISU would have to be submitted exclusively to the CAS, or the fact that the CAS had already heard and ultimately rejected her appeal, and that the CAS decision had been confirmed by the SFT.

In its decision of 26 February 2014, LG München⁶ surprisingly followed Pechstein's reasoning insofar as it rejected the arbitration plea by the defendants, finding that the arbitration agreement signed by Pechstein prior to the events in 2009 was invalid as she had no other option but to sign the agreement in order for her to be able to participate in ISU competitions,

1 CAS 2009/A/1912, 1913; award dated 25 November 2009.

2 Article 190(2) provides: 'Proceedings for setting aside the award may only be initiated: a. where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted; b. where the arbitral tribunal has wrongly accepted or denied jurisdiction; c. where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims; d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed; e. where the award is incompatible with public policy.'

3 SFT, judgment of 10 February 2010 – 4A_612/2009.

4 SFT, judgment of 28 September 2010 – 4A_144/2010.

5 Pechstein subsequently filed an application with the European Court of Human Rights (*Claudia Pechstein v Switzerland*, no 67474/10), which, to the knowledge of the authors, is still pending.

6 LG München I, judgment dated 26 February 2014 – 37 O 28331/12.

that is, that she was ‘forced’ to sign the arbitration agreement in order to be able to compete in her sport. This was unacceptable according to the court as arbitration proceedings before the CAS did not meet the requirements pursuant to Article 6 of the European Convention on Human Rights (ECHR, including the right to a fair hearing), in particular with respect to the independence of the arbitral tribunal.

The court pointed out that the CAS operated on a closed list of arbitrators appointed by the International Council of Arbitration for Sport (ICAS), a body dominated by representatives of the International Olympic Committee (IOC), the National Olympic Committees (NOCs) and international sports federations (IFs).⁷ Furthermore, the interests of athletes had to be considered only with respect to one-fifth of the arbitrators to be appointed to the list.⁸ According to the court, such a procedure institutionalised a predominance of sports governing bodies, which jeopardised the independence of the arbitrators.⁹ Also, the court found it improper that the chairman of a three-arbitrator panel in CAS appeal proceedings was appointed by the President of the CAS Appeals Division, the appointment procedure not being sufficiently transparent and the parties not being able to tell why a particular arbitrator had been appointed as chairman.¹⁰

Notwithstanding the above, LG München ultimately declared Pechstein’s claim inadmissible on the basis of the *res iudicata* principle, the bar on rehearing a matter previously decided by a final and binding judgment or arbitral award.¹¹ The court held that it was obliged to respect the CAS award on the basis of Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’).¹² In this respect, the court found that Pechstein was prevented from arguing the invalidity of the arbitration agreement before German state courts, as she herself had initiated CAS proceedings in 2009 without raising an objection against the arbitration agreement, thus implicitly accepting its validity at the time.¹³

The decision by the Higher Regional Court of Munich

Pechstein appealed the first-instance decision before the Higher Regional Court of Munich (‘OLG München’). On 15 January 2014, OLG München¹⁴ overturned the decision by LG München, finding that Pechstein’s claim was

7 Cf Arts S3, S4 and S6(3) of the Code of Sports-related Arbitration (the ‘CAS Code’).

8 Cf Art S14 of the CAS Code, 2004 version.

9 LG München I, judgment dated 26 February 2014 – 37 O 28331/12, p 37.

10 *Ibid.*

11 *Ibid* p 38 et seq.

12 *Ibid* p 39.

13 *Ibid* p 42 et seq.

14 OLG München, judgment dated 15 January 2015 – U 1110/14 Kart.

admissible as the arbitration agreement in favour of the CAS, and therefore the CAS award itself violated German¹⁵ and European antitrust law. The court held that sports federations, despite their dominant position in the market of organising sports events within their respective sport, were entitled to demand athletes to sign arbitration agreements due to the specific needs of sport to operate a quick and uniform dispute resolution system.¹⁶ On the other hand, the court found that, considering the current institutional structure of ICAS, ‘forcing’ athletes to sign an arbitration agreement in favour of the CAS qualified as an abuse of a federation’s dominant market position because the composition of the ICAS fundamentally put into question the neutrality of the CAS.

Consequently, OLG München disagreed with LG München’s view that it had to recognise the CAS award pursuant to the New York Convention, finding that such recognition was contrary to German public policy,¹⁷ as it would ‘perpetuate the abuse’ of the ISU’s dominant market position through the ‘forced’ arbitration agreement.¹⁸ The court’s decision did not explicitly address the fact that Pechstein had not objected to the arbitration agreement in the appeal proceedings before the CAS in 2009.

The decision of the German Federal Court of Justice

The ISU subsequently challenged the OLG München decision before Germany’s highest civil court, the German Federal Court of Justice (Bundesgerichtshof (BGH)). On 7 June 2016, the BGH ultimately overturned the OLG München decision, finding that Pechstein’s claim was inadmissible, because the parties had concluded a valid arbitration agreement in favour of the CAS.

According to the court, the ISU had not abused its market power when requiring Pechstein to sign an arbitration agreement in favour of the CAS. The court held that the CAS was a ‘genuine’ (ie, neutral) court of arbitration and that the CAS Code contained sufficient guarantees for preserving the rights of athletes even if arbitrators had to be selected by the parties from a closed list prepared by the ICAS, which was dominated by representatives of the IOC, NOCs and IFs.¹⁹ The influence of sports federations did not reach a degree that the federations had a controlling influence over the

15 Cf s 19 of the Act against Restraints of Competition (‘GWB’), in force until 29 June 2013.

16 *Ibid* p 16.

17 Cf Art V(2) lit b of the New York Convention.

18 OLG München, judgment dated 15 January 2015 – U 1110/14 Kart, p 26.

19 BGH, judgment of 7 June 2016 – KZR 6/15, para 25 et seq.

composition of the list of arbitrators.²⁰ Nothing had been determined or argued to the effect that the list of arbitrators did not include a sufficient number of neutral persons who are independent.²¹ The court also held that sports federations and athletes were generally not in opposing ‘camps’ guided by opposing interests in the fight against doping in sport.²² The demand for an arbitration agreement in favour of the CAS was justified by objective reasons.²³ In this context, the court held that the uniform arbitration system in sport had the function of effectively enforcing the anti-doping rules of the World Anti-Doping Code (WADC) through a uniform jurisprudence. Leaving this responsibility to the courts of the individual countries would seriously endanger the objective of the international sports arbitration system.²⁴

The BGH found that such a necessity was not contrary to Pechstein’s fundamental right to legal recourse or her right to exercise her profession pursuant to the German Constitution (Grundgesetz) or her right to fair proceedings under Article 6 of the European Convention on Human Rights.²⁵ According to the court, Pechstein entered into the arbitration agreement voluntarily, at least in the sense that she was not caused to sign the agreement by an illegal threat, deception or physical force.²⁶ Weighing the interests of the parties, the BGH took into account that the CAS Code contained sufficient provisions to prevent bias of arbitrators and that a CAS award could be appealed to the SFT.²⁷

Finally, the court also relied on section 11 of the German Act to Combat Doping in Sport adopted in December 2015, in which the German legislature had recently confirmed the legitimacy of sports arbitral tribunals in doping proceedings. According to the BGH, the arbitration agreement was also valid under Swiss law even if the agreement was signed by Pechstein under the de facto force that she would otherwise not be able to exercise her profession. In that respect, the Swiss Federal Tribunal had held that arbitration agreements in favour of the CAS were valid as long as the arbitration agreement did not include a waiver by the athlete to seek a review of the CAS award before the SFT.²⁸

20 *Ibid* para 31.

21 *Ibid*.

22 *Ibid* para 32.

23 *Ibid* para 48.

24 *Ibid* para 50.

25 *Ibid* paras 52 et seq.

26 *Ibid* paras 53 et seq.

27 *Ibid* paras 53 et seq.

28 *Ibid* paras 67 et seq, referring to SFT, judgment of 22 March 2007 – 4P.172/2006.

Significance for international sports dispute resolution

Pechstein has filed a constitutional appeal before the German Federal Constitutional Court (Bundesverfassungsgericht) against the decision of the BGH. However, the chances of overturning a BGH decision are extremely low.²⁹ That said, the significance of the BGH decision, provided it will not be reversed by the Bundesverfassungsgericht, for international sports dispute resolution provided through the CAS cannot be overestimated.

Today, the CAS has nearly 400 arbitrators. It has opened more than 4,700 proceedings since its foundation in 1984. Each year, approximately 400 additional cases are registered, including cases brought before the CAS ad hoc divisions at the Olympic Games and the Fédération Internationale de Football Association (FIFA) World Cup.

The BGH judgment underlines the utmost importance of a uniform international arbitration system in international sport as provided by the CAS. The CAS is a genuine arbitral tribunal. Arbitration agreements in favour of the CAS are valid. Sport governing bodies are allowed to demand that athletes sign arbitration agreements in favour of the CAS as a precondition for their participation in sporting competition.

Wider legal implications

The BGH judgment was based mainly on German law, and thus while commentators argued that had the BGH upheld the decision by OLG München it would have affected only German athletes who could have then chosen to bring their sports-related cases before ordinary courts,³⁰ it is not far-fetched to assume that had Pechstein prevailed this would have severely eroded the legitimacy of the CAS worldwide and would have possibly invited athletes of other nationalities to challenge their arbitration agreements in favour of the CAS as well.

While the CAS is eager to highlight that it had already instigated institutional reforms independent of the aforementioned proceedings in 2012, the Pechstein saga may have 'supported' the decision of CAS to abolish quotas for the IOC, NOCs and IFs regarding the proposal and appointment of candidates for the list of arbitrators, or to restructure the ICAS, which has

²⁹ In 2015, less than two per cent of constitutional appeals were successful.

³⁰ Despina Mavromati, 'The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law – The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016', published in CAS Bulletin 2016/1, p 40.

added new members who have no links to the IOC or IFs.³¹ Most recently, the CAS also announced that it would like to increase the number of former athletes as CAS arbitrators.³²

31 *Ibid.* Article S14 of the CAS Code 2004 has been amended multiple times. The 2016 version now reads: ‘The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes’ commissions of the IOC, IFs and NOCs...’.

32 Despina Mavromati, footnote 31.

