

Kluwer Arbitration Blog

Federal Tribunal Rejects Pechstein Petition

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In a decision dated 10 February 2010 (4A_612/2009), the Swiss Federal Tribunal rejected a petition to set aside a November 2009 CAS Award against German speed-skater Claudia Pechstein. The Federal Tribunal took some unusual procedural steps – including foregoing the usual exchange of written pleadings – to speed up the proceedings and to decide the case before the 2010 Winter Olympic Games in Vancouver.

Blood samples taken from Claudia Pechstein at the International Skating Union (ISU) World Speedskating Championships in Hamar, Norway, in February 2009, showed elevated reticulocytes values. On 1 July 2009, the ISU Disciplinary Commission declared Claudia Pechstein responsible for an anti-doping violation under the ISU Anti-Doping Regulations by using a prohibited method of blood doping. Pechstein and the German Speedskating Association appealed that decision to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.

An arbitral panel at the CAS, in a decision dated 25 November 2009, rejected the appeals and confirmed the sanction imposed by the ISU Disciplinary Commission. The CAS panel determined that Pechstein's abnormal blood readings and the unusual variations in the reticulocytes values recorded several weeks before, at, and a few weeks after the Hamar event, could not be reasonably explained by the various justifications submitted by Pechstein nor by a congenital medical condition. Rather, the CAS panel found that "they must ... derive from the Athlete's illicit manipulation of her own blood, which remains the only reasonable alternative source of such abnormal values."

A copy of the full CAS award is available here:

< a href="https://www.tascas.org/d2wfiles/document/3802/5048/0/FINAL%20AWARD%20PECHSTEIN.pdf">

Pechstein filed a petition to set aside the Award before the Swiss Federal Tribunal, urging a fast resolution in light of the upcoming Winter Olympic Games.

In its 10 February 2010 decision, the Federal Tribunal rejected Pechstein's petition. While the judgment (4A_612/2009) is not yet published, the Federal Tribunal issued a press release outlining its decision (available here: https://www.bger.ch/mm_4a_612_2009_d.pdf).

Procedurally, in order to be able to render a decision prior to the start of the Olympic Games, the

Federal Tribunal treated the case with priority and waived the exchange of written pleadings.

On the merits, the Federal Tribunal reaffirmed that Art. 190(2) of the Swiss International Private Law Act contains the exclusive list of grounds for appeal of international arbitral awards. Pechstein had invoked procedural violations, had submitted new medical expert reports, and had argued her elevated blood readings at Hamar were the result of manipulation. The Federal Tribunal rejected all of these arguments. In particular, and in line with long-standing jurisprudence, the Federal Tribunal held that it had no power to review the factual findings made in the CAS Award, nor to assess new evidence. The Federal Tribunal can only review an international arbitral award on the merits for a violation of the Swiss Ordre Public.

This decision is noteworthy for the procedural “fast track” that the Swiss Federal Tribunal was willing to adopt in order to render a decision only a little over two months from the date of the CAS Award and before the matter would have become moot with the start of the Winter Olympics on 12 February 2010. It is unusual to waive the exchange of written pleadings in setting-aside proceedings before the Federal Tribunal. The decision reaffirms the Federal Tribunal’s willingness to decide appeals against international arbitral awards quickly and to show flexibility in responding to the needs of Parties.

Georg von Segesser / James Menz

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