

# Sports Arbitration - Bremen Court of Appeals Grants Access to Courts, Finds FIFA Compensation Rules Illegal

## **Kluwer Arbitration Blog**

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The Pechstein decision of the Munich Court of Appeals (Oberlandesgericht) of January 15, 2015 has made headlines (see [here](#) and [here](#)). The Munich court refused to recognise an arbitral award of the Court of Arbitration for Sport (CAS), since it held the underlying arbitration agreement between Claudia Pechstein, the speed skater, and her sport's governing body to be invalid. Just two weeks earlier, another German Court of Appeals also had held a CAS award to be unenforceable. The [Bremen Court of Appeals on December 30, 2014](#) found in favour of SV Wilhelmshaven, a northern German amateur football club, in its dispute with FIFA and the German Football Association, DFB.

### **Facts**

In 2007, [SV Wilhelmshaven](#), at the time playing in Germany's fourth division, had signed Sergio Sagarzazu, a nineteen year old Argentinian player, who also held an Italian passport, on what SV Wilhelmshaven believed to be a free transfer. Subsequently, River Plate and Atlético Excursionistas, two clubs from Buenos Aires where Sergio Sagarzazu had played as a youth, claimed EUR 160,000 in total in training compensation under FIFA's rules. When SV Wilhelmshaven did not accept these claims, FIFA's Dispute Resolution Chamber ordered SV Wilhelmshaven to pay EUR 157,500. The club's challenge to the CAS was unsuccessful. However, the club refused to honour the CAS arbitral award and did not pay the training compensation. Consequently, FIFA requested the German Football Association (DFB) to enforce payment. To that effect DFB imposed sanctions on the club, by first deducting 6 points in two subsequent seasons. Despite these deductions, SV Wilhelmshaven managed to avoid relegation. Then, in the 2013/2014 season, the sanction of forced relegation (Zwangsabstieg) was imposed. SV Wilhelmshaven then moved to challenge this sanction in the Bremen courts.

### **Procedural aspects**

First, the Bremen Court held it had jurisdiction to hear the challenge, despite the fact that the DFB rules provided for a review process within its own framework of sports arbitration, namely its own Verbandsgerichte, arbitral bodies within the DFB organization. Here, the arguments of the Bremen Court are very similar to those in the Pechstein judgment. The court found that the arbitral bodies provided for in the German Football Association's structure did not meet the requirements of independence and impartiality. In particular, they did not provide for the parties to the dispute to have the same influence on the composition of the arbitral bodies. Therefore, the court held that SV

Wilhelmshaven had been free to approach the courts directly, without having to go through the motions of exhausting DFB's internal procedures.

### ***Non-recognition of the CAS award***

The Bremen Court then turned to the issue of recognition of the CAS award in favour of River Plate and Excursionistas. Since Sergio Sagarzazu was an Italian national, he was entitled to protection under Article 45 of the EU Treaty, the freedom of movement of workers. Citing the ECJ's landmark case in the Bosman matter (judgment dated December 15, 1995, C-415/93), the court held that FIFA's system of training compensation restrained the freedom of movement of professional football players in a way similar to the pre-Bosman transfer rules. The court was of the opinion that the right under Article 45 of the EU Treaty could be invoked not only by the player in question, but also by the club as his employer. The Dispute Resolution Chamber of FIFA and, subsequently, the CAS had not applied Article 45 of the EU Treaty. Failing to apply a fundamental freedom under the EU Treaty was in violation of Germany's *ordre public*. Pursuant to Article 5 of the New York Convention, the CAS arbitral award was not capable of recognition in Germany. The fact that SV Wilhelmshaven had failed to apply to the Swiss Federal Court (Bundesgericht) to set aside the arbitral award pursuant to Article 190 Swiss IPRG did not change that outcome.

### ***Pressure on sports arbitration - legislator to the rescue?***

Both the Wilhelmshaven and the Pechstein matters are being appealed to the German Federal Supreme Court (Bundesgerichtshof). It will remain to be seen whether the Federal Supreme Court refers the Wilhelmshaven case to the ECJ for an advance ruling on the scope of Article 45 of the EU Treaty. Jean-Marc Bosman became famous not for his playing career, but for the ECJ's landmark case that bears his name. It remains to be seen whether SV Wilhelmshaven will become internationally known for similar reasons.

On the procedural aspects related to arbitration, both judgments in my opinion are well reasoned and stand a good chance of being upheld upon appeal. As it happens, the German parliament is currently discussing anti-doping legislation, and in the latest draft version of the respective act, a provision was inserted that could come to the rescue of sports arbitration. Professor Heermann has discussed the draft bill (Referentenentwurf eines Gesetzes zur Bekämpfung von Doping im Sport) in detail from an arbitration perspective. He pointed out that the draft contains the following provision in Sec. 11:

“Sport associations and sportsmen and sportswomen may, as a precondition for the participation of sportsmen and sportswomen in organized sport events, enter into arbitral agreements relating to the resolution of disputes relating to such participation, provided that the arbitral agreements tie the sporting associations, the sportsmen and sportswomen into the national and international sports organizations and, in their totality, make possible, facilitate or safeguard (ermöglichen, fördern oder sichern) the exercise of organized sport. This is in particular the case, if the arbitration agreement implements the conditions set by the World Anti-Doping Code of the World Anti-Doping Agency.”

In the legislative material, the draftsmen go further and state that arbitration agreements between sport associations and sportsmen and sportswomen would be deemed valid. Professor Heermann criticizes, rightly so in my opinion, that this approach does not do justice to the complexity of legal reasoning behind both the Wilhelmshaven and the Pechstein cases. However, the draft legislation would be an opportunity for the German legislator to define minimum standards that sports arbitration must meet in order for it to be recognized.

***Update on the Pechstein case:***

A (partial) English translation is available on [SSRN](#), thanks to Antoine Duval of the T.C.M. Asser Institute. The full German judgment can be found [here](#).