

Kluwer Arbitration Blog

A Never Ending Story: Claudia Pechstein's Challenge to the CAS

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Claudia Pechstein, 44, is a well-known speed skater – she has won 60 medals at international championships and at the Olympics since 1992. However, the media coverage on her seven year juridical battle against a two year suspension imposed on her for a disputed doping rules violation has put her into the spotlight even more than her sporting achievements. A further decision in this saga has recently been published however, it is not anticipated to be the last in this never ending story. When the Bundesgerichtshof, the highest German civil court, delivered its eagerly expected judgment on June 6 in the “Pechstein case”, Claudia Pechstein needed a time-out to cope with the result – the confirmation of the international sport arbitration system. After about an hour, Pechstein had returned to fighting mode and told the media that she will continue and bring her claim to the Bundesverfassungsgericht, the German constitutional court.

It is not just a lonely fight of an individual – by attacking the arbitration agreement athletes have to sign to compete internationally, Pechstein has expressed a far spread discomfort. Many athletes, especially professional players in team sports, feel forced to accept a system which refuses them – as they see it – fundamental rights compared to “normal” employees. That is why Pechstein has been broadly supported by for example FIFPro, the World Players' Union representing 65.000 professional football players, granting her financial support for the legal proceedings (see [here](#)).

So what is it all about – what are the facts, what does the BGH decision imply and what is the broader context behind it?

Background

At the outset stood a doping verdict by the International Skating Union (*ISU*) based on “irregular blood parameters” in anti-doping samples taken in 2009. Pechstein never tested positive in an anti-doping control, she was the first athlete to be suspended for two years just because of her blood values. Only a short time later the World Anti-Doping Agency (*WADA*) changed the conditions for such a ruling, raising the bar for future suspensions. Pechstein and her lawyers had called medical experts who gave a genetic explanation as a possible reason for the high blood values but even then the Court of Arbitration for Sport (*CAS*) confirmed the suspension.

In 2014, the German Olympic Sport Association (*DOSB*) tasked an expert commission to explore the case scientifically. The five members of the commission unanimously came to the result that

blood-doping had not been proved. In January 2015 Alfons Hörmann, the president of the DOSB, apologized to Pechstein about the suspension and even called her a “victim” (see [here](#)). One has to know this to understand Pechstein’s insistence that she has been treated unfairly – a view her supporters share.

Two proceedings at the Swiss Federal Tribunal in which she tried to challenge the CAS decision were lost by Pechstein. After thus failing in having her suspension lifted she then started proceedings before the state courts in Germany requiring damage (about €4 million) from ISU and – for procedural reasons – from the German federation Deutsche Eislauf-Union e.V. (DEU) – for lost income during the time of her suspension.

On February 26, 2014, the Regional Court (Landgericht) of Munich upheld the CAS decision on the basis that the issues were res judicata as Pechstein had not challenged the jurisdiction of CAS before. Notably, the court also stated that the arbitration agreement signed by Pechstein was void because the ISU had a monopolistic structure denying the athletes any choice in whether they signed such an agreement if they wanted to compete, i.e. to exercise their profession.

This argument has not been followed by the next instance, the Higher Regional Court (Oberlandesgericht) of Munich (OLG). This court found that the requirement by a dominant sport organization to sign an arbitration agreement as a condition for an athlete to participate in an international competition does not make the agreement void per se. But in the specific case the OLG stated, that in 2009, when Pechstein signed the agreement, the regulations governing CAS did not provide for a fair balance with regard to the influence of the sport bodies on the one hand and the athletes on the other in choosing the arbitrators. At that time a majority of the CAS arbitrators had been nominated by sport bodies, thus giving the athletes’ side significantly less impact on the composition of the tribunal.

The decision of the German Federal Tribunal (Bundesgerichtshof – BGH)

The German Federal Tribunal dismissed Pechstein’s case, rejecting the arguments of first and second instance alike.

The central result of the decision, gladly welcomed by CAS itself (see [here](#)), is the confirmation of CAS being a genuine arbitral tribunal according to German law. The outcome is significant: the role of the CAS and international sports arbitration in the fight against doping – but of course in other cases as well – is confirmed.

The BGH confirms the dominant market position of the sport organisations, i.e. the ISU in this specific case, but sees no misuse of this position taking into account the interests of both sides – sport organisations and athletes.

The BGH does not see a structural imbalance as the CAS is not integrated in another organisation like disciplinary bodies within sport organisations are. The procedural rules of CAS give athletes enough rights to achieve a balance.

Contrary to the second instance (OLG Munich), the BGH held that the list of arbitrators has been composed in a sufficiently independent way even if established by a body with a majority of representatives of sport organisations. Athletes have a fair choice by nominating an arbitrator out of a list of more than 200 people and they can reject an arbitrator for bias. Therefore in the BGH’s view the list of arbitrators does not lead to a structural imbalance when establishing the panel in an

individual case.

Additionally, contradicting the first instance (Landgericht Munich), the BGH stresses that it is in the athletes' own interest to have such a system in place and sign an arbitration agreement. According to the BGH, the arbitration system of CAS offers advantages to both the sport organisations and the athletes with regard to consistency and promptness of decisions and is needed for effectively fighting doping on a global level. Therefore the requirement of signing the arbitration agreement is an acceptable condition set by the sport organisations to uphold the rules.

That Pechstein had to sign the agreement as otherwise she would have been excluded from competing does not make it void. Considering the interests of the parties with regard to German antitrust law (§ 19 Gesetz gegen Wettbewerbsbeschränkungen) the BGH regards the use of the arbitration clause justified.

Pechstein's right to choose her profession and to have access to legal remedy has to be seen in the light of the autonomy of ISU and has not been unduly limited as she can appeal to Swiss courts. The BGH found that there is no specific right to have access to German courts.

Comment

While confirming CAS as an independent genuine arbitral tribunal will help the sports movement with the further development of its global legal and procedural system, some major problems remain unsolved and should not be disregarded by the sport organisations. And CAS, too, having recently started to reform may consider taking additional steps to preserve its independence – for example, by giving athletes further opportunity to influence the list of arbitrators and becoming more transparent about how the chair of a panel is nominated.

Pechstein may continue by appealing to the German constitutional court (Bundesverfassungsgericht) or the even the European level but her chances, as far as one can see, seem to be limited.

Finally the FIFPro support for Claudia Pechstein underlines that athletes need to be taken seriously. Further, in times where companies, i.e. global players in business, are engaged in professional sport on a number of levels, the issue has broader ramifications.

So the BGH decision on the Pechstein case is an important step for CAS and the sport arbitration system but does not relieve the sport federations from reform for the benefit of the athletes – and the sport.

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