The CAS List of Arbitrators: Lessons from the Pechstein case for Tokyo 2020

Kluwer Arbitration Blog
January 6, 2017

Bruno Guandalini (Guandalini Sampaio Advogados) and Caio de Faro Nunes (Carvalho, Machado e Timm Advogados)

Please refer to this post as: Bruno Guandalini and Caio de Faro Nunes, 'The CAS List of Arbitrators: Lessons from the Pechstein case for Tokyo 2020', Kluwer Arbitration Blog, January 6 2017, http://arbitrationblog.kluwerarbitration.com/2017/01/06/booked-sports-arbitration/

2016 was a great year for Brazil, especially because it hosted the Rio 2016 Olympic Games, which has brought many good things: thousands of sports enthusiasts came to Rio de Janeiro to see high profile athletes; others just came for a good *caipirinha* on the Copacabana Beach; and, of course, many athletes from different countries came chasing their life dream – an Olympic gold medal. Some of these athletes are famous and have a successful career, such as Michael Phelps, Usain Bolt, or Neymar Jr. Others, however, were not even professionals and came from very poor countries, seeking an opportunity to leave dictatorial regimes. For them, preparing for the Olympic Games and even traveling to Brazil was already a huge battle, a gold medal winning. They have really set a "life record".

In order to help this last group, some Brazilian Arbitration specialists formed a steering committee, acting as pro bono attorneys in the CAS Ad Hoc Arbitrations related to Rio 2016 disputes. In fact, those athletes would be helpless without this initiative, simply because they could not afford good counsel representation in such a specialized form. This weakness brings to mind the frequent political, economic and technical imbalance between sports associations and athletes. Very often athletes cannot afford a great legal battle. At the same time, they frequently depend on a specific organization for living, and are subject to the entity's political decisions. In those cases, CAS arbitral tribunals serve as the "last resort" authority. The problem is, however, that its legitimacy has been questioned in the never ending *Pechstein* saga.

Long story short, Claudia Pechstein is a well-known German speed skater who has been suspended for two years by the International Skating Union (ISU) – the only international professional skating association – due to an alleged indication of doping. Since Ms. Pechstein has signed a CAS arbitration agreement in the organization's registration form, she commenced arbitration proceedings to challenge ISU's suspension. Following an unsuccessful arbitration, she challenged the award before the seat of the arbitration, but the Swiss courts finally upheld the arbitral award. Still upset with the outcome of the dispute – which was actually denied by some specialists on the merits – Ms. Pechstein then resorted to the German courts, requiring damages from ISU and from the German federation Deutsche Eislauf-Union e.V., for lost income during the time of her suspension. The first instance preliminarily rejected the case. In the second instance, the Higher Regional Court of Munich found that the fact that ISU required Ms. Pechstein to sign the CAS arbitration agreement as a condition to participate in an international competition does not make such agreement void per se. The court also held, however, that by the time Ms. Pechstein signed the agreement, the CAS rules "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"(since most of the arbitrators on the CAS list were appointed by the sports association, with almost no influence from athletes) (see here). A huge threat was established to the whole CAS Arbitration system. The case was then brought before the German Federal Tribunal (BGH), which dismissed it on 9 June 2016. Regarding the dominant position argument, the BGH "confirm(ed) the dominant market position of the sport organizations, i.e. the ISU in this specific case, but (saw) no misuse of this position taking into account the interests of both sides – sport organizations and athletes". As a rationale for the list of arbitrators imbalance issue, "the BGH (did) not see a structural imbalance as the CAS is not integrated in another organization like disciplinary bodies within sport organizations are". In the eyes of the BGH, CAS rules allow athletes to achieve this balance once 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 organizations". On the top of that, it found that "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". 2016 in gone and flame in Rio is over but not the *Pechstein* saga. The case is still pending before the European Court of Human Rights in Strasbourg. Also, Ms. Pechstein affirmed that she will appeal to the German Constitutional Court. Even if Ms. Pechstein overturn's chances are low, her case invites to a critical analysis of the BGH decision firstly and then to a normative analysis of the list of arbitrators issue.

To begin with, the BGH did not consider the arbitration market incentives. CAS existence depends on sports organizations to impose arbitration agreements as a condition to athletes who, having no choice, would accept CAS arbitration as a forum of last resort. It is mainly an arbitration market imposition. There is no free consent to arbitration, because if Ms. Pechstein had not signed the form she would have not competed in the ISU's events – the only professional and international skating organization – and would have probably had no money for making a living. In addition, the arbitrators listed would presumably defend the sports organizations that will keep using CAS arbitration agreements, since, in this way, CAS business (and the organizations political power) would be maintained. It consists in a systemic bias, generated by the arbitration market and political incentives.

Secondly, the fact that athletes can nominate an arbitrator out of a list of 200 people is irrelevant. Even if arbitral tribunals are usually composed by three arbitrators and athletes have the right to appoint one of them, there is no information disclosed regarding the arbitrator's nomination (whether he or she has been listed by a sports organization, by an athlete, or even by CAS itself). How then, in the appointment of the arbitrator, could athletes identify the names that were listed by sports organizations? On the top of that, there is always CAS acting as an appointing authority when parties do not appoint an arbitrator's name or when arbitrators do not agree upon the president's name.

Finally, the BGH's argument that there is a possibility of rejecting an arbitrator for bias is not valid. According to CAS rules (R34), an arbitrator may be challenged for bias if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality. However, the problem is that the challenge would be decided by the International Counsel for Arbitration for Sport (ICAS) and the CAS itself. Therefore, how would ICAS and CAS decide a challenge of an arbitrator for alleged breach of due process in the composition of the tribunal if ICAS itself is biased by economic and political incentives?

It is clear that the German Court upheld the CAS award position in order to guarantee the harmony of many CAS awards and the legitimacy of the system. If the Higher Regional Court of Munich decision would have been held valid, CAS arbitration system would have certainly collapsed.

As seen, the main problem in the *Pechstein* case is the alleged violation of due process as a consequence of the imbalance in the arbitral tribunal formation, specifically regarding the CAS list of arbitrators. Therefore, the case invites us to ask the following question, applicable to every

institutional arbitration: how to exclude a systemic bias when the list of arbitrators may be controlled by interests of one of the parties and the appointing authority could presumably have interests in favoring such party? If it is almost impossible to stop sport organizations from adopting and imposing to athletes CAS arbitration agreements, the first answer would be to immediately exclude the mandatory list of arbitrators. This could, in first hand, avoid any challenge like the one argued in the *Pechstein* case. In fact, at the end of the day the existence of the list of arbitrators is not supported. The main argument in favor could be legal certainty and better control of quality of arbitrators. However, the *Pechstein* case came to show the contrary – and CAS seemed to agree – since it has recently "consider(ed) 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" (see here).

Even though CAS wants to keep its list for market or political purposes, it shall not be mandatory and the nomination process and criteria shall be fully disclosed. All names should have the date in which the arbitrator became listed, the person or entity that indicated the arbitrator to the list, the number of CAS arbitrations in which the respective arbitrator has already sat and who the parties were. This process would ensure transparency and would help CAS to maintain its legitimacy as the leading sports arbitration institution.

Last but not least, given the alleged systemic bias presumably caused by market and political incentives, CAS should also guarantee impartiality in acting as an appointing authority. The President of the Division should always be a person independent from any sport organization whatsoever.

In conclusion, even though the *Pechstein* saga has not caused a collapse in the CAS system, its legitimacy was at least questioned. It is time – and up to CAS – to improve steps in abandoning the mandatory list of arbitrators or at least adopting a full disclosure approach in its list composition; it would certainly confirm CAS legitimacy as the main sports arbitration institution worldwide. Even if Ms. Pechstein has not yet seen any gold medal from this battle, her case certainly could call the world's attention for a more legitimate arbitration system. This is what the arbitration community, athletes, sports organizations, and mainly the International Olympic Committee should seek for Tokyo 2020.