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The Most Recent Decision in the Pechstein Saga: Red Flag for Sports Arbitration?

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With its interim judgment of 15 January 2015, the Higher Regional Court of Munich added a new chapter to the longstanding legal dispute between the German speed skater Claudia Pechstein and the International Skating Union ("ISU") (see the previous report on this story). The full decision has not yet been published. So far, the court has only issued a press statement.

Shortly before the 2009 World Speed Skating Championships in Hamar, Ms Pechstein was tested positive in a doping control. Subsequently, the ISU banned her from all ISU competitions for two years. Based on the dispute resolution clause in the registration form for the championships in Hamar, Ms Pechstein challenged this ban before a tribunal of the Court of Arbitration for Sport ("CAS"), but lost the case. She then took the matter to the Swiss Federal Tribunal in two sets of proceedings, first requesting that the tribunal's award be set aside, then that it be revised. Neither request was successful (see here the report).

Ms Pechstein then initiated proceedings before the Regional Court of Munich ("Regional Court), claiming damages of approximately 4 million Euros from the ISU and the German national skating union. In a decision of 26 February 2014, the Regional Court held that the arbitration agreement entered into by the athlete was invalid, because there had been a "*structural imbalance*" between Ms Pechstein and the monopolistic ISU. As a result, Ms Pechstein had not voluntarily agreed to arbitration. Nonetheless, the Regional Court dismissed the case on the merits, holding that the award rendered by the CAS had *res judicata* effect with regard to the doping ban. According to the Regional Court, the imbalance between Ms Pechstein and the ISU had been remedied in the arbitration proceedings as Ms Pechstein, who had legal counsel, had taken part in the CAS proceedings without objecting to the jurisdiction of the CAS tribunal. The athlete appealed this decision to the Higher Regional Court of Munich ("Higher Court").

In an interim decision, the Higher Court allowed Ms Pechstein's claim for damages.

Unlike the first instance, the Higher Court did not evaluate the validity of the arbitration agreement based on whether or not it had been entered into voluntarily. Rather, the Higher Court held that the arbitration agreement between Ms Pechstein and the ISU was invalid because it was contrary to mandatory competition law. According to the Higher Court, the ISU, as sole organizer of speed

skating world championships, enjoys a monopolistic position in speed skating and is therefore dominant pursuant to the German Act Against Restraints of Competition. The Higher Court was of the opinion that a dominant entity may not impose business terms that would not prevail in a market with effective competition.

The Higher Court held that it is not *per se* an abuse of a dominant position if the organizer of international sporting events requests the athletes to sign an arbitration agreement. It concluded, however, that the ISU had abused its market power by requiring Ms Pechstein to sign an arbitration agreement providing for arbitration before a CAS panel as a prerequisite to her participation in speed skating competitions. The court reasoned that under the CAS arbitration rules in force when Ms Pechstein signed the arbitration agreement in question in January 2009, the sports-related bodies' influence on the choice of CAS arbitrators outweighed the athletes' influence on the choice of CAS arbitrators. As a result of this structural imbalance, the court considered that the independence of the CAS was questionable. The court furthermore noted that the structural imbalance between athletes and sports-related bodies is aggravated by the fact that in all disputes concerning decisions of sports-related bodies, the president of the arbitral tribunal is directly appointed by the President of the CAS Appeals Division who is a member of the International Council of Arbitration for Sport ("ICAS"), a body that is highly dependent on the sports-related bodies.

According to the Higher Court, athletes accept this one-sided designation of the CAS arbitrators only because they have no choice if they want to compete at an international level.

Unlike the Regional Court, the Higher Court furthermore concluded that the *res judicata* effect of the CAS tribunal's decision does not prevent Ms Pechstein from bringing a claim for damages before the German state courts. The court reasoned that the tribunal's award cannot be recognized in Germany because it violates a core principle of competition law which forms part of the *ordre public*. If the court were to implicitly recognize the decision of the CAS tribunal, this would perpetuate the ISU's abuse of its monopolistic position and would deprive Ms Pechstein of her right to have access to a court of law.

The ISU already declared that it will appeal the decision of the Higher Court to the German Federal Supreme Court.

Although this latest chapter in the Pechstein saga could be (wrongly) seen as discrediting arbitration as a means of resolving disputes between athletes and sports associations in general, it is important to emphasize that the Higher Court did not consider that making the athletes' participation in sports events contingent on their agreement to arbitration in general was an abuse of a dominant position. Rather, the abuse of a dominant position leading to the invalidity of the arbitration agreement resulted from the fact that the athletes were required to agree to CAS arbitration, given the CAS' rules regarding the selection and appointment of arbitrators.

In this context, the Court pointed out that there are valid reasons to rely on arbitration to resolve sports-related disputes and that the consistent case law of a central "sports court" serves to ensure that the athletes participating in competitions have equal opportunities.

When Ms Pechstein entered into the arbitration agreement with the ISU in January 2009, three out of five arbitrators on the CAS list were chosen upon proposal by the IOC, the international federations and national Olympic committees and only two out of five arbitrators were chosen

among persons independent from those bodies.

However, the 2012 revision of the CAS Code abolished the fixed quotas for arbitrators nominated by the sports-related bodies and the ICAS now *"call[s] upon personalities (…) whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs [international federations] and the NOCs"* (see Article S14 of the CAS Code). This wording leaves the CAS considerable leeway to meet the requirements set out by the Higher Court. As long as the CAS makes use of this possibility, Ms Pechstein's victory does not necessarily signal the end of sports arbitration by means of the CAS.

From a competition law perspective, the decision C-519/04 *Meca-Medina* of the European Court of Justice (ECJ) has established that sporting rules, including anti-doping rules, are not per se shielded from competition law. However, an assessment of such rules must take into consideration whether any effects restrictive of competition are inherent in the pursuit of the objectives of such rules and are proportionate to them (the so-called regulatory ancillarity, cf. ECJ, case C-309/99 *Wouters*). On this basis, anti-doping rules have generally been considered not to be anticompetitive, given that they are justified by a legitimate objective: they are inherent in the organization and proper conduct of competitive sport. Based on the information provided in the press release it is not yet clear if the Higher Court scrutinized whether competition law is applicable to the ISU and whether the anti-doping rules could be justified on the basis of their legitimate objective. That other organizational rules would be conceivable does not mean that the current rules are per se an abuse. In order to determine whether there is an abuse, the actual effect of the rules must be taken into account.

From a more general competition law point of view, the focus on specific details of the enforcement mechanism is striking and it is unclear, under what heading such a clause would qualify as abusive (i.e. exploitative or exclusionary?). Has there been any exclusion of competing companies or participants, or have consumers or market participants been exploited with such practices? In addition, an assessment of the actual effects would be important in light of possible repercussions on other arbitration mechanisms. In particular, given that under EU competition law, legal proceedings are generally only considered to be an abuse of a dominant position in very limited circumstances (ECJ, case T-111/96, ITT *Promedia*), it is questionable whether the rules of an arbitral institution can as such – and absent an assessment of actual excluding or exploitative effects – be considered anticompetitive.

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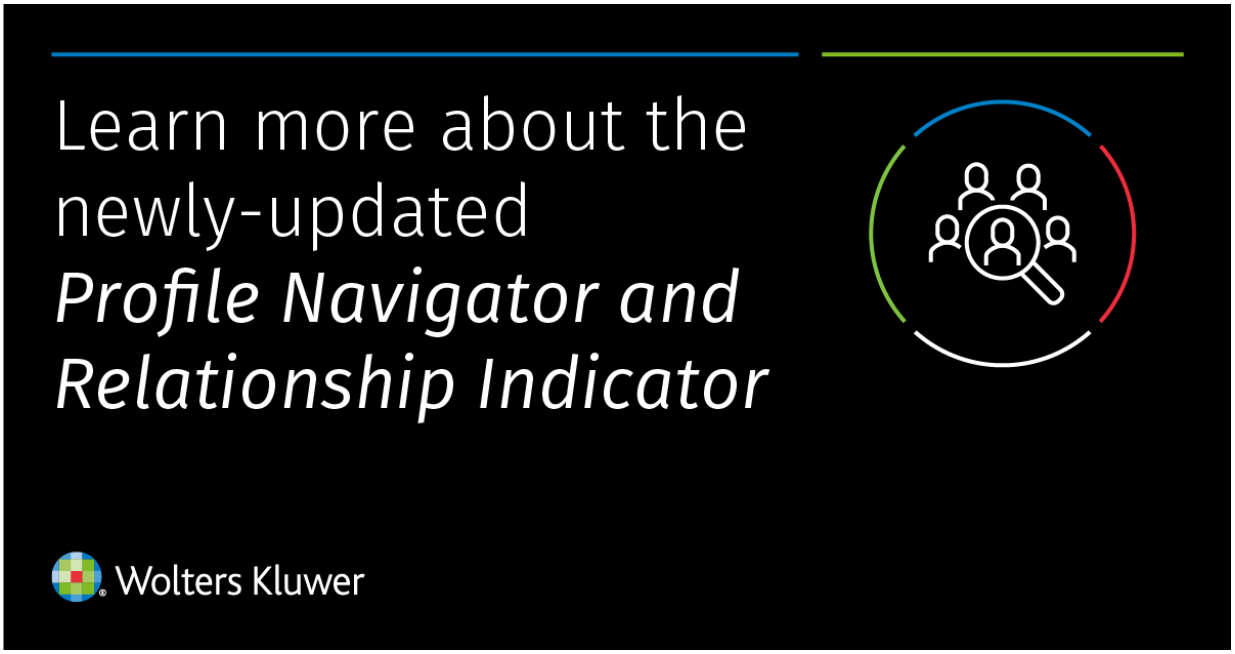

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