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# Recap of the Pechstein Saga: A Hot Potato in the Hands of the Sports Arbitration Community

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The recent public hearing at the Court of Arbitration for Sport ('CAS') involving the World Anti-Doping Agency ('WADA') on one side, and the Chinese swimmer Sun Yang and the Federation Internationale de Natation ('FINA') on the other, has been plagued with controversies. In the anticipation of the award (expected in early 2020), this seems to be an appropriate time to provide a recap on another sports arbitration saga that has turned the world of sport on its head: the Pechstein case.

Indeed, the most recent developments of the case led to a decision of the European Court of Human Rights (ECtHR), which acknowledged that the right of Mrs. Pechstein to a public hearing, deriving from the provisions of Article 6§1 of the European Convention on Human Rights ('ECHR'), had been violated. This decision led to a change in the provisions of the CAS Code, which regulates the arbitration process in front of the CAS, allowing now athletes to request a public hearing "if the matter is of a disciplinary nature."[1)] Mr. Sun Yang was the first to use this possibility, launching a new era of CAS procedures. Although this being the step in the right direction, the truth of the matter is that the crucial concerns raised by the Pechstein case still remain unaddressed by CAS.

## Background

Mrs. Pechstein is a German professional ice-skater who participated in the 2009 World Championship organised by the International Skating Union ('ISU'). Based on the results of an anti-doping test sampled after the championship, Pechstein's blood parameters were deemed as "irregular." Consequenly, the ISU disciplinary commission sanctioned her for anti-doping violation with a two–year ban from competitions. Pechstein contested the sanction in front of the CAS, in accordance with the CAS arbitration clause contained in the ISU's anti-doping regulations, by challenging the ground taken into consideration by the ISU disciplinary commission to establish an anti-doping violation. Nevertheless, the CAS confirmed the ban.[2)]

## Swiss Supreme Court Refuses to Set Aside the Award

Pechstein filed an action to set-aside the CAS award in front of the Swiss Federal Tribunal ('SFT'),[3] contesting the ban and challenging the legality of the CAS award on the ground of the lack of independence and impartiality of the CAS vis-à-vis the sports bodies. Pechstein claimed that, in this matter, it was primarily about the interests of the International Olympic Commitee (IOC) and the ISU, which through the problem of doping were concerned that the economic value of the Olympic Games and their sports would be jeopardized. Consequently, as Pechstein argued, they simply sought to make a point that they had an uncompromising stance when it came to the issue of doping. The SFT rejected the challenge, confirmed that the CAS was a real arbitral tribunal, which has been its constant position since 2003, (SFT, decision of 27 May 2003, 129 III 445) and affirmed that legitimate doubts as to the independence of the CAS had not been substantiated (SFT, decision of 10 February 2010, 4A_612/2009).

**Pechstein Goes to Germany, but Apex Court Recognises the Award**

Pechstein started proceedings in Germany, her home-state jurisdiction, in order to have the ban recognised as invalid and to get awarded damages for material and moral prejudices. The Munich Regional Court accepted jurisdiction on the ground that the CAS arbitration clause was invalid as it had not been signed under free will. According to the tribunal, the monopoly of the ISU and the hierarchical structure of international sport led to a structural imbalance that made it impossible for Pechstein to refuse the CAS arbitration clause if she wanted to enter the competition and exercise her profession. Nevertheless, the tribunal decided that it was bound by the findings of the award since Pechstein seized the CAS herself and did not challenge CAS' jurisdiction earlier in the proceedings.[4]

Thereafter, the Munich Higher Regional Court accepted jurisdiction on the ground that the CAS clause was invalid, albeit on another basis. In the court's opinion, the signature of the CAS clause violated the provisions of German competition law. The ISU has a dominant position on the market for access to international speed-skating championships. In requiring the signature of a CAS arbitration clause, the ISU had abused its position insofar as the unequal designation of the potential arbitrators to a closed-list (made by the International Council of Arbitration for Sport ('ICAS') whose structure remains structurally dominated by the sports bodies)[5] embeds a structural imbalance of CAS' procedures – such that the athletes would not choose the CAS clause under normal competitive circumstances. Since it stripes the athlete of her fundamental right to seize the national courts, the intensity threshold required for the recognition of an abuse of dominant position is exceeded. The provisions of German competition law being part of the German public order, the award cannot be recognized, and hence the leave for appeal was granted.[6]

The German Federal Tribunal reversed the appeal: considering that Pechstein entered voluntarily into the arbitration agreement – there had been no coercion. The ISU is a monopolist on the market but it did not breach competition law provisions when it made the participation of an athlete to a sports competition dependent on the signature of a CAS arbitration agreement because CAS' processes contain sufficient guarantees safeguarding athletes' rights and CAS awards are subject to review by the SFT. CAS Code's provisions do not create a structural imbalance when it comes to appointing the arbitrators for the individual arbitral tribunal since the sports associations and the athletes do not stand on two opposite sides with fundamentally antithetical interests. In particular,

the fight against doping is in the interest of both the associations and the athletes. In the German Federal Tribunal's view, so are the advantages brought by the CAS of a uniform international system of sports arbitration, with uniform standards and speedy decisions.[7)]

**From Germany onto Strasbourg – Pechstein before Europe's Human Rights Court**

Pechstein brought the case to the ECtHR. The Court declared itself competent to hear the case and decided that, although not imposed by law but by the provisions of the ISU's regulations, the CAS arbitration could be considered as having been imposed on Pechstein as she had no other choice than to accept the CAS clause or give up the exercise of her profession at an international level. The CAS arbitration consequently should fulfil the guarantees mentioned in Article 6§1, including the right to a decision by an independent and impartial tribunal. The ECtHR identified the issue raised by Pechstein of the alleged structural imbalance between the athletes and the sports bodies in the appointment of the CAS arbitrators, but decided that the evidence that this resulted in an actual bias of the majority of the arbitrators appointed to the CAS closed list was not substantiated. The court thus decided that the CAS was independent and impartial.

**A Pyrrhic Victory for Sports Arbitration Community?**

Until now, diverging approaches have seemingly been taken and various views expressed by different jurisdictions on both issues raised. The assessment of these aspects is of actual importance as it touches upon the trust in the CAS system, hence upon the legitimacy of the CAS itself and of international sports disputes settlement regime in general. Indeed, the CAS since its creation in 1983 by the IOC has been gaining influence within the field, seeing its case-law increase every year and having been designated as the appeal instance in doping matters by the World Anti-Doping Code ('WADC'). The 2005 UNESCO Convention against Doping in Sport that helps ensure the effectiveness of the WADC has been very successfully ratified worldwide (187 parties).

Consent of the parties to arbitration is considered by most arbitration laws as the cornerstone of arbitration, on which rests the legitimacy of the arbitrator's power to decide on the matter and the validity of the arbitral award.[8)] It might be so that international arbitration is adapted to the needs of international sports dispute settlement and all the actors involved: the flexibility, specialization and speed of its procedures are well suited to the rhythm and globalization of sport and the aspect of uniformity of procedures brings also a crucial aspect of equal treatment into the process. Nevertheless, there is a need for clarity and common ground approach to the issue of (imposed) consent, which shows a clear deviation from the fundamentals of arbitration. The fact that it leads to such divided assessments is an issue in itself.

Moreover, the aspect of independence and impartiality of the CAS arbitrators is pivotal for the trust in and legitimacy of the system. Arbitration seems well-suited in this connection too, bringing the opportunity to settle disputes smoothly "within the family of sport."[9)] Nevertheless, the strong dissent in the ECtHR's opinion challenging the exclusively subjective approach of the majority of the Court confirms that appearance, hence an objective assessment, counts. Such aspect is crucial

when it comes to independence and impartiality and is a key factor for the trust in the system of those who are accountable to it. The CAS, apparently willing to implement changes as it drastically did in 1994 on the impetus of the SFT Gundel's decision, should take the issue related to the ICAS' role and impact on CAS' processes very seriously and engage into appropriate reforms considering athletes' needs – even more so due to its rising position within the world of international sport and to the nature of the disputes brought before it, some of them directly impacting athletes' lives and reputation.

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References

**?1** CAS Code, Article R 57.
**?2** CAS 2009/A/1912, award of 25 November 2009.
**?3** Swiss Federal Statute on Private International Law, Art. 191.
**?4** Munich Regional Court, decision of 26 February 2014, 37 O 28331/12.

?5 CAS Code, Article S4.

?6 Munich Higher Regional Court, decision of 15 January 2015, U 1110/14 Kar.

?7 German Federal Tribunal, decision of 7 June 2016, KZR 6/15.

?8 Nigel Blackaby, Constantine Partasides et al., Redfern and Hunter on International Arbitration, 6th Edition, Oxford University Press 2015, 2.01, 2.63, 10.36.

?9 Ian Blackshaw, The Court of Arbitration for Sport: An international Forum for Settling Disputes Effectively “Within the Family of Sport,” Entertainment Law, Vol. 2 No 2. Summer 2003, pp. 61-83.