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The Pechstein Saga Continues: The German Federal Constitutional Court Grants Another Round on the Rink

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The arbitration world's most famous ice skater, Claudia Pechstein, has won a stage victory in her long-lasting and widely discussed struggle against the international sports arbitration system. On June 3, the German Federal Constitutional Court (*Bundesverfassungsgericht (BVerfG)*, Beschluss vom 3.6.2022, 1 BvR 2103/16) sided with Pechstein in her constitutional complaint against a ruling of the German Federal High Court of Justice. In essence, the BVerfG ended up reviving a more than ten-year-long legal dispute that so far was already heard by the Court of Arbitration for Sport (CAS), six state courts in Switzerland and Germany and the European Court of Human Rights (ECtHR). This post offers a brief background to this protracted legal saga, diving first into the history of the dispute (I), then turning to her ECtHR and BVerfG actions (II) before commenting the BVerfG decision (III).

I) A Brief History

Claudia Pechstein is a well-known German speed skater and a five-time Olympic champion. Following a doping test at the 2009 World Allround Speed Skating Championship in Hamar (Norway), the International Skating Union (ISU) suspended her for two years from international competitions. The test had revealed an elevated reticulocyte count in her blood, which can point to blood doping with EPO. Pechstein contested her suspension at the CAS, claiming that the count was elevated due to an inherited blood disease. The CAS first dismissed Ms Pechstein's request for a public hearing (the CAS procedure did not provide for that at the time), and then it dismissed her claim. Pechstein's attempts to have the CAS award set aside by Swiss courts were unsuccessful. She then sued the ISU for damages before German courts, claiming that the ISU had abused its monopoly for major ice-skating competitions by making her sign an arbitration clause in favour of the CAS, which, as she claimed, was not independent.

The case got interesting when the German District Court of Munich (LG München I) declared a part of Pechstein's action admissible instead of rejecting it on the spot, as art. 1032 para. 1 of the German Code of Civil Procedure (ZPO) would so require if the parties have signed a valid arbitration agreement. In the eyes of the court, the agreement was void for violating competition law (Sec. 19 GWB, German Restriction of Competition Act) as Pechstein had to sign it in order to participate in Hamar, putting the ISU in a dominant market (or rather monopoly) position. The court found that the ISU had abused this position by requiring athletes to sign an arbitration

agreement in favour of the CAS, stating that this was not a neutral forum because the appointment procedure for CAS arbitrators put athletes at disadvantage over their opponent, the ISU. It therefore threw out the arbitration agreement and allowed Pechstein to pursue her case in state court. The court did, however, reject Pechstein's damage claim on the merits, leading her to appeal to the Higher Regional Court of Munich (OLG München), where the judgment (including its controversial part on the arbitration agreement) was confirmed.

The OLG München decision set off alarm bells in the arbitration community, with some voices (especially her lawyer) even predicting the demise of international sports arbitration. Relief came when the German Federal Court of Justice (Bundesgerichtshof) (BGH) decided on final appeal to quash the earlier judgment, to enforce the arbitration agreement and thus to declare Pechstein's claim inadmissible. The court did criticise a certain imbalance in the rules of the CAS. It, however, held that the CAS was neutral enough to be deemed an arbitral tribunal in the sense of Sec. 1032 (1) ZPO and that its award therefore had to be respected. Pechstein's journey into the foundations of international sports arbitration seemed to be over at this point.

II) First the ECtHR Had Its Say, 4 Years Later the BVerfG

Setbacks did not stop Pechstein, being every bit as competitive as she probably must be, from taking the case to the BVerfG and to the ECtHR. The ECtHR ruled first and, on the one hand, awarded Pechstein a minor compensation for not having been granted a public hearing before the CAS (in violation of Art. 6 European Convention on Human Rights (ECHR)), but rejected all other claims. The BVerfG, on the other hand, took much longer to decide, with the case pending before it for more than six years. This is somewhat surprising, as the standard of scrutiny of the BVerfG is very limited. Not being an appellate court, the BVerfG only verifies whether preceding courts have violated constitutional law (i.e., the German Basic Law, Grundgesetz) while rendering their decision. For this und other reasons, constitutional complaints are rarely successful. In Pechstein's case, it all came down to the question whether the preceding BGH had misapplied Sec. 1032 ZPO (and therefore violated its obligation to adhere to the rule of law, Art. 20 (3) Grundgesetz) and, as a consequence thereof, had denied Pechstein her access to justice guaranteed by Art. 19 (4) Grundgesetz.

In its long-awaited ruling, the BVerfG quashed the judgment of the BGH and remanded the case to the OLG München.

III) BVerfG's Decision: Analysis and Implications

The linchpin of this decision is, somewhat unexpectedly, the public nature of court proceedings. The BVerfG found that the preceding court had failed to give this principle sufficient consideration when balancing freedom of contract, the autonomy of associations like the ISU and access to justice (para. 34 of the judgment). Like the ECtHR, the BVerfG found that Ms Pechstein was denied the right to a public hearing in violation of Art. 6 EChHR (para. 35). Instead of awarding a small compensation however, the BVerfG found that this throws the decision of the preceding court out of balance, necessitating its vacation.

While it emphasized that the access to (state court) justice does not preclude arbitration *per se*

(para. 39), the BVerfG found that the specific setting of sports arbitration had to be considered, especially the imbalance of power between associations and athletes that triggers the application of competition law (para. 41). Given that under these circumstances a public hearing would have been mandatory according to Art. 6 ECHR (paras. 42-50), an arbitration clause that provided for proceedings without such a hearing was void for violating German competition law (Sec. 19 GWB) and could not be invoked in state court proceedings (Sec. 1032 (1) ZPO (para. 51)). Having declared the arbitration agreement void for this reason, the BVerfG refrained from deciding on the question of neutrality of the CAS that had concerned the preceding courts. It merely stated that neutrality is "part of the nature of judicial activity", whether in state court or in international arbitration (para. 53).

Although the BVerfG vacated the judgment for a slightly different reason than was to be expected after the judgments of the preceding courts, it drew upon the same juxtaposition of party (and association) autonomy and access to justice, with competition law serving as a link between the two: An arbitration agreement is invalid, if it is imposed on one party in a way that constitutes an abuse of a dominant position (Art. 102 TFEU/Sec. 19 GWB). The agreement is abusive, if the arbitral proceedings do not provide for a public hearing although this would be required by Art. 6 ECHR.

Does this mean that from now on, public hearings will become mandatory in sports arbitration? Probably yes, and the CAS has already amended its rules to allow public hearings if the dispute is of a disciplinary nature (R57, CAS Rules 2021). Will public hearings also be mandatory in commercial arbitration? Rather not, given the required imbalance of powers and the narrow scope of Art. 6 ECHR. In the Pechstein case, the ECtHR considered that Pechstein was "penalised for doping", that "the facts were disputed and the sanction imposed on the applicant carried a degree of stigma and was likely to adversely affect her professional honour and reputation" (ECtHR judgment, para. 182). A comparable situation is unlikely to present itself in commercial arbitration.

IV) Concluding Remarks

Whether or not the next court (OLG München again) will finally enter into the (long forgotten) merits of the case, namely the question whether Pechstein was wrongfully suspended 13 years (!) ago, there is already an important takeaway from the Pechstein saga: If arbitration proceedings are to be regarded as equal to state court proceedings, they must provide for due process. Due process requirements increase when the parties do not have the same bargaining power. The "weaker" party has to be protected, whether in state court proceedings or in arbitration proceedings. After all, such a party is just as likely to win the case as a party that brings more bargaining power to the table. A recent example for this truism is Pechstein herself: Although participating in Beijing 2022 as the oldest female athlete ever to compete at the Winter Olympics (aged 49), she still managed to outrun most of her younger competitors, finishing 9th on the Women's Mass Start as the best German participant.

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