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New Developments in International Commercial Arbitration 2015

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Pechstein v. Court of Arbitration for Sport: How Can We Break the Ice?

XAVIER FAVRE-BULLE¹

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¹ I thank David Dubin, Nadia Smahi and Nicolas Eckert (Lenz & Staehelin Arbitration Group) for the assistance in the preparation of this paper.

I. Introduction

Among the numerous cases in which an athlete has been sanctioned for a doping offence, the *Pechstein* "saga" has regularly been in the spotlight. In a first phase taking place in Switzerland, Ms Pechstein unsuccessfully challenged by all means the decision of disqualification and suspension against her. However, in a second phase which took place before the German courts, the analysis of the case was conducted with a completely different angle, much more favourable to the athlete. Many have seen the outcome as a sharp revolution for the resolution of sports disputes. The issue is not the anti-doping rules themselves and how they have been applied in the *Pechstein* case on the merits. The target of the German courts has been the Court of Arbitration for Sport ("CAS") in Lausanne, the reliability of which as a valid arbitral tribunal has been challenged in two ways: 1) lack of consent of the athlete to have her case referred to the CAS as an arbitration process unilaterally imposed by the sports federation; 2) lack of independence of the CAS, with the consequence that the arbitration agreement is deemed null and void as in breach of German competition law.

After a brief overview of the Swiss and German proceedings, the main issues which will be addressed below are: i) the extent to which a foreign court may revisit the findings of a Swiss arbitral tribunal; and ii) the sources of divergence between the courts as to the consent of the athlete to the CAS jurisdiction, the independence of the CAS and the role of competition law.

II. Swiss Proceedings

A. Decision of the ISU Disciplinary Commission

Claudia Pechstein is a world-renowned German speed skater and a member of the Deutsche Eisschnelllauf-Gemeinschaft e.V. ("DESG"), the German national federation (based in Munich) and member of the International Skating Union ("ISU", based in Lausanne). Among other merits, Claudia Pechstein has earned 7 Olympic medals, including 5 gold medals, since her first participation in the Albertville Winter Olympic Games in 1992.

Ms Pechstein underwent frequent anti-doping controls between 2000 and 2009. None of these controls led to abnormal results. In the course of the World Allround Speed Skating Championships organised in Norway in February 2009, the ISU collected samples that showed an increased level of reticulocytes in Ms Pechstein's blood. The ISU filed a complaint with the ISU Disciplinary Commission ("ISU DC"), accusing Ms Pechstein of blood doping. Ms Pechstein and the DESG denied the accusations.

After hearing experts, the ISU DC considered that the high levels of reticulocytes in Ms Pechstein's blood could be caused by two factors: either voluntary blood manipulation or a very rare congenital blood disease. Ms Pechstein was granted the opportunity to provide medical proof of the existence of such disease, but she refused and asked for a decision on the basis of the evidence already available.

On 1 July 2009, the ISU DC declared Ms Pechstein liable for an anti-doping violation under the ISU anti-doping rules by using a prohibited method of blood doping. Her results obtained during the World Allround Speed Skating

Championships were disqualified and a two-year ineligibility was pronounced.²

B. CAS Award

Ms Pechstein and the DESG brought (distinct) appeal arbitration proceedings before the CAS against the decision of the ISU DC. The proceedings were consolidated. On 4 September 2009, the CAS Panel partially upheld an application by Ms Pechstein for interim measures, authorising her to take part in all training sessions in relation to the Vancouver Winter Olympic Games.

The jurisdiction of the CAS was not challenged. In signing the Order of Procedure, the parties agreed to have their dispute decided by the CAS. The CAS Panel considered Ms Pechstein's arguments regarding the methods used for her blood profiling, the results obtained, as well as the likelihood of a congenital blood disease. Several witnesses and experts were heard.

On 25 November 2009, the CAS Panel issued a 63-page award whereby it dismissed the appeals. The ISU DC decision was upheld. Ms Pechstein was disqualified and suspended for two years.³

C. Decisions of the Swiss Federal Supreme Court

Ms Pechstein first sought to have the CAS Award set aside by the Swiss Federal Supreme Court. She later applied for the

² Decision of the International Skating Union Disciplinary Commission of 1 July 2009, available online at: <http://static.isu.org/media/104483/full-decision-of-the-isu-disciplinary-commission-pechstein1.pdf>.

³ CAS 2009/A/1912, *Claudia Pechstein v. International Skating Union* and CAS 2009/A/1913, *Deutsche Eisschnelllauf Gemeinschaft e.V. v. International Skating Union*, Award of 25 November 2009.

revocation of the CAS Award on the basis of new medical evidence. The Supreme Court dismissed both applications.⁴

1. Setting Aside Proceedings

In its first decision of 10 February 2010⁵ based on the grounds relied upon by Ms Pechstein under Art. 190(2) PILA, the Supreme Court dismissed all complaints pertaining *inter alia* to the application of the ECHR, Ms Pechstein's right to be heard and to equal treatment, as well as public policy (in particular regarding the taking of evidence). The Supreme Court also dismissed Ms Pechstein's complaints regarding the improper constitution of the CAS Panel and its alleged lack of independence (Art. 190(2)(a) PILA). It found that the CAS Panel was a legitimate arbitral tribunal. This could not be questioned by unsupported allegations regarding interests of the International Olympic Committee ("IOC"), its representatives and the international sports federations to see Ms Pechstein sanctioned for doping as "an example". Further, the argument that the President of the CAS Panel took a "hard line on doping issues" was not precise enough to create reasonable doubts with regards to his impartiality. Ms Pechstein's additional argument that the IOC and international sports federations could have influenced the CAS Award during the process of scrutiny by the CAS Secretary General – a process specifically provided for in the CAS Code as discussed below⁶ – was also deemed purely

⁴ See PATOCCHI/FAVRE-BULLE, Case Notes on International Arbitration, SZIER/RSDIE 2012, pp. 384 *et seq.* Ms Pechstein also filed a number of requests for interim relief to participate in competition training sessions, as well as an application for stay of the award. The Supreme Court allowed two of Ms Pechstein's requests, denied the others and dismissed the application for stay. See in detail: RIGOZZI, Speed Skating and Court Rushing, in: Jusletter 28 June 2010.

⁵ *Claudia Pechstein v. International Skating Union and Deutsche Eisschnelllauf Gemeinschaft e.V.*, decision by the Swiss Federal Supreme Court No. 4A_612/2009 of 10 February 2010.

⁶ V.B.4. below.

speculative. The Supreme Court stressed that, if Ms Pechstein had any issues with the independence of the CAS Panel, she should have raised them from the outset of the CAS proceedings and not for the first time during the setting aside proceedings. Such conduct was incompatible with the principle of good faith.

2. Revocation Proceedings

Following the dismissal of her application to have the award set aside, Ms Pechstein applied for the revocation of the award, relying on new (medical) evidence within the meaning of Art. 123(2) of the FTA. In its decision of 28 September 2010⁷ dismissing the application, the Supreme Court considered that Ms Pechstein had not proven that she had been unable to rely on an alleged new diagnosis (with a new algorithm) in the CAS arbitration proceedings. It was held not acceptable to rely on scientifically recognised methods and to submit expert evidence during the arbitration proceedings and, after facing an adverse award, to make an application for revocation based on some unpublished scientific methods yet to be established.

III. German Proceedings

A. Decision of the Landgericht München

Following the proceedings in Switzerland, Ms Pechstein initiated proceedings in Germany before the Landgericht München I ("LG"). She sought to have the two-year ineligibility declared unlawful and claimed damages in excess

⁷ *Claudia Pechstein v. International Skating Union (ISU)*, decision by the Swiss Federal Supreme Court No. 4A_144/2010 of 28 September 2010.

of EUR 3.5 million. The LG dismissed the action by a decision dated 26 February 2014.⁸

In the first part of its decision, the LG held that the arbitration agreements entered into between Ms Pechstein and the DESG, on the one hand ("DESG Agreement", in favour of the DIS Sports Arbitral Tribunal in Germany), and Ms Pechstein and the ISU, on the other hand ("ISU Agreement", in favour of the CAS in Switzerland), were both invalid. The Court considered that Ms Pechstein had no other alternative but to sign entry forms referring to CAS arbitration if she wished to participate in international competitions and thus practice her profession. The LG found that this resulted in a structural imbalance ("*strukturelle Unterlegenheit*") between the athletes and the sports federations. More specifically, the DESG Agreement, which was governed by German law, was found to be invalid due to the absence of free consent by Ms. Pechstein; her waiver of the procedural rights available before the state courts was *contra bonos mores* within the meaning of §138(1) of the German Civil Code (*Bürgerliches Gesetzbuch*, "BGB").⁹ For its part, the ISU Agreement, governed by Swiss law, was also found to be invalid, as it breached Art. 27(2) CC, pursuant to which "*no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or good morals*". The Court held that, in view of the ISU's position at the time of the conclusion of the arbitration agreement, Ms Pechstein could not validly waive her right to justice. The LG considered that the Swiss Federal Supreme Court's approach towards sports arbitration agreements – whereby such agreements are deemed valid notwithstanding the somewhat limited free consent of the athlete as

⁸ LG München I Az. 37 O 28331/12, Urteil vom 26. Februar 2014, reported in *Causa Sport* 2014, pp. 154 *et seq.*

⁹ In addition, the arbitration clause was held invalid as to its content ("*Inhaltskontrolle*" within the meaning of §§138, 242 BGB).

discussed below¹⁰ – could not be followed in the light of Art. 6 ECHR.

Despite having found both arbitration agreements invalid, the LG then considered that the CAS Award had carried *res judicata* effect. The Court held that Ms Pechstein could not invoke the invalidity of the arbitration agreement in order to prevent recognition of the CAS Award pursuant to Art. V(1)(a) NYC. Although Ms Pechstein was aware of the invalidity of the arbitration agreement at the time of the CAS proceedings, she proceeded without raising an objection as to the Panel's jurisdiction. In line with general principles of international arbitration, Ms Pechstein implicitly waived her right to subsequently invoke the invalidity of the arbitration agreement; hence, she was precluded from doing so before the German Courts. The LG denied further objections based on the NYC, such as Ms Pechstein's contention that the CAS Award breached (both procedural and substantive) public policy.

B. Decision of the Oberlandesgericht München

Ms Pechstein appealed against the LG decision to the Oberlandesgericht München ("OLG"), which upheld the appeal by a decision dated 15 January 2015.¹¹ In essence, the OLG held that the ISU Agreement was null and void and denied the *res judicata* effect of the CAS Award. Ms Pechstein was not prevented from seeking relief before the state courts, in particular in claiming damages against the ISU. Unlike the LG, the appellate Court considered that an

¹⁰ V.A. below.

¹¹ OLG München Az. U 1110/14 Kart, *Claudia Pechstein gegen Deutsche Eisschnelllauf-Gemeinschaft e.V. (DESG) und International Skating Union (ISU)*, Teil-End- und Teil-Zwischenurteil vom 15. Januar 2015, reported in SpuRt 2015, pp. 78 ff; RIW 2015, pp. 233 *et seq.*

arbitration agreement is not necessarily null and void due to the lack of free consent of the athlete, and does not *per se* breach Art. 6 ECHR. By contrast, the OLG held that the arbitration agreement in favour of the CAS breached mandatory provisions of German competition law.

According to the OLG, the ISU is a monopolist within the relevant market, which it defined as the market for the organisation of speed skating world-championships. As a monopolist, the ISU is prohibited under German law from imposing business terms that would likely not be agreed to in a free market. This includes arbitration agreements which impair recourse to state courts. The OLG emphasised that the requirement for an athlete to enter into an arbitration agreement for disputes arising out of international competitions is not *per se* an abuse of a dominant position as long as the agreement provides for a “structurally neutral” tribunal.

However, an arbitration agreement referring disputes to the CAS would not have been agreed to by an athlete in a free market situation, due to the “structural imbalance” of CAS arbitration in favour of the sports federations. According to the Court, a disproportionate influence in favour of the sports federations is in particular reflected by Art. S4 and S14 of the CAS Code 2004, which set out the rules of constitution of the International Council of Arbitration for Sport (“ICAS”) and the selection of arbitrators to be included on the CAS closed list of arbitrators. These structural deficiencies affect the independence of the CAS arbitral tribunals. The OLG also criticised the imbalance arising from Article R54 of the CAS Code 2004, which in its view allowed the sports federations to exercise an indirect influence on a CAS Panel through the nomination of its President. No rational justification for the imbalance in favour of the sports federations was found to exist. As a consequence, the

arbitration agreement was held to be null and void because of the abuse by the ISU of its dominant position.

Having established its jurisdiction over the claims asserted by Ms Pechstein, the OLG further held that the CAS Award has no *res judicata* effect. The CAS Award does not necessitate a particular recognition process in Germany; however, the Court must at least verify that the requirements for the recognition of that award are met. Pursuant to German law and Art. V(2)(b) NYC, recognition and enforcement of an arbitral award may be denied if the award is contrary to German public policy, which includes fundamental provisions of competition law. Given that the CAS arbitration agreement imposed by the ISU on Ms Pechstein is an abuse of dominant position prohibited under German competition law, the CAS Award which upheld such arbitration agreement cannot be recognised and enforced in Germany. Therefore, the German Courts are not bound by the findings of the CAS as regards the doping sanction at stake; they will be able to examine the merit of Ms Pechstein's action, which is admissible (in part).

This interim decision allowing further proceedings on the merits has been challenged by the ISU before the German Supreme Court (*Bundesgerichtshof*). According to our information, no decision is expected before 2016.

IV. How Far May a Foreign Court Revisit the Findings of a Swiss Arbitral Tribunal?

The way in which the two Munich Courts reviewed the CAS Award in the *Pechstein* case calls for an analysis in two parts: (1) what are the situations in which, and the conditions under which, a foreign court may make findings on a dispute which already led to a first decision by the CAS

in Switzerland, and (2) did the German Courts remain within what is acceptable when revisiting the *Pechstein* case?

A. Principles

An arbitral award made by an arbitral tribunal sitting in Switzerland is final from its notification to the parties (Art. 190(1) PILA). The award may be set aside before the Swiss Federal Supreme Court (Art. 190(2) PILA). The suspensive effect is not automatic; it may be requested¹² and the situations in which it is granted are rather exceptional.¹³ In the absence of any suspensive effect, or when the award is ultimately upheld by the Swiss Federal Supreme Court upon the dismissal of the application to set aside, the award may be sought to be enforced, in Switzerland or abroad.

In a foreign state, the Swiss award has neither any existence nor binding effects unless and until it is recognised and enforced or at least held recognisable, most often in accordance with the NYC (when applicable). Recognition and enforcement of the award may be refused only if at least one of the narrow grounds set out in Art. V is met. Most courts interpret these grounds narrowly in order to safeguard the “pro-enforcement-bias” of the Convention.¹⁴

A foreign court should in principle not revisit a decision on the merits (whether a judgment or arbitral award) made in Switzerland in the same case. The general and widely recognised principle of civil procedure barring an open review of a Swiss decision in subsequent proceedings abroad is *res judicata*. In a system based on principles of natural justice and legal certainty, there is an obvious interest that a dispute between parties already settled by a decision in force

¹² Art. 103 FTA.

¹³ In Ms Pechstein’s case, the athlete’s application for stay of the award was dismissed (see footnote 4 above).

¹⁴ FAVRE-BULLE, New York Convention, p. 65.

is not revisited by another court or tribunal in subsequent proceedings. When a party is unhappy with a first decision and seizes a second court to hear the matter again, that court should in principle dismiss the action as it is bound by the *res judicata* effect of the first decision. When the second court is not in the same state, it will also have to consider as an ancillary issue whether the first decision is recognisable. Whilst clear in its nature, *res judicata* is nevertheless a principle of law the application of which may slightly vary from a state to another (e.g. as to whether the first decision is binding on the second court only with respect to its operative part or also as regards to its reasons).

B. The German Court Decisions in *Pechstein*

The *Pechstein* case, namely the dispute between the athlete and the ISU regarding the sanction applied for a doping offence, has been fully heard and finally decided by an arbitral tribunal sitting in Switzerland, *i.e.* a CAS Panel. The CAS Award has been upheld by the Swiss Federal Supreme Court, both in setting aside and revocation proceedings. It has not been sought to be recognised and enforced abroad, in particular not in Germany, since there was no need to do so (Ms Pechstein was banned from all competitions for two years by application of the ISU anti-doping rules). In short: the CAS Award was final and binding; there was no reason that it be revisited by any other judicial body.

The very clever move by Ms Pechstein was to initiate new proceedings on the merits in Germany, in her own country before the Munich Courts (where the national federation [DESG] has its registered office), in suing the ISU as co-defendant pursuant to Art. 6(1) of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007 ("Lugano Convention"). Ms Pechstein is seeking a declaration that her sanction of 2009 is invalid, as well as significant damages.

From a formal point of view, this prayer for relief is different from what has been decided in the operative part of the CAS Award. However, it is fairly obvious that Ms Pechstein's action in Germany is intended to have the findings of the CAS revisited by a new court having a fresh look at a matter already decided on the merits.

In such circumstances, one would have expected the Munich Courts to have taken a very prudent approach of the case in avoiding the consideration of issues of substance already decided by a foreign tribunal. The main obstacle for the Munich Courts was the *res judicata* effect of the CAS Award, which prevented them from deciding afresh on matters already adjudicated upon by a first tribunal. Depending on how *res judicata* is applied in German civil procedure, this principle could apply directly, if the applicable requirements are met, or at least indirectly, if the Courts consider that the new action by Ms Pechstein in Germany runs counter to the rules of good faith and constitutes an abuse of process.

Two other issues are also relevant. First, while the jurisdiction of the German Courts rests on the Lugano Convention, arbitration is expressly excluded from the scope of application of that treaty, in Art. 1(2)(d). Considering that Ms Pechstein was bound by a CAS arbitration agreement with the ISU (which led to the CAS Award being made on that basis), the German Courts could have decided that they had no jurisdiction to hear Ms Pechstein's action in Germany against the ISU based on the Lugano Convention. Second, Ms Pechstein had not raised the invalidity of the arbitration agreement before the CAS and she had not denied the jurisdiction of that arbitral tribunal. One could consider that, after having accepted to have her case fully heard by the CAS, Ms Pechstein was precluded from denying the jurisdiction of that tribunal in subsequent proceedings; her

new action in Germany could thus be seen as an abuse of right (*venire contra factum proprium*).¹⁵

Surprisingly, neither the LG nor the OLG exploited these routes as one would have expected. Instead of starting with the issues of the arbitration exclusion in the Lugano Convention, *res judicata* and the principle of good faith and the prohibition of the abuse of right, both Courts first embarked on a thorough analysis of the validity of the arbitration agreement, whether as to Ms Pechstein's consent to have her case referred to CAS arbitration (LG) or in competition law (OLG), as if the German Courts were the first courts to hear the matter on the merits. At no point did the German Courts apply a *prima facie* test whereby, in presence of an arbitration agreement, the detailed examination of the jurisdiction under that agreement should be left to the arbitral tribunal; the so-called negative effect of the competence-competence principle was not considered.¹⁶

Res judicata and the abuse of process by Ms Pechstein were considered by the LG, but only at the end of the decision, after lengthy reasons on the invalidity of the arbitration agreement. Since the LG ultimately dismissed Ms Pechstein's claims, on the ground that she had not raised any jurisdictional objection before the CAS and was thus bound by the *res judicata* effect of the CAS award, one may wonder why the LG dedicated significant parts of its decision to Ms Pechstein's lack of consent as to the CAS arbitration agreement "imposed" by the ISU. As regards the OLG, it took another approach in denying any *res judicata* effect to the CAS Award on the ground that it could not be recognised in Germany since the abuse of dominant position of the ISU in "imposing" a CAS arbitration agreement was against

¹⁵ DUVE/RÖSCH, *Kartellrecht*, p. 73; MONHEIM, pp. 93-94. Contra: ROMBACH, p. 110.

¹⁶ See in detail: GAILLARD, pp. 257 *et seq.*

public policy. Although the validity of an arbitration agreement providing for arbitration in Switzerland in a matter also governed by Swiss law on the merits should be decided under Swiss law by the arbitral tribunal constituted under that agreement (Art. 178, 186, 187 PILA), the OLG applied conflict of laws provisions and provisions of substantive law exclusively under German law.¹⁷

The specific grounds held by the German Courts will be discussed in the next section, to assess the extent to which these grounds had sufficient merit to hold in favour of Ms Pechstein.

The preliminary conclusion to be drawn at this juncture is the great concern one should have in the critical stand taken by the German Courts, with their unfettered power to review and decide on issues already considered by a foreign tribunal. On that basis, other parties unhappy with a first decision might wish to have it reconsidered on the merits *de novo* by a second court, although without any good reason insofar as the first decision was final and in force. When the Lugano Convention was adopted, the underlying idea of the Member States was that a European court seized after a first decision had been made in another European country should recognise and enforce it without any review of the merits of the decision (Art. 36) and even without considering in most cases whether the first court had jurisdiction (Art. 35). In light of such spirit of judicial cooperation in Europe, it is puzzling that a CAS award made in Switzerland, when brought before the German courts, draws little interest and that the German courts would feel entitled to proceed with a full review of the substance of the dispute already decided, in disregarding the arbitration agreement. The *Pechstein* case may have very negative consequences for arbitration and put at risk the legal certainty of arbitral awards made in

¹⁷ See DUVE/RÖSCH, *Kartellrecht*, pp. 73-74.

Switzerland when they are revisited by a foreign court without the appropriate restraint.

V. The Swiss View versus the German View: the Sources of Divergence

On the one hand, the *Pechstein* case was successively heard in Switzerland by the ISU instances, a CAS Panel and the Swiss Federal Supreme Court. The sanction against Ms Pechstein for a doping offence and the submission of the dispute to CAS arbitration were considered valid and enforceable. On the other hand, for certain grounds, both the LG and OLG Munich came to completely different conclusions. The question arising for determination, when comparing the "Swiss approach" and the "German approach" as to the issues at stake, is: who is right?

A. The Athlete's Consent to the CAS Jurisdiction

Arbitration is of a consensual nature, and such is supposed to be the case of CAS arbitration,¹⁸ which is not *per se* intended to be a form of forced or compulsory arbitration.

¹⁸ See Article R27 CAS Code (2013 version): "*These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)*". For appeals arbitration proceedings, see Article R47 CAS Code: "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body*".

However, the reality of sports disputes is different, as discussed below.

When assessing the validity of a CAS arbitration agreement, a CAS Panel may apply Swiss law under Art. 178(2) PILA. As for any other system of law, the arbitral tribunal will have to determine whether the legal requirements are met in order to consider that an (arbitration) agreement has validly been entered into. Under Swiss law, the basic requirement is that the parties have expressed their mutual intention to refer their disputes to CAS arbitration (Art. 1 *et seq.* CO) and that the parties' consent was not vitiated (Arts 21, 23 *et seq.* CO).

This test does not automatically lead to acknowledge that a CAS arbitration agreement is valid and binding and that the CAS has jurisdiction. There are instances where, in view of the circumstances of the case, the Swiss Federal Supreme Court disagreed with the CAS Panels and held that a CAS arbitration agreement had not properly been entered into.¹⁹ However, as regards the consent given by the athlete when agreeing to a CAS arbitration agreement contained in the statutes of a sports federation, the decided cases of the Swiss Federal Supreme Court show that the test should not be too strict.

This "liberal approach" ("*Wohlwollen*"; "*bienveillance*") has been applied in order to favour prompt settlements by specialised arbitral tribunals with sufficient guarantees of independence and impartiality, including in anti-doping matters in view of the significant role taken by the CAS in the fight against doping.²⁰ When reviewing the validity of

¹⁹ See e.g. *Busch v. World Anti-Doping Agency (WADA)*, decision by the Swiss Federal Supreme Court No. 4A_358/2009 of 6 November 2009; *X. v. Y.*, decision by the Swiss Federal Supreme Court No. 4A_456/2009 of 3 May 2010.

²⁰ See e.g. the leading *Cañas* case: *X. v. ATP Tour and Tribunal Arbitral du Sport (TAS)*, BGE/ATF 133 III 235, 22 March 2007; *Fussballclub X. v. Y. S.à.r.l.*,

such arbitration agreements, the Supreme Court gives more weight to substantive consent (Art. 178(2) PILA) than to the formal requirements (Art. 178(1) PILA), in admitting clauses contained in statutes and therefore incorporated by reference.²¹ Regarding the substantive consent, the Supreme Court also assumes that an athlete agrees to the regulations of a federation when he/she seeks a general authorisation from that federation in order to be allowed to participate in a competition.²²

This position of the Swiss courts is of course open to debate and some commentators and practitioners have expressed criticism.²³ However, the merit of this soft approach in the review of the athlete's consent is to be pragmatic and efficient. Although leading commentators rather analyse the Supreme Court's position as the acknowledgement that sports arbitration is in fact non-consensual and compulsory (in particular based on the *Cañas* decision), the validity of the arbitration agreement despite the athlete's lack of true consent is supported.²⁴

The reality of sports is that the athletes want to participate in competitions, not negotiate with federations as to the contents of a dispute resolution clause. The professional athletes usually know that the statutes of their international federation provide for CAS arbitration and that CAS arbitration is not worse than most state courts with poor knowledge of sports law. Accordingly, those athletes accept at least by conduct that the CAS would be the tribunal of

BGE/ATF 138 III 29, 7 November 2011; *A. and B. v. AMA and VTV*, decision by the Swiss Federal Supreme Court No. 4A_428/2011 of 13 February 2012.

²¹ *A. v. World Anti-Doping Agency (WADA), Fédération Internationale de Football Association (FIFA) and Cyprus Football Association (CFA)*, decision by the Swiss Federal Supreme Court No. 4A_640/2010 of 18 April 2011.

²² *X. v. Y. and Fédération Internationale de Football Association (FIFA)*, decision by the Swiss Federal Supreme Court No. 4A_548/2009 of 20 January 2010.

²³ See e.g. BADDELEY, pp. 717-719; ZEN-RUFFINEN, pp. 489-495.

²⁴ RIGOZZI/ROBERT-TISSOT, pp. 64-72.

competent jurisdiction in case they have to challenge a decision of their sports federation. The submission that the athlete did not consent to CAS arbitration is often an argument used by legal counsel when the CAS award was not favourable to their client. This is what happened with Ms Pechstein.

The Munich Courts did not consider these aspects. The LG applied a very strict test of consent, which is hardly realistic and would suggest that most arbitration agreements incorporated by reference to the statutes/regulations of the sports federation and/or competition entry forms are null and void as they are imposed on athletes, who have no choice but to agree to them if they want to participate in competitions. This approach – amounting to a quasi-presumption of nullity of arbitration agreements resorted to for sports disputes – goes too far.²⁵ Whilst acknowledging the advantages of a specialised tribunal dealing with sports disputes, the OLG, for its part, criticised arbitration clauses used to force athletes to refer their disputes to an arbitral tribunal that lacks sufficient independence.

Arbitration agreements proposed by sports federations in favour of CAS or other arbitration schemes (e.g. DIS Sports Arbitral Tribunal in Germany) are in the interest of an efficient resolution of the dispute.²⁶ They are not imposed by sports federations simply willing to abuse their dominant position.²⁷ For all sports submitted to the World Anti-Doping Code adopted by the World Anti-Doping Agency (“WADA”), the CAS is specifically the tribunal mandatorily designated to hear appeals for international events or international-level athletes. This is why CAS arbitration was referred to in the

²⁵ BRANDNER/KLÄGER p. 115; ROMBACH p. 109; Note on LG München by MAISONNEUVE, *Chronique de jurisprudence arbitrale en matière sportive*, *Revue de l'arbitrage* 2014, pp. 670 *et seq.*, 672.

²⁶ RIGOZZI/ROBERT-TISSOT, p. 68; DUVE/RÖSCH, Pechstein, p. 223.

²⁷ GÖKSU, p. 360.

statutes of the ISU. CAS arbitration allows sports disputes to be decided in one forum worldwide, in principle efficiently (short proceedings), with the same rules applying to all athletes, thereby ensuring equal treatment.²⁸

For these reasons, CAS arbitration agreements are not *contra bonos mores*. They do not *per se* constitute a contractual restriction on the economic freedom of the athletes within the meaning of Art. 27(2) CC.²⁹ This provision of Swiss law may apply in very specific circumstances, but not in a very broad way simply because a CAS arbitration agreement is at stake. Art. 27(2) CC was applied by the Swiss Federal Supreme Court in the *Matuzalem* case in view of the sanction regime imposed by the FIFA Disciplinary Code when a football player does not pay the damages decided against him, not at all because of the presence of a CAS arbitration agreement.³⁰ In sum, Swiss law was not correctly applied by the LG.³¹ Further, referring a sports dispute to CAS arbitration is not incompatible with Art. 6 ECHR.³²

Another fundamental circumstance acknowledged by the LG but somewhat ignored by the OLG (for which the abuse of ISU's dominant position prevailed) is that Ms Pechstein had agreed to the jurisdiction of the CAS when appearing before it, at least in signing the Order of Procedure and not raising any jurisdictional objection. In so doing, the athlete waived any grievances she could have as to the invalidity of the CAS

²⁸ RIGOZZI/ROBERT-TISSOT, p. 72; Note on LG München by MAISONNEUVE, *Chronique de jurisprudence arbitrale en matière sportive*, *Revue de l'arbitrage* 2014, pp. 670 *et seq.*, 673; GÖKSU, p. 360.

²⁹ GÖKSU, p. 359; RIGOZZI/ROBERT-TISSOT, pp. 71-72. *Contra* : BADDELEY, pp. 710 – 714; ZEN-RUFFINEN, pp. 488-494.

³⁰ *Francelino da Silva Matuzalem v. Fédération Internationale de Football Association (FIFA)*, BGE/ATF 138 III 322, 27 March 2012. See FAVRE-BULLE/VIRET, pp. 393 *et seq.* and the references cited.

³¹ GÖKSU, p. 363; HAAS, pp. 708-713, 733.

³² HAAS, pp. 716-733. *Contra*: MURESAN/KORFF, p. 10.

arbitration agreement she had agreed to (unless her consent was vitiated, which she did not contend). As a general principle of international arbitration, a plea against the jurisdiction of the arbitral tribunal must be presented at the outset of the arbitration proceedings (see Art. 186(2) PILA under Swiss law and Art. 1040(2) ZPO under German law). As emphasised above,³³ relying on the absence of consent to challenge the validity of the arbitration agreement in subsequent court proceedings after an adverse CAS award is not compatible with the rules of good faith and should have been disregarded by the OLG.

B. Sufficient Independence of the CAS?

1. The CAS as a True Arbitral Tribunal

In view of the increasing number of sports disputes and the absence of any independent authority that specialising in such disputes, the CAS was set up and became operational in 1984 on the initiative of the IOC. Over time, international sports federations adopted CAS arbitration agreements in their statutes and the CAS became the most important sports dispute resolution institution worldwide.

After amendments to its statutes and procedural rules in 1990, the CAS faced cases before the Swiss Federal Supreme Court where its independence was tested by applications to set aside filed by athletes. In the first leading case of 1992 (*Gundel*),³⁴ the Supreme Court, while acknowledging the nature of the CAS as an independent arbitral tribunal despite its closed list of arbitrators, emphasised numerous ties between the CAS and the IOC (in particular as regards the costs of the CAS, its statutes and

³³ IV. B. above.

³⁴ *Gundel v. Fédération Equestre Internationale and Tribunal Arbitral du Sport*, BGE/ATF 119 II 271, 15 March 1993.

the appointment of the arbitrators on the CAS list), which could compromise the independence of the CAS in situations where the IOC would be a party to the proceedings.

This led to a major reform of the CAS, characterised by the setting up of the ICAS, which took over responsibilities from the IOC to ensure more independence, and the adoption of the Code of Sports-related Arbitration ("CAS Code"), which came into force on 22 November 1994.

Among other cases brought before the Supreme Court after that reform,³⁵ the Supreme Court confirmed in the *Lazutina* case,³⁶ upon a fresh and thorough review of the institution and its rules, that the CAS was sufficiently independent from the IOC. Since then, this position has been consistently maintained, including in Ms Pechstein's own case decided on 10 February 2010 as described above.³⁷

The CAS Code has regularly been amended since its adoption, to adapt it to modern arbitration practice and standards, and to take into account certain developments in case law.³⁸ The main revisions came into force in 2004, 2012 and in 2013 for the current version. The cornerstone of the *Pechstein* case lies in the provisions of the version of the CAS Code which applied at the time (2004), some of which have subsequently been amended, as discussed below. The main issues stressed by the OLG as impeding the

³⁵ *Nagel v. Fédération Equestre Internationale*, decision by the Swiss Federal Supreme Court No. 4C_44/1996 of 31 October 1996; *Raducan v. Comité International Olympique*, decision by the Swiss Federal Supreme Court No. 5P.427/2000 of 4 December 2000; *Stanley Roberts v. Fédération Internationale de Basketball (FIBA)*, decision by the Swiss Federal Supreme Court No. 4P.230/2000 of 7 February 2001.

³⁶ *A. and B. v. Comité International Olympique, Fédération Internationale de Ski and Tribunal Arbitral du Sport*, BGE/ATF 129 III 445, 27 May 2003.

³⁷ II.C.1. above.

³⁸ RIGOZZI/HASLER/QUINN, pp. 2 *et seq.*; FAVRE-BULLE, CAS Code, p. 46. See also RIGOZZI, *L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux*, RSD 2013 I, p. 301 *et seq.*

independence of the CAS concern the influence of the ICAS on the list of approved CAS arbitrators (i) and the influence of the CAS on the appointment of the President of a CAS Panel (ii); although this was not discussed by the OLG, the LG further criticised the scrutiny of the draft award by the CAS Secretary General (iii).

2. The CAS List of Arbitrators

The selection of arbitrators in CAS arbitration proceedings is based on a closed list from which the parties have to pick arbitrators to constitute the CAS Panel. This system has been considered efficient since it guarantees that the arbitrators have sufficient expertise in sports and arbitration.³⁹ The OLG did not contest the principle of a list, but the way arbitrators are selected to be on that list, considering that sports organisations have a decisive influence on the selection of the persons acting as CAS arbitrators.

According to Art. S6(3) of the CAS Statutes, the ICAS appoints the arbitrators who constitute the list of CAS arbitrators. Under the 2004 version of the CAS Statutes, in force at the time of the CAS proceedings in Ms Pechstein's case, Art. S14 provided that, in establishing the list of CAS arbitrators, the ICAS shall "*call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language*". In addition, the ICAS had to appoint arbitrators pursuant to a specific composition (Art. S14): (a) 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside; (b) 1/5th of the arbitrators selected from among the persons proposed by the International Sports

³⁹ See e.g. DUVAL/VAN ROMPUY, p. 22.

Federations ("IFs"), chosen from within their membership or outside; (c) 1/5th of the arbitrators selected from among the persons proposed by the National Olympic Committees, chosen from within their membership or outside; (d) 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; (e) 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with Art. S14.

Accordingly, only 2/5th of the arbitrators were not designated by sports organisations. These 2/5th were to be nominated by the ICAS, whose composition is in turn governed by Art. S4.

Pursuant to Art. S4 (substantially the same in the 2004 and 2013 versions), the ICAS is composed of twenty experienced jurists appointed in the following manner: (a) four members are appointed by the ("IFs"), viz. three by the Summer Olympic IFs ("ASOIF") and one by the Winter Olympic IFs ("AIOWF"), chosen from within or from outside their membership; (b) four members are appointed by the Association of the National Olympic Committees, chosen from within or from outside its membership; (c) four members are appointed by the IOC, chosen from within or from outside its membership; (d) four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; (e) four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS.

It results from Art. S4 that the sports organisations designate 12 members out of the 20 that constitute the ICAS. These 12 members then designate the 1/5 of the members in the interests of the athletes and then have an

influence on the designation of the last 1/5 of the arbitrators on the list.

The OLG considered that, through their influence on the composition of the ICAS, the sports federations exercised a considerable influence on the composition of the list of CAS arbitrators. The independence of the ICAS itself was also questioned given the influence of sports federations on its very own composition. In short, the OLG took the view that this "structural deficiency" threatened the neutrality of the arbitral tribunal, regardless of the fact that a person included on the CAS list may or may not be personally connected to a sports federation. In other words, the OLG considered that the "tainted" composition of the ICAS influences all arbitrators on the list. An athlete should rather have the possibility of picking the arbitrator of his/her choice, perhaps while additionally proving that the arbitrator has the expertise needed.

These reasons are somewhat surprising in that they presume an inherent lack of independence of the individuals composing the ICAS and in turn of the list of CAS arbitrators, as if a person potentially close to a sports federation should by nature be biased. This strong stance has never been shared by the Swiss Federal Supreme Court, which preferred to limit its considerations on a possible lack of independence to situations where concrete circumstances so suggest.

In any event, the 2004 CAS Statutes have been revised since the *Pechstein* case. The current 2013 CAS Statutes provide for a new process to establish the list of arbitrators under Art. S14:

"In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one

CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes”.

Since Arts. S4 and S6(3) of the CAS Statutes have substantially remained the same, the ICAS still designates the arbitrators on the list and is still composed in the same manner. If the issue raised by the OLG lies in the constitution of the ICAS itself, the amendments to the disputed provisions have not resolved the problem. However, it would be quite schizophrenic to presume that the arbitrators on the CAS list, despite the new appointment system in Art. S14, are still influenced by the sports federations having themselves an influence on the composition of the ICAS. Such considerations do not exist when bodies of arbitration institutions appoint arbitrators (although not from a closed list in commercial or investment arbitration). Creating high suspicion of bias simply because one is dealing with sports organisations seems unjustified, not to say unfair.

3. Appointment of the President of a CAS Panel

The OLG criticised the process by which the President of a CAS Panel is appointed, *i.e.* by the President of the Appeals Arbitration Division,⁴⁰ who is himself nominated by the ICAS (Art. S6(2) of the CAS Statutes).

⁴⁰ Article R54 of the CAS Code provides in relevant part (the 2004 version was substantially the same) that “*If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel following nomination of the arbitrator by the Respondent and after having consulted the arbitrators. The arbitrators nominated by the parties shall only be deemed appointed after confirmation by the President of the Division. Before proceeding with such confirmation, the President of the Division shall ensure that the arbitrators comply with the requirements of Article R33*”.

In the OLG's opinion, since the sports federations influence the composition of the ICAS, the designation by the ICAS of the President of the Division allows him to have an indirect influence on the third member of the Panel that will deal with a given dispute.

Again, this position may appear rather extreme in that it assumes that the President of a CAS Panel will more often than not be chosen to preserve the interests of the sports federation involved in the dispute, as opposed to those of the athlete. Compared to other sets of arbitration rules, an efficient system would have been to let the party-appointed arbitrators select the president, possibly in consultation with the parties as is often the case in commercial arbitration. The appointment by a representative of the arbitration institution upon mere consultation of the party-appointed arbitrators certainly leaves more discretion to the CAS in the selection of what they consider suitable chairpersons. However, this does not necessarily make this choice arbitrary and pro-sports organisations biased.

4. Proofreading of the Draft Award

As an additional flaw, the LG mentioned the proofreading of arbitral awards by the CAS Secretary General. Although the Court recognised the validity of such process in other institutional arbitrations (*e.g.* the ICC), it considered that this compromised the independence of the Panel in Ms Pechstein's case since the arbitration agreement was "forced".

According to Art. R59 of the CAS Code,⁴¹ the award drafted by the Panel shall be transmitted before it is signed to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle.

⁴¹ For appeal proceedings. Art. R46 applies to ordinary proceedings.

This process does not appear unreasonable in nature. While it mostly allows for corrections of formal mistakes (e.g. spelling, grammar or miscalculation of figures), it also enables the Secretary General to point out substantial issues (e.g. missing elements of the award or differences potentially unjustified with established CAS case law).⁴² As long as the Secretary General cannot impose these changes on the Panel and the arbitrators keep their entire discretion to make their award as they deem appropriate, the independence of the arbitral tribunal is preserved.⁴³ The CAS Secretary General's assistance shall remain a mere optional device to improve the quality of the CAS awards. As held by the Swiss Federal Supreme Court in its *Pechstein* decision,⁴⁴ the contention that the IOC and the sports federations may influence a CAS award through the scrutiny process by the CAS Secretary General is speculative.

5. Reform of the CAS: Wish, Necessity or Uselessness?

Although the method and outcome may be seen as rather harsh, the decisions of the Munich Courts in *Pechstein* have at least the merit of questioning whether the CAS deserves some reform. This is also what the Swiss Supreme Court did in the *Gundel* case mentioned above.⁴⁵

The short answer is yes.⁴⁶ As emphasised by some commentators, the CAS – and in turn the decided cases of the Swiss Federal Supreme Court in CAS matters – have been the target of strong criticism over recent years which

⁴² MAVROMATI/REEB, p. 366.

⁴³ RIGOZZI/ROBERT-TISSOT, p. 72. Contra : ZEN-RUFFINEN, pp. 507-508.

⁴⁴ See II.C.1. above.

⁴⁵ V.B.1. above.

⁴⁶ ROMBACH, p. 110; DUVE/RÖSCH, Kartellrecht, p. 77; ZEN-RUFFINEN, pp. 533-537.

cannot be completely ignored.⁴⁷ However, one should be careful not to throw out the baby with the bathwater and destroy or dramatically affect what has patiently been built over time. On balance, the CAS system as an arbitration scheme dedicated to the resolution of sports dispute is to be approved. Its day-to-day functioning could yet be improved so as to strengthen the trust that everyone should have in the system, not only the sports organisations but also all athletes.⁴⁸

Hence, the reform should not necessarily be major. It is not of paramount urgency either in view of the improvements brought about by the 2013 revision of the CAS Code. The most efficient way to go forward would be to organise a large consultation process so as to gather the opinion of all circles involved in sports. Another question to be addressed could be the role that the CAS Court Office has throughout the proceedings as the direct contact point of the parties. More autonomy could be left to the Panels. As regards the alleged influence of the sports organisations on the CAS, the issue is very subtle as it is difficult to measure absent a concrete and established bias. The reasons in the Munich Courts' decisions show that the grievances expressed are inherent in the manner the system is framed and operated in general, regardless of what happens in each concrete case. At no time was Ms Pechstein able to demonstrate an actual flaw which directly affected her as an athlete in the proceedings.⁴⁹ It is all about impressions and how far sports organisations and their representatives may be trusted or presumed biased.

⁴⁷ See e.g. PONCET, pp. 31 *et seq.*; BEFFA, pp. 600-601; BADDELEY, pp. 707 *et seq.*; ZEN-RUFFINEN, pp. 483 *et seq.*

⁴⁸ RIGOZZI/ROBERT-TISSOT, p. 71.

⁴⁹ GÖKSU, p. 360 ; PATOCCHI/FAVRE-BULLE, Case Notes on International Arbitration, SZIER/RSDIE 2012, pp. 382 *et seq.*, 388.

In a statement issued on 27 March 2015 after the OLG Decision, the CAS confirmed that it is “*always prepared to listen and analyse the requests and suggestions of its potential users i.e. the athletes, sports federations and other sports entities, in order to continue its development with appropriate reforms*” and that “*it will continue to improve and evolve with changes in international sport and best practices in international arbitration law*”.⁵⁰ Such a statement of intent should now be concretised with effective steps for an efficient reform.

The key question regarding CAS arbitration is whether a closed list should be maintained.⁵¹ On the one hand, arbitration proceedings may be conducted and be efficient and fair without predetermined arbitrators, as most sets of arbitration rules show. On the other hand, the closed list (if sufficiently large) guarantees a selection of various profiles and that former athletes may be appointed as arbitrators. A free choice of arbitrators might lead to the regular appointment of so-called “usual suspects”, more likely to be experienced arbitration practitioners than individuals having solid sports background, or conversely, to the appointment of sports “friends” having no sufficient arbitration experience.

In case the list is maintained, which arbitrators are put on that list and how the ICAS members are appointed (possibly with more representation power of athletes’ and players’ unions) is an area for improvement, as is the appointment of the President of the Panel in a given case. The message sent by the German Courts in *Pechstein* is clear: the appearance of independence of the CAS vis-à-vis the sports

⁵⁰ Statement of the CAS on the decision made by the Oberlandesgericht München in the Case between Claudia Pechstein and the International Skating Union (ISU), 27 March 2015, available at: http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf.

⁵¹ See RIGOZZI/ROBERT-TISSOT, p. 72.

organisations (IOC, IFs, etc.) is key, and sufficient confidence in the system will only exist if reforms are concretely made in this respect.⁵² In turn, this is the only way to ensure that CAS awards, even when upheld by the Swiss Federal Supreme Court, are not revisited by foreign courts.

C. CAS “Imposed” by Sports Federations: Breach of Competition Law?

While the LG did not find any breach of competition law in the way Ms Pechstein had been treated, the main feature of the appeal decision by the OLG is that it gives significant weight to German competition law – to such an extent that the CAS Award was ultimately held to be against German public policy and thus not recognisable. The room left to competition law in the German decisions is not surprising since the matter was submitted to the antitrust section of the Courts in view of the nature of Ms Pechstein’s complaints.

However, as emphasised by some commentators,⁵³ the reasons of the OLG are hardly persuasive. A thorough analysis of German competition law cannot be conducted in this paper.⁵⁴ This section will be limited to highlighting some areas where the OLG’s approach seems questionable.

First, the OLG made very strong findings as to the application of competition law to how the resolution of sports disputes is organised (*i.e.* submission to the CAS), including in anti-doping matters. One may be surprised that such findings were not backed up by a thorough analysis by the German competition authorities (*Bundeskartellamt*), which

⁵² NIEDERMAIER, p. 286.

⁵³ DUVE/RÖSCH, *Kartellrecht*, pp. 71 *et seq.*

⁵⁴ See *e.g.* STANCKE, pp. 46 *et seq.*

could have intervened in the proceedings in providing their opinion on the legal issues at stake.

Second, a specific international sports federation (such as the ISU in the *Pechstein* case) may hardly be blamed for abusing its dominant position in “imposing” the CAS as an arbitration institution. The CAS is the body, recognised by WADA, that each Olympic sport has to choose as the competent arbitral tribunal for appeals in anti-doping matters.⁵⁵ The OLG’s finding that this circumstance is without relevance from a competition law perspective (“für die kartellrechtliche Würdigung ohne Belang”) is not convincing.

Third, the OLG decision is silent on the application of EU competition law. Yet, within the EU, national and European competition laws are often applied concurrently. When a court applies national competition law to the abusive practice of a dominant undertaking, and this practice may affect trade between the Member States, it must also apply EU competition law.⁵⁶ The OLG applied a provision of German law⁵⁷ which prohibits the abuse of a dominant position through the imposition of business terms that would likely not be agreed to in a free market. It should also have examined the application of an essentially identical provision of European law, Art. 102 TFEU⁵⁸ (ex Art. 82 of the Treaty establishing the European Community). The Court would then have had to determine whether the ISU’s behaviour was capable of influencing, directly or indirectly, actually or potentially, the pattern of trade in goods or services on the

⁵⁵ YAZICIOGLU/GROZDANOVSKI, p. 9; HANDSCHIN/SCHÜTZ, p. 181.

⁵⁶ Art. 3(1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁵⁷ Art. 19 *Gesetz gegen Wettbewerbsbeschränkungen* (“GWB”).

⁵⁸ Treaty on the Functioning of the European Union, 2012/C 326/01, 13 December 2007.

market. In view of the OLG's reasoning under German law, an effect on trade between member states would have been found, leading to the application of EU competition law.⁵⁹

Fourth, it is doubtful that the requirements for an abuse of dominant position would be met in the *Pechstein* case when applying the principles laid down by the European Court of Justice ("ECJ"), in particular under the *Meca-Medina* test.⁶⁰ In *Meca-Medina*, the ECJ held that a rule emanating from a sports federation may or may not constitute an abuse of dominant position, depending on the overall context in which the rule was adopted or produces its effects and objectives, whether the restrictions caused by the rule are inherent in the pursuit of those objectives and whether the rule is proportionate in light of the objective pursued.⁶¹ The ECJ found in *Meca-Medina* that the anti-doping rules imposed upon the athletes could not be considered an abuse of dominant position. This was later embraced by the European Commission in the Commission Staff Working Document,⁶² which concluded that anti-doping rules "*have been found or are likely not to infringe [Articles 101(1) and 102 TFEU] provided that the restrictions contained in such rules are inherent and proportionate to the objectives pursued*". The European Commission also stated that rules excluding legal challenges of decisions by sports associations before national courts represent a higher likelihood of problems concerning compliance with EU competition law if the denial of access to ordinary courts facilitates anti-competitive agreements or conduct, although some of them could be justified.

⁵⁹ DUVAL/VON ROMPUY, p. 12. Despite the absence of any mention of EU competition law in its decision, the OLG refers to the ECJ's decision in *MOTOE* as support of its position that competition law may also apply to sports.

⁶⁰ *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, ECJ Decision C-519/04 P, 18 July 2006.

⁶¹ BRANDNER/KLÄGER, p. 116.

⁶² Commission Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport, 11 July 2007.

Applying these tests to the *Pechstein* case, the sanction arising from anti-doping rules based on the WADA Code appears legitimate and in compliance with competition law. *Mutatis mutandis*, one hardly understands why the appeal process against the ISU DC decision before an arbitral tribunal such as the CAS should be subject to stricter requirements, all the more so if an alleged lack of independence is not concretely demonstrated. In any event, the OLG did not conduct any such tests. The brief and unconvincing examination of whether there could be a "rational justification" ("*sachliche Rechtfertigung*") for the imbalance in favour of sporting organisations falls short of the test which should be carried out under EU competition law. It can be expected that, following the OLG decision, a number of athletes will refer similar cases to their respective national courts in the EU. This might lead national courts to conduct a true analysis of the position under EU competition law.

Fifth, the OLG held that the CAS Award in *Pechstein* could not be recognised in Germany as it runs counter to public policy in upholding a breach of competition law by the ISU. By contrast, the position of the Swiss Federal Supreme Court is that competition law does not fall within public policy.⁶³ The extent to which public policy encompasses competition law is a disputed question, which goes much beyond sports arbitration and cannot be discussed here.

VI. Conclusions

Several conclusions may be drawn from the *Pechstein* case:

1. A party cannot in principle validly waive its right to refer a dispute to the state courts without sufficient

⁶³ *X. S.p.A. v. Y. S.r.l.* ("*Tensacciai*" case), BGE/ATF 132 III 389, 8 March 2006.

consent. However, an arbitration agreement in favour of the CAS is not *per se* invalid for the sole reason that it is contained in the statutes of a sports federation. A soft test should apply when assessing the athlete's consent to the CAS jurisdiction. An athlete shall be precluded from challenging the CAS jurisdiction at a later stage if he/she has appeared before the CAS Panel without raising objections to that effect.

2. CAS arbitrators appointed in a given case must be presumed independent and impartial as soon as they have provided a statement to that effect. A CAS award should only be set aside in case of concrete circumstances of bias. The position that the composition of the ICAS is detrimental to the athletes and necessarily contaminates the selection of the arbitrators on the CAS list, as well as the appointment of the President of the CAS Panel in a given case, is unsupported.
3. On balance, the CAS is a reliable arbitration institution, recognised by WADA for all anti-doping matters and better suited to deal with sports disputes than most state courts. Most flaws pointed out by the LG and OLG Munich are either without solid foundation or have somewhat been cured by the 2013 revision of the CAS Code (selection process of the arbitrators on the CAS list). However, certain issues, both institutional and operational, should be improved. A well thought-out reform of the CAS should thus be welcomed so as to ensure that all interests at stake, in particular those of the athletes, are sufficiently taken into account.
4. Sports law is not immune to competition law. By nature, a unique international federation in a given sport may appear as having a dominant position. However, an abuse of such position should not be found too easily. Applying WADA-based anti-doping rules and

referring appeals to the CAS are legitimate matters, complying with public interest. Hence, a CAS arbitration agreement entered into by an athlete in that context does not breach competition law, whether under national law or EU law, unless other circumstances clearly establish an anti-competitive behaviour in the relevant market.

5. When a CAS award has been made and upheld by the Swiss Federal Supreme Court, the findings of the arbitral tribunal should not be reviewed on the merits by a foreign court. When a similar dispute is brought by the athlete before a foreign court, so that the CAS decision is somewhat revisited by the foreign court by way of declarations, damages or other equivalent relief, the court should in principle be barred from doing so due to the *res judicata* effect of the CAS award, unless specific and justified circumstances prevent the recognisability of the CAS award in that foreign state under the NYC (when applicable). A foreign court should refrain from reviewing the validity of a CAS arbitration agreement with unfettered power, outside recognition proceedings (see Art. V(1)(a) New York Convention). In the presence of a *prima facie* valid arbitration agreement (CAS or otherwise), the decision on jurisdiction should mainly be left to the arbitral tribunal; in reliance on the negative effect of the competence-competence principle, a state court should refrain from holding that it has jurisdiction (under the Lugano Convention or otherwise) and disregarding the arbitration agreement under its own law. When a CAS Panel has acknowledged its jurisdiction and upheld the validity of the arbitration agreement, this decision has *res judicata* effect on a subsequent court/tribunal seized of the same matter.

On a final note, the *Pechstein* saga mainly appears as an athlete's personal fight to have a court acknowledge that she did not violate any anti-doping rule. Yet, all of Ms Pechstein's attempts have failed so far, after six years of proceedings: on the one hand, the court proceedings are still pending in Germany; on the other hand, the ISU on 9 July 2015 issued a statement entitled "*Claudia Pechstein has not been rehabilitated*" whereby the international federation stressed that, from an expert point of view, the athlete has still not demonstrated the alleged legitimate cause (inherited blood disease) for the significant peaks and excess of variation of her hematologic parameters in the relevant period 2007-2009.⁶⁴

While having no concrete effects on her case, at least for the time being, Ms Pechstein's action before the German Courts has had a very damaging collateral effect in affecting the credibility of the CAS and, thereby, of the whole process of resolving sports disputes by way of a specialised arbitration institution referred to in the sports federations' statutes. One may wonder whether this case justified such a storm. The risk from now on is legal uncertainty: a door has been opened for a review of CAS arbitration agreements and of the merits of the case by foreign courts, in spite of the Swiss Federal Supreme Court's upholding of the CAS award beforehand. This is not satisfactory.

More clarity is expected to be brought in the upcoming months by the courts which will hear the matter: the BGH, on the one hand (when reviewing the OLG decision on appeal), and the European Court of Human Rights, on the other hand (since Ms Pechstein also lodged a complaint

⁶⁴ ISU Statement, *Claudia Pechstein has not been rehabilitated*, 9 July 2015, available at: <http://www.isu.org/en/news-and-events/news/2015/07/claudia-pechstein-has-not-been-rehabilitated>.

against Switzerland on the basis of Art. 6 ECHR).⁶⁵ From a Swiss arbitration perspective, and in the interest of maintaining the reliability of CAS arbitration for all sports actors involved, one may hope that the issues of the athlete's consent and the role of competition law will be assessed differently by the higher courts than by the Munich regional courts.

⁶⁵ Note on LG München by MAISONNEUVE, *Chronique de jurisprudence arbitrale en matière sportive*, *Revue de l'arbitrage* 2014, pp. 670 ff, 672-674.

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