THE PECHSTEIN JUDGMENT: CAS'S REACTION & POTENTIAL RAMIFICATIONS

By Andrew Smith (/item/andrew-smith-2) published on 17 April 2015

The background to the dispute between Claudia Pechstein ("CP") and the International Skating Union ("ISU") has been discussed in an earlier article (/articles/item/a-guide-to-the-higher-regional-court-s-decision-in-the-pechstein-case),[1] and may be summarised briefly as follows.

CP, a highly decorated international speed-skater (with multiple Olympic and World titles to her name), failed a doping test in 2009 and was banned from competition for two years. She challenged this ban before the Court of Arbitration for Sport ("CAS") but was unsuccessful (http://isu-prod.blob.core.windows.net/media/108941/arbitral-award-cas.pdf)[2] – the CAS Award was issued in November 2009. Dissatisfied with this ruling, CP unsuccessfully challenged (on two occasions) the CAS Award in the Swiss Federal Tribunal (see the judgments of the Swiss Court here

(http://www.swissarbitrationdecisions.com/sites/default/files/10%20fevrier%202010%204A%20612%202009.pdf)[3] and here (http://isuprod.blob.core.windows.net/media/102869/28-septembre-2010-4a-144-2010.pdf)[4]).

In addition to these proceedings, CP issued claims in:

i. The European Court of Human Rights (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117166)[5], alleging a contravention of Article 6 ECHR (http://www.echr.coe.int/Documents/Convention_ENG.pdf)[6]; and
ii. The local Court of Munich, challenging the validity and enforceability of the CAS Award.

DECISION OF THE LOCAL COURT OF MUNICH

On 26 February 2014, the local Court of Munich issued its judgment (https://open-jur.de/u/678775.html).[7] In summary, it concluded that:

i. The arbitration clause in CP's license with the national and international skating federations was void, owing to the fact that it had been forced upon her – i.e. if she wanted to compete, she had no option but to agree to the arbitration clause;
ii. The CAS arbitration did not satisfy all the requirements of Article 6 ECHR, owing to the way in which arbitrators are appointed and the institutional bias in favour of sports federations;
iii. Notwithstanding the above, CP was bound by the CAS Award, owing to the fact that she had never raised any objection to the arbitration process (including the competence and impartiality of the panel) at the time, and the German Court was precluded from reconsidering the decision pursuant to the *res judicata (a matter already judged)* doctrine.

DECISION OF THE HIGHER REGIONAL COURT

CP appealed to the Higher Regional Court in Munich, whose judgment was handed down on 15 January 2014 (the official press release can be viewed, in German, here (http://www.justiz.bayern.de/gericht/olg/m/presse/archiv/2015/04642/index.php)[8]; and an unofficial translation of the judgment can be viewed here (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561297)[9]). In summary, the Court concluded that:

i. As a matter of principle, owing to the particular nature of international sports competitions and the disputes arising therefrom, there was nothing unlawful *per se* about sports federations requiring athletes to sign, as a condition of eligibility to compete in its competitions, an agreement to refer disputes to arbitration.
ii. However, on the facts (i.e. as matters stood in 2009), the CAS Award amounted to a violation of German anti-trust / competition law, which prohibits the abuse of a dominant position (or monopoly) in a particular market.
iii. The conclusion in (ii) was based upon the Court's findings that, in essence:
    a. The ISU was the only provider on the market for the organisation of World Championships in speed-skating and therefore, due to the absence of competition, a monopolist in a dominant position;

b. The fact that CP and other athletes could compete in *national* competitions without signing the arbitration agreement mandated by the ISU did not affect the analysis in (a) above: the World Championships for speed-skating was a specific market in its own right, owing to the worldwide interest it triggers and the 'side revenues' that successful athletes may potentially secure;
c. It was not an adequate defence for the ISU to submit that the arbitration clause was a mandatory provision of the WADA Code;
d. Whilst there was no identification of *actual* bias on the part of the Arbitral Panel appointed to hear CP's appeal before the CAS, the composition and structure of the International Council of Arbitration for Sport ("ICAS") – the body which is responsible for establishing the approved list of CAS arbitrators – was weighted heavily in favour of sports federations, which in turn fundamentally undermined the neutrality of the CAS itself;
e. Put simply, sports associations such as the ISU and the International Olympic Committee ("IOC") had a disproportionately strong influence on the selection of persons appointed as CAS arbitrators;
f. In turn, this structural imbalance gave risk to a risk that the arbitrators appointed to determine individual disputes at the CAS would (or may) have a tendency to favour the governing bodies, rather than acting in a wholly neutral, objective and independent manner;
g. There was no rational justification for the structural imbalance identified by the Court;
h. The fact that many members / representatives of sports governing bodies are in fact former athletes themselves did not displace or dispel the concerns outlined above;
i. Furthermore, there was a lack of transparency in the method of appointing the Chairman / President of a CAS panel, which again gave rise to legitimate concerns regarding the objectivity and impartiality of CAS panels (in general);
j. Having regard to these 'defects', an exclusive arbitration clause in favour of the CAS would not, under normal circumstances in a competitive market, be freely entered into by competitors such as CP;
k. In all the circumstances, the ISU's stipulation that CP must sign an arbitration agreement in favour of the CAS constituted an abuse of ISU's dominant position in the relevant market;

iv. Having regard to the above, it would be contrary to German public policy, which prohibits abusive conduct by undertakings that have a dominant position in a particular market, to recognise the CAS Award.
v. In the circumstances, Article V, para. 2 (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)[10] (which provides that "*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that…The recognition or enforcement of the award would be contrary to the public policy of that country*") was applicable;
vi. It followed that CP was not precluded, whether by reason of signing the arbitration agreement or by failing to protest at the time about the composition or competence of the CAS Panel, from suing the ISU for damages in the German Courts (albeit no view was expressed by the Court on the underlying merits of the claim).

SO IS IT THE END OF THE ROAD FOR CAS?

The decision, taken by an appellate Court in a leading EU Member State, that it would be contrary to public policy to recognise the Award of a CAS Arbitral Panel, is highly significant. The conclusion that a sports governing body abused a dominant position by mandating the CAS as the exclusive forum for the resolution of certain disputes is a serious matter of concern to those who rely upon the CAS system to provide a relatively prompt, inexpensive, impartial and expert system of resolution for sports-related disputes.

The *potential* ramifications of this judgment are worthy of careful consideration. For example, it has been stated that: "*If other national courts were to follow the Munich Higher Regional Court's lead by refusing to recognise CAS awards, re-litigating the merits of cases and then handing out punitive damages awards against sports organisations, it would surely sound the death knell for CAS as an institution and for the international sports arbitration system as we know it.*"[11]

So, is such a scenario *likely* to occur in practice?

First of all, it is important to note that this is not the end of the road in terms of the German legal process (on the assumption that the ISU does indeed file an appeal to the German Federal Court of Justice, as has previously been indicated). The superior Court may well take a different view as to the validity and enforceability of the CAS Award.

Secondly, the Munich Higher Regional Court did not go so far as to 'strike down' the concept of 'take it or leave it' arbitration clauses, as a condition of eligibility imposed by sporting federations on prospective participants. This is consistent with the view of the English Court of Appeal, as expressed in the case of *Stretford v The Football Association* (http://www.bailii.org/ew/cases/EWCA/Civ/2007/238.html),[12] in which Sir Anthony Clarke MR held (at para. 49), in the context of a player / agent dispute:

> "*...An arbitration clause has become standard in the rules of sporting organisations like the FA. The rules regulate the relationship between the parties, which is a private law relationship governed by contract... Clauses like r K [of the FA Rules] have to be agreed to by anyone, like Mr Stretford, who wishes to have a players' licence, but it does not follow that the arbitration agreement contained in them was required by law or compulsory. To strike down clauses of this kind because they were incompatible with art 6 [ECHR] on that basis would have a far-reaching and, in our opinion, undesirable effect on the use of arbitration in the context of sport generally.*"

So, there is presently no threat to the authority or competence of the CAS, arising purely from an argument that athletes have little or no bargaining power when it comes to signing up to an exclusive jurisdiction clause in favour of the CAS.

Thirdly, the *Pechstein* case was determined on the basis of the ICAS and CAS institutions, systems and processes as they stood more than five years ago, in 2009. There have been some material changes to the Statutes of CAS and ICAS since then, including in connection with the mode of selecting individuals to be appointed to the list of approved CAS arbitrators.

In its judgment, the Munich Higher Regional Court was particularly critical of Articles S4 and S14 of the CAS Procedural Rules of 2004 (http://www.tas-cas.org/fileadmin/user_upload/3.120CodeEngnov2004.pdf)[13], which governed the composition of the ICAS and the mode of selection of the arbitrators included on the CAS approved list. The Court held that the CAS Statues did not themselves assume the independence of the ICAS members and of the CAS arbitrators; in so doing, it highlighted the fact that of the 20 members appointed to the ICAS:

i. 12 were to be appointed by sports associations;
ii. Those 12 members then appointed a further four members, after "*appropriate consultation*", with a view to safeguarding the interests of athletes; and
iii. Those 16 members then appointed a further four members, selected from personalities independent of the sports associations designating the other members of the ICAS.

The content of Rule S4 remains materially the same in the most recent version of the CAS Code (http://www.tas-cas.org/fileadmin/user_upload/Code20201320corrections20finales20_en_.pdf)[14], and critics maintain that the deck remains stacked significantly in favour in sports associations and against individual athletes and players.

However, something that *has* materially changed is the content of Rule S14 – the provision which governs how the appointed members of the ICAS appoint individuals to the approved list of arbitrators for the CAS. It used to be the case that the appointment of arbitrators to this list took the form of a 'quota' system – specifically, the ICAS was required to respect, in principle, the following "*distribution*" of arbitrators:

- "*1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside;*
- *1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;*
- *1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;*
- *1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;*
- *1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.*"

Accordingly, the effect of old Rule S14 was that three fifths of the arbitrators appointed to the approved list would be selected from the pool of potential candidates nominated by sports federations. That is no longer the case: the current Rule S14 contains no such quota system and provides as follows:

> "*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.*"

Critics of this change may point out that although it removed the *inherent* institutional 'weighting' (or structural imbalance) in favour of prospective candidates nominated by sports federations, it did not guarantee a broader pool of appointments *in practice*, and also removed the express 'safeguard' that one fifth of approved arbitrators must be selected "*with a view to safeguarding the interests of athletes.*" However, with regard to the latter point, in the author's view there is an inherent tension between appointing arbitrators on the basis that they are expected to, or responsible for, safeguarding the interests of athletes, whilst at the same time requiring them to conduct arbitral proceedings (between an athlete and a sports governing body, for example) in a wholly neutral, objective and impartial manner. The same principle would apply equally in reverse: i.e. appointing arbitrators on the basis that they are expected to (or responsible for) safeguarding the interests of sports associations.

In appointing persons to the list of approved arbitrators, rather than selecting by reference (in part) to who has proposed them for appointment, or their 'pro-athlete' or 'pro-governing body' instincts or values, a pure merits-based assessment, focussing on the candidate's relevant experience, expertise, reputation and absolute commitment to objectivity and fairness in the conduct of their proceedings, must surely be preferable. As with any fair and transparent recruitment process, it is important to invite applications from a diverse range of candidates; to utilise (insofar as is practicable) relevant and objective selection criteria, which are known to the applicants in advance of submitting an application; and to adopt a consistent and objective approach to any interview or other form of assessment process.

THE CAS'S RESPONSE

Plainly stung by the criticisms meted out by the German Courts, on 27 March 2015 the CAS issued a statement (http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf)[15] (or rebuke) in response. It seems reasonable to infer that the CAS would wish for its statement to be put before the German Federal Court of Justice and carefully considered by it, at any future appeal hearing.

The statement robustly defends the fairness of the CAS proceedings, stating that "*Claudia Pechstein had a fair trial, not only before the CAS Panel but also before the SFT, and the judgment of the SFT, which remains in force, should have settled this matter definitively in 2010...Proper procedures were applied and followed at all times.*" As noted above, there was no finding by the German Court that CP had actually received an unfair trial, in the sense of any actual bias, prejudice or hostility tainting the decision-making of the panel members. Rather, its criticisms were of a more general, structural / institutional nature (as regards both the ICAS and the CAS).

The CAS statement also highlights the failure of CP to challenge the fairness of the CAS process at the time when those proceedings took place, and the potential implications of the Munich Higher Regional Court's judgment for internal arbitration more generally. It states: "*If, like in the Pechstein/ISU case, arbitration agreements were to be considered as invalid by state courts, even when not challenged at any stage during the arbitration, then the basic principles of international arbitration would be compromised.*"

The CAS statement notes with considerable concern the prospect of conflicting and contradictory decisions in national courts across the world, with the practical consequence that athletes may be able to compete in certain countries but not in others (on the basis that a doping ban, upheld by the CAS, may be recognised as valid and enforceable by some national / state courts but not others).

In addition, the statement seeks to categorise the Munich Higher Regional Court's decision as something of an 'anomaly' in the domestic jurisprudence, stating: "*It must be emphasized that, also in Germany, various state courts have previously recognized and upheld the jurisdiction of the CAS.*"

Finally, no doubt cognisant of the basis on which the Munich Higher Regional Court refused to recognise the CAS Award, the CAS statement stresses the fact that it is an organisation which is willing to 'move with the times' and "*listen and analyze 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.*" However, the statement stresses that this process of consultation "*must be independent of individual interests related to an existing dispute.*"

POTENTIAL CHANGES

In order to minimise the prospect of any similarly successful 'copycat' litigation, it seems likely the ICAS and the CAS will, in due course, move to introduce further amendments to the Statutes / Code governing their structural make-up and processes and procedures – perhaps, for example, taking steps to:

i. Increase the level of input / influence on the part of athletes' and players' unions in the appointment of the ICAS members – for example, by providing that:
   a. Half of the ICAS members are to be appointed by identified sports associations, with the other half to be appointed by identified athletes' and players' unions or associations; alternatively
   b. One third of the ICAS members are to be appointed by identified sports associations, another third by identified athletes' and players' unions, and the final third are to be selected by those existing members, from among persons wholly independent of sports or athletes' / players' unions or associations; or
   c. Some other variant of the above.

ii. Amend the voting mechanism in the ICAS, so that instead of a simple majority voting system, proposals made within the ICAS (for example in relation to the appointment of arbitrators to the approved list) require a greater level of consensus between the ICAS members before they may be ratified.

iii. Improve the transparency, awareness of and confidence in the process for appointing arbitrators to the CAS approved list.

iv. In a three panel member case, oblige the two appointed arbitrators (one of whom will have been nominated by the Appellant athlete) to select the President of the Panel, rather than the current Rule 40.2 of the CAS Code, which provides that "...The two arbitrators so appointed shall select the President of the Panel by mutual agreement within a time limit set by the CAS Court Office. Failing agreement within that time limit, the President of the Division shall appoint the President of the Panel". In other words, the final sentence of the existing rule could be removed; this would be consistent with section 16 (5) of the UK Arbitration Act 1996 (http://www.legislation.gov.uk/ukpga/1996/23/data.pdf)[16], which provides that:

   "*(5) If the tribunal is to consist of three arbitrators —*
   a. *each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and*
   b. *the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.*"

v. In order to cater for the unlikely event that the two arbitrators are unable / unwilling to agree upon the identity of the President of the Panel, the rule could provide that a wholly independent third party makes that appointment, such as the Swiss Court – again, this would reflect the position under the UK Arbitration Act, section 18,[17] which provides as follows:

   "***18 Failure of appointment procedure.***

1. *The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.*

   There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.
2. *If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.*
3. *Those powers are —*
   a. to give directions as to the making of any necessary appointments;
   b. to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
   c. to revoke any appointments already made;
   d. to make any necessary appointments itself.
4. *An appointment made by the court under this section has effect as if made with the agreement of the parties.*
5. *The leave of the court is required for any appeal from a decision of the court under this section.*"

vi. Increase the number of suitably qualified and experienced arbitrators (on the approved list of CAS arbitrators) who have a professional background in acting for athletes and players, as a significant part of their practice.

CONCLUSION

It is fair to say that the Judgment of the Higher Regional Court in Munich has sparked a strong reaction from the CAS in defence of its processes and procedures. While the decision undoubtedly gives pause for thought and will probably give rise to some further institutional developments and reforms, in the author's view there is no reason to believe that the well-established system of international sports arbitration is on its last legs.

Indeed, the Munich Higher Regional Court specifically recognised the legitimate reasons for bestowing upon a specialist international tribunal, instead of state courts, the responsibility for ensuring the uniform adjudication of sports-related disputes. That is a powerful principle that has not been subjected to any serious challenge; the pressing objective for the CAS is to ensure that *its* position of authority in the resolution of sports-related disputes is not eroded by similar legal challenges henceforth.

References (http://www.lawinsport.com/articles/item/the-pechstein-judgment-cas-s-reaction-potential-ramifications?highlight=WyJ0aGUiLCIndGhlIiwiJ3RoZSciLCJwZWNoc3RlaW4iLCJwZWNoc3RlaW4ncyIsImp1ZGdtZW50IiwianVkZ21lbnQnLCIsInRoZSBwZWNoc3RlaW4iLCJ0aGUgcGVjaHN0ZWluIGp1ZGdtZW50IiwicGVjaHN0ZWluIGp1ZGdtZW50Il0=#references)

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