

## Sports Arbitration: The decision of the Munich Higher Court in the Pechstein case: New tendencies in Sports Arbitration?

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### Introduction [\[arriba\]](#)

1. The purpose of this essay is to analyze the Pechstein saga[1], with special focus on the latest decision of the Munich Higher Regional Court from 15 January 2015.[2] In order to do so, it goes in first place through (I) the background of the dispute; and then, it analyzes (II) the decision of the Munich Higher Regional Court regarding (A) the jurisdiction of the German Courts over the claims, and the findings over (B) the validity of the arbitration agreement and (C) the res judicata effect of the CAS awards.

### I. Background [\[arriba\]](#)

#### *A. The ban imposed by the International Skating Union*

2. German Claudia Pechstein is the most successful speed skater ever. She won a medal in five consecutive Olympics from 1992 to 2006 -nine medals overall, five of them gold- and in 2009 she was banned from all competitions for two years for blood doping by the International Skating Union (ISU) based on irregular levels of reticulocytes in her blood.[3]

3. Pechstein denied the doping allegations and started legal proceedings before the Court of Arbitration for Sport (CAS) and then before the Swiss Federal Court without success; the ban was ultimately upheld.[4]

4. The five-time Olympic gold medalist was banned on the basis of her “biological blood profile” monitored by the International Skating Union, which records every drug test an athlete takes. Between 2000 and 2009, Pechstein had submitted blood samples for this program in 90 times.[5] None of these controls resulted in an adverse finding, but her blood profile was found atypical.[6] This makes the Pechstein’s case the first doping ban to be based on circumstantial evidence alone.

#### *B. The appeal before the CAS*

5. Appeals before the CAS are de novo hearings, meaning that the panels may make new decisions in matters under appeal, disregarding and/or replacing all or part of the findings and conclusions of the previous instances if necessary.[7] In the appeal to the CAS, Pechstein argued that the results of the blood tests were explained by a genetic abnormality she inherited from her father.

6. In her defense, Pechstein drew the panel’s attention to the fact that the ISU biological passport program did not follow the WADA[8] guidelines. She submitted that if her blood profile had been assessed in accordance with those guidelines, there would have never been a case, because the WADA guidelines proposed a 99.9% probability of accuracy in contrast to the 95.0% probability of the ISU method.[9]

7. The panel disregarded Pechstein's contention that the WADA Draft Biological Passport Guidelines should be followed by the ISU, because at the time the decision was made, that document was -precisely- only a draft.[10]

8. In ruling on Pechstein's appeal, the CAS panel sustained that abnormalities in Pechstein's blood profile "could not be reasonably explained by the various justifications submitted by the athlete nor by a congenital medical condition..." and concluded that "there were no signs of any detectable blood disease or anomaly".[11]

9. By its decision of 25 November 2009, the CAS tribunal ruled that the athlete's illicit manipulation of her own blood remained the only reasonable alternative source of such abnormal values and upheld the disciplinary commission's decision.[12] The Swiss Federal Supreme Court denied a setting aside petition by Pechstein on 4 March 2010.[13]

### *C. The proceedings before the Munich Regional Court*

10. Pechstein sued the ISU and the German Speed Skating Association before the Regional Court of Munich, seeking damages for loss of income through lost of advertising revenue, court costs, medical records and personal suffering. On 28 February 2014 the district Court dismissed her case.[14]

11. The Court found that it had jurisdiction because the arbitration clause signed by Petchstein was invalid. However, it held that it could not revisit and review the legality of the ban, as it was bound by the CAS decision. It further stated that, since Mrs. Pechstein had chosen to proceed with the arbitration proceedings and raised the issue of the potential invalidity of the arbitration agreement only when her claims were rejected in the arbitration, the arbitral award of the CAS was final.[15] According to the Regional Court, at the time Mrs. Petchstein appealed the ban to the CAS, she could have, and should have challenged the jurisdiction of the CAS.[16]

## **II. The decision of the Munich Higher Court** [\[arriba\]](#)

### *A. The German Courts' international jurisdiction*

12. The International Skating Union claimed that the German Courts did not have international jurisdiction over the claims and entered a plea based on the existence of the arbitration agreement.

13. However, the Higher Court remarked that Article 6.1 of the Lugano Convention grants the international jurisdiction of the German courts.[17] According to this provision:

"A person domiciled in a State bound by this Convention may (...) be sued: where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

14. Consequently, the Higher Court decided that due to the fact that the German Federation substantiated the ban handed down by the International Skating Union,

the international jurisdiction of the German courts for the legal action against the International Skating Union continues to exist even in the case of a dismissal of the action against the German Federation.

*B. The invalidity of the arbitration agreement*

15. Secondly, the Higher Court found that the arbitration agreement concluded between the complainant and the International Skating Union dated 2 January 2009 did not exclude recourse to the ordinary courts and that it was invalid.[18]

16. In order to construe the validity and effectiveness of the arbitration agreement, the Higher Court measured it against the provisions of German private international law, and found that it was null and void pursuant to section 134 of the German Civil Code.[19]

17. The Court interpreted that German antitrust regulations are mandatory provisions that cannot be excluded by the parties' choice of law.

18. Contrary to the opinion of the Regional Court, the Higher Court stated that arbitration agreements concluded between an organizer of international sports competitions and the participating athletes in such events are not per se ineffective because the athlete has no free decision-making process when signing such an agreement.

19. Nevertheless, the fact that the International Skating Union demanded that the complainant gave her consent to the arbitration agreement constitutes an abuse of market power contrary to antitrust law. The Higher Court noted that the International Skating Union holds a monopoly in the market of the authorization of speed skating world championship competitions and was therefore in a dominant market position.[20] It also stated that an economic activity that has a connection with sport does not oppose the application of the provisions of competition law.[21]

20. According to the Higher Court, the ISU, as sole organizer of speed skating world championships, enjoys a monopolistic position in speed skating and is therefore dominant pursuant to the German Act Against Restraints of Competition. The Higher Court was of the opinion that a dominant entity may not impose business terms that would not prevail in a market with effective competition.[22]

21. The Higher Court also made special mention to the unilateral organization of the appointment of arbitrators by the participating governing bodies in the disputes with athletes. It remarked that parties calling upon the CAS could only select the arbitrators from a list drawn up by the International Council for Arbitration of Sports (ICAS).[23]

22. From the 20 members that compose ICAS, 12 are appointed by the sports governing bodies. As a result of the fact that ICAS' decisions are made by way of majority votes cast, there is a predominance of the sports governing bodies in the conformation of the list of possible arbitrators.

23. In the Court's opinion:

“Even if the personal integrity of the persons included on the list is assured, there is still the risk that the point of view of these persons is closer to that of the governing bodies than to that of the athletes.”

24. Furthermore, it also pointed out that in the appeal procedure before CAS, the president of the Arbitration Division of the CAS (elected by majority of votes by the members of ICAS) determines the chairman for the panel for the specific dispute if the parties fail to agree on it. This ultimately means that the governing bodies can have an indirect influence on the composition of the panel for the specific dispute.

25. As a consequence, the Higher Court concluded that the arbitration agreement signed by Mrs. Pechstein and the International Skating Union was ineffective because it violated compelling provisions of antitrust law.

### C. The res judicata effect of the CAS decisions

26. Unlike the Regional Court, the Higher Court concluded that the res judicata effect of the CAS tribunal’s decision does not prevent Mrs. Pechstein from bringing a claim for damages before the German courts.[24]

27. It stated that:

“The recognition of the arbitration decision of the CAS contradicts public policy and is therefore not recognizable pursuant to section 1061(1) ZPO in conjunction with Art. V (2) of the New York Convention[25].”

28. The Higher Court also answered the question as to whether the complainant concluded a new arbitration agreement with the respondent through her recourse to the CAS.

29. It stated that following that interpretation would constitute a perpetuation of the abuse of the International Skating Union’s dominant market position, because Mrs. Pechstein had no other possibilities than the CAS arbitration available that were promising of success of gaining her access to the impending Winter Olympic Games 2010 in Vancouver.

30. Finally, the Higher Court concluded that due to the fact that the CAS decision contradicts German public policy and is not recognizable, the German courts are not bound by this decision when examining the question of whether the doping ban was handed down illegally, which must be answered prior to the awarding of any claimed compensation for damages.

### III. Concluding remarks [\[arriba\]](#)

31. Although Pechstein has not won her case yet, the decision of the Munich Higher Court places in the eye of the storm the imbalanced situation between athletes and sports governing bodies in the dispute settlement mechanism before the CAS.

32. If Germany’s Highest Civil Court supports the Munich Higher Court’s decision, then the CAS decisions will not be enforceable in Germany. The consequence of

this would be an open door for athletes seeking for damages against bans they have received.[26]

33. However, CAS still appears to be the most cost effective and less time consuming mechanism available to solve sports related disputes. But after the Munich Higher Court's decision, the necessity of adapting it and make it more balanced and independent becomes evident. In the end, will be upon the spots governing bodies to adapt to the new tendencies in sports arbitration and to evaluate in which scenario is there more to lose... or if there is anything to lose at all.

### **Bibliography** [\[arriba\]](#)

#### *Primary Sources:*

- CAS, "CAS 2009/A/1912 Claudia Pechstein v/International Skating Union"
- Claudia Pechstein v. Deutsche Eisschnelllauf-Gemeinschaft (DESG) and International Skating Union (ISU), Munich Higher Regional Court, Case No. U 1110/14Kart, 15 January 2015.
- Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Lugano, 30 October 2007.
- ECJ C-49/07 MOTOE/Greek Government.
- ECJ, C-309/99 Wouters.
- ECJ, C-519/04, Meca-Medina.
- German Civil Code (BGB)
- Regional Court of Munich I, Case Number 37 O 28331/12.
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

#### *Secondary Sources:*

- Antonio Rigozzi and Erika Hasler, Chapter 5, Part III: Commentary on the CAS Procedural Rules, Article R57 [Scope of panel's review; hearing] (in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide, Kluwer Law International, 2013), 1036-1046.
- Antonio Rigozzi et al., "Sports Arbitration under the CAS Rules" (in: Arbitration in Switzerland, the practitioner's guide (2013)) 885-1083.

- Georg von Segesser and Dorothee Schramm, “Claudia Pechstein v. International Skating Union (ISU), Federal Supreme Court, 4A\_144/2010, 28 September 2010, A contribution by the ITA Board of Reporters, Kluwer Law International.
- Jan Paulsson, “Arbitration of international sport disputes” (in: The Court of Arbitration for Sport -1984-2004-, The Hague (Asser) 2006, 40-49, 43; first published in 9 Arbitration International (1993) No. 4, 359-369.)
- Kevin Draper, “A lawsuit threatens the future of the Court of Arbitration for Sports”, deadspin.com, 18 February 2015.
- Laurence Burger, “Invalidity of arbitration agreement when lack of choice to refuse it” (Kluwer Arbitration Blog, 12 March 2014).
- Matt Slater, “Claudia Pechstein puts sport's supreme court on trial”, BBC Sports, 19 February 2015.
- Nathalie Voser et al., “The Most Recent Decision in the Pechstein Saga: Red Flag for Sports Arbitration?” (Kluwer Arbitration Blog, 22 January 2015).
- Nesha Starcevic, “CAS confirms Pechstein's ban”, Associated Press International, Frankfurt, November 25, 2009.
- Peter Bert, “Sports Arbitration: Munich Court finds arbitration clause invalid in Pechstein case”, Dispute Resolution in Germany, 26 February 2014.
- Verner Møller, Who Guards the Guardians? (The International Journal of the History of Sport, Vol. 31, No. 8, 2014) 934-950.

## Notas [\[arriba\]](#)

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[1] Dispute between the German speed skater Claudia Pechstein and the International Skating Union (ISU).

[2] Claudia Pechstein v. Deutsche Eisschnelllauf-Gemeinschaft (DESG) and International Skating Union (ISU), Munich Higher Regional Court, Case No. U 1110/14Kart, 15 January 2015.

[3] Kevin Draper, “A lawsuit threatens the future of the Court of Arbitration for Sports”, deadspin.com, 18 February 2015.

[4] Peter Bert, “Sports Arbitration: Munich Court finds arbitration clause invalid in Pechstein case”, Dispute Resolution in Germany, 26 February 2014.

[5] Matt Slater, “Claudia Pechstein puts sport's supreme court on trial”, BBC Sports, 19 February 2015.

[6] Verner Møller, Who Guards the Guardians? (The International Journal of the History of Sport, Vol. 31, No. 8, 2014) 934-950.

[7] Antonio Rigozzi and Erika Hasler, Chapter 5, Part III: Commentary on the CAS

Procedural Rules, Article R57 [Scope of panel's review; hearing] (in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013), 1036-1046.

[8] World Anti-Doping Agency.

[9] See note 5. "The statistical risk of an innocent athlete potentially being sanctioned would be 1 in 20 athletes following the ISU program whereas the WADA draft guidelines, now officially in place, warranted that statistically only 1 in 1000 athletes will be a false positive".

[10] Matt Slater, n 5.

[11] CAS, "CAS 2009/A/1912 Claudia Pechstein v/International Skating Union"

[12] Neshia Starcevic, "CAS confirms Pechstein's ban", Associated Press International, Frankfurt, November 25, 2009.

[13] Georg von Segesser and Dorothee Schramm, "Claudia Pechstein v. International Skating Union (ISU), Federal Supreme Court, 4A\_144/2010, 28 September 2010, A contribution by the ITA Board of Reporters, Kluwer Law International.

[14] Judgment of the Regional Court of Munich I, Case Number 37 O 28331/12.

[15] Laurence Burger, "Invalidity of arbitration agreement when lack of choice to refuse it" (Kluwer Arbitration Blog, 12 March 2014).

[16] Peter Bert, n 4.

[17] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007.

[18] See also Jan Paulsson, "Arbitration of international sport disputes" (in: *The Court of Arbitration for Sport -1984-2004-*, The Hague (Asser) 2006, 40-49, 43; first published in 9 *Arbitration International* (1993) No. 4, 359-369.)

[19] In its old version, which is applicable to the matter at hand.

[20] Pursuant to section 19(1) No. 2 of the German Civil Code.

[21] See also: ECJ C-49/07 MOTOE/Greek Government; ECJ, C-519/04, Meca-Medina; ECJ, C-309/99 Wouters.

[22] Nathalie Voser et al., "The Most Recent Decision in the Pechstein Saga: Red Flag for Sports Arbitration?" (Kluwer Arbitration Blog, 22 January 2015).

[23] See also Antonio Rigozzi et al., "Sports Arbitration under the CAS Rules" (in: *Arbitration in Switzerland, the practitioner's guide* (2013)) 885-1083, 887.

[24] Nathalie Voser et al., n 22.

[25] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

[26] Matt Slater, n 5.