

Claudia Pechstein and SV Wilhelmshaven: Two German Higher Regional Courts Challenge the Court of Arbitration for Sport

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In a decision of January 15, 2015, the Munich Court of Appeal (OLG) addressed dispute resolution practices common to sports law. The case concerns the well-known German speed skater Claudia Pechstein. In February 2009, Ms. Pechstein was imposed a two year ban by the International Skating Union (ISU) for blood doping. As she had signed an arbitration clause, she challenged the ban before the Court of Arbitration for Sport (CAS). However, an arbitral tribunal of the CAS confirmed the ISU suspension in November 2009. Ms Pechstein challenged the award before the Swiss Federal Tribunal (case no. 4A 612/2009 and 4A 144/2010), but without success. On December 31, 2012, Ms. Pechstein started litigation before the German courts contesting the lawfulness of the ban. She has always asserted that the doping results are due to an illness she has inherited from her father. According to recent (innovative) expert testimonies her allegation is correct.

In its judgment of 15 January, the OLG Munich addressed the validity of the CAS arbitration agreement and the recognition of the arbitral award. Relying on German cartel law the Court concluded that the arbitration agreement was void (a) and the arbitral award could not be recognized (b).

(a) First, the Court held that no valid arbitration agreement had been concluded between Ms. Pechstein and the ISU, as Ms. Pechstein had no choice but to agree to the arbitration clause in favor of the CAS in order to participate to the “World Speed Skating Championship” organized by the ISU. According to the Munich court, the organization of professional sports by international sports federations like the ISU corresponds to a dominant position in the (sports) market, and the

ISU had abused this dominant position by imposing the arbitration clause on the athlete. In addition, the Court held that the CAS appeal dispute resolution procedures do not correspond to the required minimum standards of a fair trial as the parties are not treated equally. In this respect the court relies on two arguments: First, parties to the CAS arbitration proceedings must select the arbitrators from a closed list; but only the sports federations (i.e., not the athletes) participate in its drawing up. Furthermore, the Court criticizes the nomination of the president of the arbitration tribunal, made by the CAS and not by the party-appointed arbitrators. Again, the Court denounces the influence of the sports' federation on the process, which entails an unequal treatment of the parties. In light of these arguments it is clear that the judgment is much more about the independence of sports arbitration than about German cartel law. Hence it may prove to be much further-reaching than appears at first sight.

(b) With regard to the recognition of the CAS arbitral award confirming the validity of the ban for doping, the Munich Court applied Art. V (2) (b) NY Convention to hold that the CAS award violated German cartel law pertaining to the German "public policy", and refused to grant recognition. In this respect, the court referred again to the lacking independence of the CAS from the international sports federations.

It must be noted that the "Pechstein-story" has not yet come to an end. A second appeal was filed with the German Federal Supreme Civil Court; a decision is expected in the next months. Moreover, this spring the European Court of Human Rights (pending case 67474/10, *Claudia Pechstein ./. la Suisse*) will decide on a complaint brought by Ms. Pechstein against Switzerland for an allegedly insufficient review of the CAS by the Federal Tribunal.

In addition, a recent decision of the Court of Appeal Bremen of 30 December 2014 is also worth mentioning here. In the case under consideration a local football club, SV Wilhelmshaven, challenged a ban of the Regional Football Association, imposed on the local football club for the non-payment of a so-called "training compensation". This compensation corresponds to a payment due to a football club by another upon the transfer of an athlete; in the case at hand SV Wilhelmshaven had recruited an Italian football player from Argentina. The FIFA ordered the German club to pay to the Argentinian club the amount of 157.000 € "training compensation". The order was contested by the addressee but confirmed by an arbitral tribunal of the CAS. When the German club failed to pay

the sum, the FIFA decreed the German club's relegation to a lower league. Once again, the club challenged this decision before the CAS, once again to no avail. Finally, the German Regional Football Association, being under the statutory obligation to enforce the FIFA decision, implemented the sanction. The SV Wilhelmshaven challenged the relegation before the Bremen Court of Appeal relying on the *Bosman* decision of the CJEU (Case C-415/93) and arguing the incompatibility of the "training compensation" with article 45 TFEU. The Bremen court held that the relegation was indeed incompatible with European Union law, hence it was void. Again, an arbitral award of the CAS was not recognized, this time for non-compliance with mandatory European Union law.

The *SV Wilhelmshaven* litigation may still be appealed before the German Federal Supreme Court. As with the *Pechstein* case it remains to be seen whether the Supreme Court will uphold the decision of the lower court. At any rate, the two controversies clearly demonstrate that arbitration in sports law must, like all arbitration proceedings, abide by minimum standards of procedural fairness (*Pechstein*) and apply mandatory law (*SV Wilhelmshaven*). Otherwise, the awards will be successfully challenged in state courts, and the *de facto* immunity of sports law from state court interference (which is based on arbitration) will find its limits.