



SPORTS BRIEFING

The Pechstein Decision – The End of Sports Jurisdiction As We Know It?

Dr. Lucien W. Valloni

When the Oberlandesgericht Munich (Higher Regional Court) announced its decision in the Pechstein case on 15 January 2015, the well-established pyramid of sports jurisdiction with the Court of Arbitration for Sport (CAS) in Lausanne at its peak was shaking. Could this decision bring about the end of sports jurisdiction as we know it?

Claudia Pechstein and the Courts

The Oberlandesgericht decided to allow Pechstein's claim against the International Skating Union (ISU); the first win for the 42-year old speed skating Olympic Gold Medalist and World Champion in her ongoing legal odyssey against a doping ban in 2009. Pechstein always protested her innocence, and doctors later diagnosed her with a genetic defect explaining the test results.

At the 2009 World Speed Skating Championships, Pechstein was tested positive for doping and subsequently banned from all ISU competitions for two years. She contested that ban before a tribunal of the CAS based on an arbitration clause in the registration form of the World Championships but lost the case (CAS 2009/A/1912 & 1913 and CAS OG 10/04). Pechstein contested that award twice in front of the Swiss Federal Court (BGer 4A_612/2009 & 4A_144/2010)*, but without success. Whilst there is currently a complaint pending before the European Court of Human Rights against the decisions of the Federal Court (pending case 67474/10, *Pechstein c. Suisse*), Pechstein also took the matter to the Landesgericht Munich (Regional Court) and claimed damages from the ISU.

The Landesgericht rejected Pechstein's claims based on the *res iudicata* principle with respect to the CAS award. The Oberlandesgericht has now overturned that decision and allowed Pechstein's claim for damages in an interim decision. The Court considered the arbitration agreement between Pechstein and the ISU to be contrary to mandatory German (and maybe European) competition law and therefore a violation of the *ordre public*.

The Decision of the Oberlandesgericht Munich

The decision of the Oberlandesgericht is straightforward and well-argued. The Judges start off by pointing out a fact about international sports federations: they are monopolists. German doctrine refers to this as the *Ein-Platz-Prinzip*, which stipulates that in each sport there can be only one federation per geographical level. At least in speed skating, if an athlete wants to make a living from this sport, there is no alternative to the international competitions organised by the governing bodies. This puts the ISU, organiser of the World Speed Skating Championships, in a dominant position pursuant to the German Act against Restraints of Competition. If athletes want to compete at an international level, they have no other choice but to put up with an arbitration clause that the organising federations include in their registration forms. Having athletes sign a compulsory arbitration agreement is not *per se* an abuse of a dominant position because there are good reasons for such an agreement. The Court held, however, that the problem lies in a structural imbalance of the CAS. In 2009, when Pechstein signed the arbitration agreement, the CAS Code then in force provided that 3 out of 5 arbitrators were chosen by the sport's governing bodies, with only two among those

* Claudia Pechstein was represented in these proceedings before the Swiss Federal Supreme Court by Dr. Lucien W. Valloni.

persons independent from those bodies. Furthermore, the court noted that in disputes in which the parties don't agree on a name, the president of an arbitral tribunal is directly nominated by the president of the CAS Appeals Division, who is himself nominated by the International Council of Arbitration for Sport (ICAS), a body highly dependent on sports associations. Forcing an athlete to accept an *imbalanced* arbitral court's jurisdiction is what constitutes an abuse of market power (and not the arbitration agreement itself).

Accordingly, the Oberlandesgericht refused to recognise the CAS award based on Art. V (2) (b) New York Convention because it violates German cartel law, which is part of the *ordre public*. Hence, no *res iudicata* effect of the CAS award hinders Pechstein from bringing forward claims for damages before German state courts.

To sum up, the Oberlandesgericht Munich held that the arbitration agreement was void and the arbitral award could not be recognized.

The decision is currently under appeal to the German Bundesgerichtshof (Federal Supreme Court).

Towards a CAS Reform

The Oberlandesgericht's decision is not one against sports arbitration in general, quite the contrary. However it reveals some apparent flaws in the CAS set up that need to be addressed. This decision could also potentially be used as a blueprint for other cases in which an athlete does not want to accept a CAS decision in any part of the world, or wants to sue a federation for damages.

Thus, to answer the question from the beginning of this paper, the system of sports arbitration will stay in place, which is a good thing for achieving harmonisation in sports law. However, the ICAS/CAS will have to undergo an internal restructuring and to sit together with all stakeholders to find an acceptable well balanced solution. World unions especially of the different sports should have a direct and equal say in respect of ICAS/CAS rules involving athletes and the nomination and composition of the CAS list of arbitrators. Furthermore, a mechanism has to be found for the nomination of the president of each arbitration panel in order to guarantee independence.

Dr. Lucien W. Valloni
 lvalloni@froriep.ch
 Tel. +41 44 386 60 00



OUR SPORTS LAW SPECIALIST

Dr. Lucien W. Valloni, Zürich
 lvalloni@froriep.ch
 Tel. +41 44 386 60 00

WHO IS FRORIEP?

Founded in Zurich in 1966, Froriep is one of the leading law firms in Switzerland, with around 90 lawyers and offices in Zurich, Geneva, Lausanne and Zug, as well as foreign offices in both London and Madrid, serving clients seeking Swiss law advice.

We have grown a domestic and international client base ranging from large international corporations to private clients. Our unique, truly integrated, international structure mirrors our strong cross-border focus. We value and promote continuity and strong client relationships. Our teams are tailor-made, assembled from every practice area and across our network of offices.

Many of our lawyers are recognised as leaders in their practice areas, and our clients benefit from our in-depth knowledge and the rich diversity of talents, languages and cultures that makes our lawyers particularly versatile and adaptive.

ZURICH
 Bellerivestrasse 201
 CH-8034 Zurich
 Tel. +41 44 386 60 00
 Fax +41 44 383 60 50
 zurich@froriep.ch

GENEVA
 4 Rue Charles-Bonnet
 CH-1211 Geneva 12
 Tel. +41 22 839 63 00
 Fax +41 22 347 71 59
 geneva@froriep.ch

ZUG
 Grafenastrasse 5
 CH-6304 Zug
 Tel. +41 41 710 60 00
 Fax +41 41 710 60 01
 zug@froriep.ch

LAUSANNE
 9a Place de la Gare
 CH-1003 Lausanne
 Tel. +41 21 863 63 00
 Fax +41 21 863 63 01
 lausanne@froriep.ch

LONDON
 17 Godliman Street
 GB-London EC4V 5BD
 Tel. +44 20 7236 6000
 Fax +44 20 7248 0209
 london@froriep.ch

MADRID
 Antonio Maura 10
 ES-28014 Madrid
 Tel. +34 91 523 77 90
 Fax +34 91 531 36 62
 madrid@froriep.ch

A high-angle photograph of a mountain valley. In the foreground, a steep, rocky slope descends towards a large, calm lake. The lake is surrounded by rugged, grey rock formations. In the background, more mountain peaks are visible under a cloudy sky. A red horizontal band is overlaid on the top portion of the image, containing the main headline.

THE BEST OF OUTLOOKS FOR OUR CLIENTS

FRORIEP

ZURICH | GENEVA | ZUG | LAUSANNE | LONDON | MADRID

FRORIEP.COM