

# **Bundesgerichtshof, Az. KZR 6/15, *Pechstein v. International Skating Union* (ISU), 7 June 2016**

**Bernd Ehle and Ignacio Guaia**

**Abstract** The January 2015 ruling of the *Oberlandesgericht* of Munich in the matter opposing the ice speed skater Claudia Pechstein to the International Skating Union (ISU) stirred up the international sports arbitration community as it impugned the very basis of the CAS dispute resolution system. Is CAS arbitration biased structurally towards SGBs, putting athletes at a disadvantage? Can athletes wanting to compete internationally be forced to agree to arbitration, or can they choose to have recourse to ordinary courts to protect their rights? In its landmark decision of 7 June 2016, the German *Bundesgerichtshof* quashed the verdict of the lower court and cleared the CAS dispute resolution system of Pechstein's accusations, finding *inter alia* that there was no abuse of a dominant position and hence no violation of the German *ordre public*. To the Munich court's credit, its controversial decision intensified the ongoing debate about the CAS' independence, from which the CAS dispute resolution system will likely emerge both improved and strengthened.

**Keywords** CAS · Doping · Arbitration agreement · Forced arbitration · Voluntary consent · Competition law · Abuse of dominant position · Violation of public policy · Independence and impartiality · Article 6 ECHR

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B. Ehle (✉) · I. Guaia  
LALIVE, Geneva, Switzerland  
e-mail: behle@lalive.ch

I. Guaia  
e-mail: iguaia@lalive.ch

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## 1 Introduction

The much-awaited June 2016 decision of the German Federal Supreme Court (*Bundesgerichtshof*, BGH) has put an—at least preliminary—end to the “German angle” of the Pechstein saga: it reversed the 15 January 2015 decision of the Court of Appeal of Munich (*Oberlandesgericht München*, OLG) according to which arbitration agreements between sports institutions and their members constitute an abuse of a dominant position. The BGH took up a similar stance as the SFT when finding that agreements referring disputes between athletes and sports federations to the CAS in Lausanne are valid and binding. The decision therefore bolsters the CAS system, which has been under attack in recent years, and also came as a welcome relief to many in the sports (arbitration) world. Indeed, any other outcome would have been tantamount to a revolution of the international sports-related dispute resolution system. However, some uncertainty remains in light of Pechstein’s still pending legal actions before the German Constitutional Court and the ECtHR.

## 2 Facts and Proceedings

The relevant facts and proceedings have been skilfully summarized in Professor Maisonneuve’s discussion of the January 2015 decision of the Munich Court of Appeal, which was published in the 2015 edition of this Yearbook.<sup>1</sup> Nonetheless, for the sake of completeness, they shall be restated here, in different terms.

Claudia Pechstein is one of the most successful ice speed skaters, having earned nine Olympic medals. In February 2009, at the World Speed Skating Championships in Norway organized by the International Skating Union (ISU), it was found that Pechstein’s blood samples contained an abnormally high percentage of reticulocytes (and thus an irregular red blood cell count), prompting the German

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<sup>1</sup> Maisonneuve 2015, pp. 335–347.

Ice Skating Federation (*Deutsche Eisschnelllauf-Gemeinschaft e.V.*, DESG) to withdraw her from the competition. Based on those results, the ISU Disciplinary Commission in July 2009 imposed a sanction on Pechstein: two years of ineligibility to participate in competitions on the grounds of blood doping.<sup>2</sup> This is where her legal battles began.

Pechstein first challenged her doping ban before the CAS. However, on 25 November 2009, the CAS panel<sup>3</sup> issued an award confirming Pechstein's ban based on the inconclusive tests for blood doping.<sup>4</sup> The CAS panel was unwilling to reconsider certain exculpatory evidence that Pechstein sought to produce, finding that it was not "new" since it could have been produced in the original proceedings and thus did not merit a re-evaluation.<sup>5</sup>

In late 2009, Pechstein challenged the CAS award before the SFT on a number of grounds. In its decision of 10 February 2010, the SFT dismissed her application, such that the CAS award remained in effect.<sup>6</sup> Specifically, the SFT rejected Pechstein's argument about the lack of impartiality and independence of the CAS tribunal as she had not raised this issue earlier in the proceedings and was thus precluded from doing so at the setting-aside stage. Pechstein's argument that the CAS rule of maintaining closed proceedings violated Article 6(1) of the ECHR by not granting a public hearing was also dismissed: the SFT found that Pechstein had failed to prove that arbitral proceedings benefitted from the same protections as a court hearing, ruling that the ECHR did not apply to arbitral hearings.<sup>7</sup>

In November 2010, Pechstein brought her case before the ECtHR, arguing that both the ISU Disciplinary Commission and the CAS had not been impartial and independent, as to the latter because it was strongly influenced by the IOC and because its Secretary General could allegedly influence the awards. Moreover, Pechstein argued that she was not allowed to have a public hearing and that the SFT's scope of review of CAS awards was too limited. Pechstein further argued that arbitral procedures before the CAS do not respect the presumption of innocence as guaranteed by Article 6(2) ECHR.<sup>8</sup> The proceedings before the ECtHR are still pending.

In late 2012, having lost in all other fora, Pechstein tried her luck before the German courts for the first time on this matter. She filed suit with the District Court of Munich (*Landgericht München*, LG) against both the ISU and the DESG,

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<sup>2</sup> Pechstein was the first athlete ever to be suspended (for two years) because of irregular (i.e. neither negative nor positive results) blood samples.

<sup>3</sup> Composed of Swiss arbitrators Dr. Stephan Netzle and Michele Bernasconi and presided by Italian arbitrator Massimo Coccia.

<sup>4</sup> CAS 2009/A/1912 & 1913, *Claudia Pechstein v. International Skating Union & Deutsche Eisschnelllauf Gemeinschaft e.V. v. International Skating Union*, Award of 25 November 2009, paras 207 *et seq.*

<sup>5</sup> *Ibid.*

<sup>6</sup> SFT 4A\_612/2009, decision of 10 February 2010, para 7.

<sup>7</sup> *Ibid.*, para 4.1.

<sup>8</sup> ECHR, Application No. 67474/10, *Pechstein v. Switzerland*, 11 November 2010, p. 9.

claiming damages in the amount of more than EUR 3.5 million for losses suffered as a result of the allegedly illegal doping ban. In October of 2014, the German Olympic Sports Confederation (*Deutscher Olympischer Sportbund*, DOSB) appointed an expert commission to investigate Pechstein's case scientifically, attempting to identify a source for her abnormal blood values. The five members of the commission unanimously came to the conclusion that blood doping had *not* been proven and published their findings in January 2015.<sup>9</sup> In its February 2014 judgment, the LG nonetheless dismissed Pechstein's damages claim based on *res judicata*, but stated that her consent to arbitrate before a CAS tribunal had not been validly given as it had been imposed on her through a "structural imbalance" caused by the "monopolistic power of ISU."<sup>10</sup>

In January 2015, the Court of Appeal of Munich (*Oberlandesgericht München*, OLG)—seized on appeal by Pechstein—rendered a partial decision<sup>11</sup> holding that the CAS award could not be recognized in Germany under the 1958 NYC for being in violation of German public policy since the arbitration clause—to which all competing athletes like Pechstein were deemed to have agreed—violated German competition law. The Court found that the ISU abused its dominant position by imposing an arbitration clause on athletes, and the CAS system does not provide for an impartial and independent adjudication given that it is structured unilaterally in favour of the SGBs. The decision, which according to Pechstein was worth more than all of her Olympic medals,<sup>12</sup> shocked the world of sports arbitration as it shook arbitration as a dispute resolution mechanism in international sports to its very foundation.

Following the appeal filed by ISU, the BGH on 7 June 2016 rejected the entirety of Pechstein's claims.<sup>13</sup> In July 2016, Pechstein decided to pursue her case before the German Constitutional Court (*Bundesverfassungsgericht*) arguing that the mandatory submission of the dispute to the CAS violated her constitutional right to a fair trial.<sup>14</sup> The proceedings before the *Bundesverfassungsgericht* are still pending.

<sup>9</sup> Anno Hecker, Dopingnachweis nicht haltbar, 29 January 2015. <http://www.faz.net/aktuell/sport/sportpolitik/claudia-pechstein-von-medizinischer-kommission-entlastet-13396925.html>. Accessed 17 February 2017.

<sup>10</sup> LG München, Az. 37 O 28331/12, *Claudia Pechstein v. International Skating Union*, 26 February 2014; SchiedsVZ 2014, pp. 100–112.

<sup>11</sup> OLG München, Az. U 1110/14 Kart., *Claudia Pechstein v. International Skating Union*, 15 January 2015; SchiedsVZ 2015, pp. 40–47. See also *Maisonneuve* 2015, pp. 335–347.

<sup>12</sup> Die Presse, Mehr wert als alle Medaillen zusammen—Gericht lässt Pechstein-Klage gegen Eislaufweltverband zu, 15 January 2015. <http://diepresse.com/home/sport/wintersport/4639631/Mehr-wert-als-alle-Medaillen-zusammen>. Accessed 17 February 2017.

<sup>13</sup> BGH, Az. KZR 6/15, *Pechstein v. International Skating Union*, 7 June 2016; an English translation of the decision can be found in SchiedsVZ 2016, pp. 268–276.

<sup>14</sup> Frankfurter Allgemeine Zeitung, Klagen über Klagen, Claudia Pechstein zieht vors Bundesverfassungsgericht, 12 July 2016. <http://www.faz.net/aktuell/sport/mehr-sport/sport-kompakt/sport-kompakt-klagen-ueber-klagen-14336748.html>. Accessed 17 February 2017.

### 3 Commentary

#### 3.1 The Decision Rendered by the BGH

The cartel panel of the BGH dismissed Pechstein's legal actions before the German courts as being in conflict with the valid and binding arbitration agreement between her and the ISU, and hence as inadmissible.<sup>15</sup> One of the Supreme Court's essential findings is that the CAS is a "genuine" court of arbitration under German law,<sup>16</sup> and not merely an internal tribunal or disciplinary body of an association; hence, agreeing to CAS arbitration validly excludes any recourse to the ordinary courts.<sup>17</sup> The BGH held that CAS arbitral tribunals are independent of sports associations and Olympic committees, and that their mission is to adjudicate in a harmonious manner.

In fact, the Court reinforced the legitimacy of the existing CAS system and further highlighted its advantages over default litigation, stating that:

a unitary arbitral tribunal for sports-related matters can contribute to the further development of international sports law. Among the further advantages of international sports arbitration over the state courts are the arbitrators' special expertise, the speed in rendering decisions, which is crucial for the athletes given the tight calendar of scheduled sporting events, and the international recognition and enforceability of arbitral awards.<sup>18</sup>

This, in itself, could be argued to lay the path for Latty's *lex sportiva*, i.e. a system of sports laws applied in sports arbitration.<sup>19</sup> Or, as Rigozzi suggests, "*l'ensemble des normes coutumières privées qui se sont dégagées de l'interaction entre les normes de l'ordre juridique sportif et des principes généraux propres aux ordres juridiques étatiques, telles qu'elles se concrétisent dans les arbitrages sportifs.*"<sup>20</sup>

According to the BGH, an arbitral panel appointed by virtue of the CAS' closed list system does not create any procedural or structural inequalities for the athlete, and does not jeopardize the neutrality of the arbitral tribunals. There is no structural imbalance in the CAS system that would make it slanted against athletes as the

<sup>15</sup> BGH, Az. KZR 6/15, Pechstein v./ International Skating Union, 7 June 2016, paras 22 *et seq.*

<sup>16</sup> *Ibid.*, para 23, with reference to Sections 1025 *et seq.* of the German Code of Civil Procedure (ZPO).

<sup>17</sup> *Ibid.*, para 24.

<sup>18</sup> *Ibid.*, para 59. The German original reads: "Zudem vermag ein einheitliches Sportschiedsgericht zur Rechtsfortbildung im Rahmen des internationalen Sportrechts beizutragen. Zu den weiteren Vorteilen einer internationalen Sportschiedsgerichtsbarkeit gegenüber staatlichen Gerichten zählen darüber hinaus die besondere Fachkunde der Schiedsrichter, die im Hinblick auf termingebundene Sportereignisse insbesondere auch für den von einem Verfahren betroffenen Sportler besonders bedeutsame Schnelligkeit der Entscheidungsfindung sowie die internationale Anerkennung und Vollstreckung von Schiedssprüchen".

<sup>19</sup> Latty 2007, pp. 1–2.

<sup>20</sup> Rigozzi 2005, p. 628.

procedural rules of the CAS provide for sufficient guarantees to safeguard the athletes' rights: the parties to a CAS arbitration appoint their arbitrators on a basis of parity and, if need be, can challenge them on grounds of lack of independence and impartiality.<sup>21</sup> The Court held that while international sports federations, such as ISU, indeed have some influence on the composition of the closed list of CAS arbitrators, such influence is quite limited as the list is composed of more than 200 individuals and thus contains a sufficient number of independent arbitrators to choose from.<sup>22</sup>

The BGH further found that there was no abuse of a dominant position under German competition law, and thus no public policy violation.<sup>23</sup> While according to the monopolistic "one place principle" (*"Ein-Platz-Prinzip"*) the ISU, just like other international sports federations, admittedly holds a dominant position as the sport's international governing body, referring athletes to compulsory CAS arbitration does not amount to an abuse of such position. According to the BGH, the athletes and SGBs do not form two different camps with diverging interests; quite the contrary, they have a common interest to keep international sports doping-free:

Only an independent and fair sports arbitration system can expect worldwide recognition, and every athlete seeking fair competition must be concerned that presumed violations of the anti-doping rules at the international level are investigated and sanctioned according to uniform standards and with equal treatment of all affected athletes from different countries.<sup>24</sup>

The Court held that the arbitration clause subjecting Pechstein's claims to CAS arbitration is valid with respect to her fundamental rights to exercise a profession freely, to access the judicial system, and to a fair trial as guaranteed by Article 6(1) ECHR.<sup>25</sup> According to the BGH, CAS arbitration agreements constitute a valid waiver of the right to renounce the access to state courts and this right was exercised through voluntary consent to arbitration, devoid of any physical coercion; i.e. the arbitration agreement was not obtained through force.<sup>26</sup> Finally, the BGH found that the arbitration agreement is also valid under Swiss law, by reference to the case law of the SFT.<sup>27</sup> Any curtailment of the voluntary nature of arbitration agreements is compensated by the availability of legal remedies to the athletes.<sup>28</sup>

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<sup>21</sup> BGH, Az. KZR 6/15, *Pechstein v. International Skating Union*, 7 June 2016, paras 30 and 34.

<sup>22</sup> *Ibid.*, paras 30–31.

<sup>23</sup> *Ibid.*, paras 46 *et seq.*

<sup>24</sup> *Ibid.*, para 49. The German original reads: "Nur eine unabhängige und faire Sportsschiedsgerichtsbarkeit kann weltweite Anerkennung erwarten, und jedem den fairen Wettkampf suchenden Sportler muss daran gelegen sein, dass mutmassliche Verstöße gegen die Anti-Doping-Regeln auch auf internationaler Ebene nach einheitlichen Massstäben und unter Gleichbehandlung der betroffenen Sportler aus unterschiedlichen Ländern aufgeklärt und sanktioniert werden."

<sup>25</sup> *Ibid.*, paras 57 *et seq.*

<sup>26</sup> *Ibid.*, para 54.

<sup>27</sup> *Ibid.*, paras 67 *et seq.*

<sup>28</sup> *Ibid.*, para 70.

### 3.2 *The Structural Imbalance When Selecting CAS Arbitrators*

The BGH identified the existing shortcomings in the system but concluded that these were justified by the overarching common interest to fight doping in international sports.<sup>29</sup> The Court's pro-CAS arbitration stance was criticized as blending out the reality of sports dispute resolution<sup>30</sup>—and arguably rightly so: the general fight against doping is only one of many interests that come into play in sports disputes. Federations and athletes are far from always being “in the same camp” and the “CAS list of arbitrators does not exist for the purpose of pursuing the general political goal of doping-free sports”.<sup>31</sup> In practice, there are multiple disputes in which the athletes' interests diverge significantly from those of the federations and, therefore, the existing structural imbalance between the two parties potentially turns out to be to the athletes' detriment. This obvious reality seems to have been disregarded by the BGH.

While a uniform sports arbitration system is undeniably preferable to domestic court litigation (with a high risk of contradicting decisions around the world)—or even the only viable option—when it comes to resolving international sports disputes in an efficient and consistent manner, further reforms of the closed arbitrator list set-up should be considered to address the athletes' legitimate concerns to create a truly level playing field. The BGH made sure not to voice any such criticism, which would effectively have undermined its own reasoning. However, when reading between the lines of the decision, it is obvious that the Court is not entirely convinced that the CAS system could not be improved when it states that

[t]he statutes of the CAS in their present form constitute a *still acceptable* structure for the procedure when appointing arbitrators.<sup>32</sup>

Hence, the ruling can be understood to induce the CAS to undertake necessary reforms, be it by opening up the list, by avoiding repeat appointments or by enhancing transparency.<sup>33</sup> In any event, despite this important precedent supporting it, the CAS system will remain under observation, and indeed under pressure, to live up to the expectations regarding its legitimacy and fairness that were outlined by the BGH, and to build trust, especially at a time when international sport faces serious challenges and corruption scandals around the world.

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<sup>29</sup> Ibid., para 49.

<sup>30</sup> Rombach 2016, p. 278.

<sup>31</sup> BGH, Az. KZR 6/15, *Pechstein v. International Skating Union*, 7 June 2016, para 49.

<sup>32</sup> Ibid., para 50 (emphasis added). The German original reads: “In der gegenwärtigen Form stellen die Statuten des CAS eine *noch hinnehmbare* Ausgestaltung des Verfahrens bei der Bestellung der Schiedsrichter dar” (emphasis added).

<sup>33</sup> For instance by following the example of the ICC International Court of Arbitration, which has started publishing the names of the arbitrators appointed in ICC cases on its website in 2016.

### 3.3 *The Athletes' Voluntary Consent to CAS Arbitration*

With respect to Pechstein's (alleged) free consent to CAS arbitration, the BGH balanced the interests and—again with emphasis on the fight against doping—concluded that the overriding (and commonly accepted) need for a uniform dispute resolution system generally warrants a differential treatment and outweighs the athletes' fundamental rights to freely exercise their profession and to access the judicial system<sup>34</sup>:

Therefore, it is generally recognized that especially in the area of international sports, arbitration agreements in favour of a specific arbitral tribunal are necessary in order to assure a uniform approach with regard to the rules in sports law. Precisely in the field of doping, the uniform application of the anti-doping rules of the federation and the WADC is absolutely necessary to allow for a fair international sporting competition of the athletes.<sup>35</sup>

The notion that the athletes' consent to arbitrate is given “voluntarily” remains however controversial.<sup>36</sup> As acknowledged by the BGH with respect to Pechstein,<sup>37</sup> for most athletes competing at a high international level in their sport is equivalent to exercising a profession. Therefore, in reality, the athletes' hands are bound: not consenting to arbitration, and as a result not participating in official competitions, will often mean not having any revenue—hence affecting their freedom to choose a profession.<sup>38</sup> The issue of an alleged violation of Pechstein's fundamental and constitutional rights has yet to be decided by the *Bundesverfassungsgericht*, Germany's highest court. A reversal of the BGH's decision, which seems rather unlikely from a statistical point of view,<sup>39</sup> would certainly be a serious blow to the CAS and international sports dispute resolution systems in general. The immediate consequence would be that German athletes would be in an unfairly better legal position than their foreign competitors: for instance, any German athlete whose sanctions (of monetary or disciplinary nature) were confirmed by a CAS award

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<sup>34</sup> BGH, Az. KZR 6/15, *Pechstein v. International Skating Union*, 7 June 2016, paras 54 *et seq.*; Rombach 2016, p. 278.

<sup>35</sup> *Ibid.*, para 59. The German original reads: “Es ist daher allgemein anerkannt, dass insbesondere im Bereich des internationalen Sports Schiedsvereinbarungen zugunsten eines bestimmten Schiedsgerichts erforderlich sind, um ein einheitliches Vorgehen hinsichtlich der sportrechtlichen Regeln zu gewährleisten. Gerade im Bereich des Dopings ist die einheitliche Anwendung der Anti-Doping-Regeln der Verbände und des WADC zwingend erforderlich, um einen fairen internationalen sportlichen Wettbewerb der Athleten zu ermöglichen”.

<sup>36</sup> SFT, 133 III 235, 244–245, para 4.3.2.3. The SFT held that the choice for athletes boils down to being allowed to participate in international competitions—and thus consenting, on the one hand, or merely “practicing one's sport in one's backyard”, on the other hand. The BGH refers itself to legal authors denying the athletes' voluntary consent: BGH, Az. KZR 6/15, *Pechstein v. International Skating Union*, 7 June 2016, para 53 with reference to, e.g., Heermann 2015, p. 80. See also Duval 2017.

<sup>37</sup> BGH, Az. KZR 6/15, *Pechstein v. International Skating Union*, 7 June 2016, para 56.

<sup>38</sup> Rombach 2016, p. 278.

<sup>39</sup> *Ibid.*, p. 278.

would probably elude the consequences of the award—at least in Germany—by resisting enforcement on the basis of this precedent. This would, in turn, apply to any CAS award that is sought to be enforced in Germany.

#### 4 Pechstein’s Action Before the ECtHR

In her still pending application before the ECtHR, Pechstein argues, as in her previous law suits, that (i) the ISU Disciplinary Commission and the CAS are not independent and impartial bodies; (ii) the International Olympic Committee exercises control over the CAS and its own Secretary General could influence the awards, thus making it partial; (iii) she did not have a public hearing, neither before the ISU Disciplinary Commission, nor before the CAS (despite her request, in particular to have her agent present); (iv) her right to a fair trial was not respected because, pursuant to Swiss law, there is no competent court to re-examine the establishment of facts after the CAS panel has done so,<sup>40</sup> and the SFT’s power was (and as a general matter is) very limited; and lastly that (v) proceedings before the CAS are against the presumption of innocence in Article 6(2) ECHR.<sup>41</sup> Since Pechstein’s action is technically directed against Switzerland, she will have to establish that Switzerland was at fault for actions or circumstances that could be seen attributable to either ISU or CAS but arguably not to Switzerland. The ECtHR asked the parties to address certain questions: is Article 6(1) ECHR applicable to proceedings before the CAS? Is the CAS an independent and impartial tribunal in this respect? Is the CAS’s refusal to conduct public hearings compatible with Article 6(1) ECHR?<sup>42</sup> These issues are not new to the discussions surrounding the legitimacy of CAS.

##### *Applicability of Article 6(1) ECHR to CAS Proceedings*

Article 6(1) ECHR provides that

[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.<sup>43</sup>

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<sup>40</sup> ECHR, Application No. 67474/10, *Pechstein v. Switzerland*, 11 November 2010, p. 9.

<sup>41</sup> *Ibid.*, p. 9.

<sup>42</sup> *Ibid.*

<sup>43</sup> Article 6(1) ECHR.

The answer to the ECtHR's first question hinges on whether the sanctions dealt with by CAS tribunals are of a criminal or civil law nature. According to the official ECHR commentary, "[t]he concept of a 'criminal charge' has an 'autonomous' meaning, independent of the categorisations employed by the national legal systems of the member States".<sup>44</sup> The starting point for the assessment of the applicability of the "criminal" aspect of Article 6 ECHR is based on the criteria outlined in *Engel and Others v. the Netherlands*, according to which one is to consider (i) the relevant classification in domestic law; (ii) the nature of the offence; and (iii) the severity of the penalty that the defendant risks to incur.<sup>45</sup> The majority of sports disciplinary offences are not considered as crimes by most state legislations.<sup>46</sup> Penalties generally involve a ban from participating in professional competitions and/or fines, which cannot be equated to prison sentences. Even though CAS panels are mindful of Switzerland's obligations regarding the ECHR,<sup>47</sup> the SFT has repeatedly distinguished between ECHR guarantees, ruling that parties to arbitration may validly contract out of otherwise enforceable rights such as public hearings and even the presumption of innocence.<sup>48</sup> In order to trigger Switzerland's liability, it will be for Pechstein to establish that the SFT's stance on the ECHR and sports arbitration is contrary to ECHR principles.

#### *Independence and Impartiality of CAS Tribunals*

To succeed with her case before the ECtHR, Pechstein must also show that Switzerland wrongfully characterizes CAS tribunals as impartial and independent. The SFT has addressed the issue on several occasions, starting with *Gundel v. FEI*,<sup>49</sup> and established that CAS panels are indeed independent and impartial in the *Lazutina v. IOC* case.<sup>50</sup> The CAS Code provides that the arbitrators for each case must necessarily be appointed from the closed list of CAS arbitrators.<sup>51</sup> As mentioned above, this rule has been and remains subject to debate. According to its

<sup>44</sup> Guide on Article 6 of the European Convention on Human Rights, 2014, p. 7. [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf). Accessed 27 February 2017; see also ECtHR, Case No. 8269/78, *Adolf v. Austria*, 26 March 1982, para 30.

<sup>45</sup> ECtHR, Case No. 6181976, *Engel and Others v. the Netherlands*, 8 June 1976, paras 82–83.

<sup>46</sup> Switzerland considers sports disciplinary matters as civil law matters, see SFT, 119 II 271, *Gundel v. FEI*, 15 March 1993, paras A *et seq.*

<sup>47</sup> CAS 2011/A/2426, *Adamu v. FIFA*, Award of 24 February 2012, para 66: "[t]he Panel is mindful that some guarantees afforded in relation to civil law proceedings by Article 6.1 of the ECHR are indirectly applicable even before an arbitral tribunal—all the more so in disciplinary matters—because the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards (at the enforcement stage or on the occasion of an appeal to set aside the award), verify that parties to an arbitration are guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal. These procedural principles thus form part of the Swiss procedural public policy."

<sup>48</sup> See SFT 4A.448/2013, decision of 27 March 2014.

<sup>49</sup> SFT 119 II 271.

<sup>50</sup> SFT 129 III 445.

<sup>51</sup> Article R33 CAS Code.

statutes, the purpose of ICAS is to “facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties”.<sup>52</sup> Even though the CAS policy of maintaining a closed list of arbitrators limits the parties’ fundamental freedom to appoint an arbitrator of their choice, i.e. including non-listed individuals, the SFT has validated the closed list in *Lazutina v. IOC* on the ground that it ensures that the CAS panels are composed of specialists in the relevant field of sports and will thus be able to issue fast and consistent decisions.<sup>53</sup>

Pursuant to the same code, ICAS is composed of twenty members, all of whom are experienced jurists.<sup>54</sup> In this regard, “the ICAS shall appoint personalities to the list of CAS arbitrators 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, the NOCs and by the athletes’ commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes”.<sup>55</sup>

The ECtHR is expected to analyse the CAS arbitrator selection process, although the rule whereby only one-fifth of the members are selected expressly with the notion of “considering the athletes’ best interests”—in place during the *Pechstein* arbitration and perceived as allowing for the underrepresentation of athletes—is no longer in force. The view that the CAS and ICAS are overly entangled (and hence partial given that 13 out of 20 ICAS members have or had executive positions

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<sup>52</sup> Article S2 ICAS and CAS Statutes.

<sup>53</sup> SFT 129 III 445, 450–463, paras 3.3.3 *et seq.* The IOC disqualified two skiers after the 2002 Winter Olympic Games in Salt Lake City for doping. The International Ski Federation suspended the skiers for a period of two years. The athletes appealed to the CAS, calling for a reversal of the ruling. The subsequent challenge was grounded on the alleged bias in the CAS system, since it received funding from the IOC and could thus not be considered a truly independent body. The SFT held that the CAS offered all the guarantees of independence and impartiality allowing it to qualify as a real court of arbitration, even when the IOC, as in this case, was a party to the proceedings.

<sup>54</sup> Article S4 CAS Code provides that four ICAS members are appointed by the International Federations (IFs), namely three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of the Winter Olympic IFs (AIOWF), chosen from within or outside their members; four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its members; four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its members; four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

<sup>55</sup> Article S14 CAS Code.

within SGBs, and this very body of 20 members has the power to select arbitrators to the list) will again be in the spotlight.<sup>56</sup>

In any event, the ECtHR will likely pay due regard to the SFT's position that neither party should have an overriding influence on the composition of the list of arbitrators; this is why, in *Gundel v. FEI*, the SFT stated that in light of the fact that the list of arbitrators was compiled exclusively by the IOC, the CAS would not have qualified as a genuine arbitral tribunal in a dispute involving the IOC, as it was a party to the dispute.<sup>57</sup>

### *Compatibility of CAS's Hearings with Article 6(1) ECHR*

The CAS Code provides that:

[p]roceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.<sup>58</sup>

Article 6(1) ECHR, on the other hand, allows for the press and public to be excluded from all or part of the proceedings only

in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.<sup>59</sup>

The debate regarding the nature of professional sports will therefore likely remain alive and the legitimacy of the relevant CAS Code provisions will be tested. The issue here is whether athletes engaged in professional sports enjoy the same protection as non-athletes in non-commercial activities who do benefit from certain non-waivable features in the ECHR (such as the right to a public hearing). To win before the ECtHR, Pechstein will need to demonstrate that Switzerland is wrongly upholding jurisprudence that characterizes professional sports as commercial activities.

## 5 Conclusion

By clearly and unconditionally bolstering up the existing CAS system in its June 2016 decision, the *Bundesgerichtshof* has re-established legal certainty with respect to dispute resolution in the international sports arena. The last word has however

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<sup>56</sup> Antoine Duval, The Pechstein case: Transnational constitutionalism in inaction at the Bundesgerichtshof, 10 June 2016. <http://verfassungsblog.de/the-pechstein-case-transnational-constitutionalism-in-inaction-at-the-bundesgerichtshof/>. Accessed 17 February 2017.

<sup>57</sup> SFT, 119 II 271, para 3.b.

<sup>58</sup> Article R43 CAS Code.

<sup>59</sup> ECHR Guide on Article 6, p. 32.

not yet been spoken—Pechstein’s pending applications before the German Constitutional Court and the ECtHR could potentially destabilize the system more permanently. The combative ice skater’s ongoing court battle has highlighted differences of opinion when it comes to critical issues such as the independence and fairness of CAS arbitration. Attacks against the CAS system will likely persist as long as there is a real—or even only a perceived—structural imbalance in favour of SGBs. The debate triggered by the Pechstein saga will eventually result in an improved and possibly more transparent CAS system, as no one has an interest in jeopardizing the achievement of an efficient and industry-specific international dispute resolution system.

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