Pechstein V. International Skating Union – Court Of Arbitration For Sport At The Target

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ÖZET

Münih Eyalet Yüksek Mahkemesi'nin (Oberlandesgericht München) 15 Ocak 2015 tarihli kararı, Spor Tahkim Mahkemesi'nin (CAS) verdiği kararların güvenilirliği ve tenfiz kabiliyeti konusunda birçok tartışmaya neden oldu ve özellikle CAS'ın kurumsal yapısı tartışmaya açılmış oldu. Alman sürat patencisi Claudia Pechstein ve Uluslararası Buz Pateni Federasyonu (ISU) arasındaki ihtilafta, Münih Eyalet Yüksek Mahkemesi (Oberlandesgericht München), taraflar arasındaki tahkim sözleşmesinin geçersiz olduğuna hükmetti ve dolayısıyla, bu tahkim sözleşmesine dayanılarak verilen CAS kararının, Alman mahkemeleri önünde kesin hüküm niteliği taşımadığını karara bağladı. Bu karar, ISU tarafından, Almanya Federal Adalet Mahkemesi (Bundesgerichtshof) nezdinde temyiz edildi ve temyiz talebi henüz karara bağlanmadı. Eğer Federal Mahkeme, Eyalet Mahkemesi tarafından verilen kararı onarsa, bu CAS'ta çok önemli yapısal reformların habercisi olabilir. Bu makale, Eyalet Mahkemesi'nin vermiş olduğu karar inceledikten sonra; Avrupa Birliği rekabet hukuku yönünden, davanın olası yorumlarına değinmektedir.

Anahtar Kelimeler: *Spor Tahkim Mahkemesi, Pechstein, kesin hüküm, kurumsal yapı.*

ABSTRACT

A decision of the Oberlandesgericht München (OLG), dated January 15, 2015, created a lot of controversy on the reliability and enforceability of awards rendered by the Court of Arbitration for Sport (CAS), in particular by opening the institutional structure of the CAS up for discussion. In the dispute between the German speed skater Claudia Pechstein and the International Skating Union (ISU), the OLG decided that the arbitration agreement between the parties was null and void and therefore the award of the CAS Panel, which relied its jurisdiction on this

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arbitration agreement, did not have *res judicata* effect before German courts.[1] This decision was appealed by the ISU to the German Supreme Court (Bundesgerichthof) and the latter still has not rendered its decision. If the Bundesgerichthof upholds the decision of the OLG, this could give rise to important structural reforms in the CAS. This article analyzes the findings of the OLG and lays down possible interpretations of the case from the perspective of the European Union competition law.

Keywords: *Court of Arbitration for Sport, Pechstein, res judicata, institutional structure.*

Introduction and Factual Background

Claudia Pechstein is an Olympic gold medalist speed skater who was held liable for an anti-doping violation by the Disciplinary Commission of the ISU. After a decision imposing two-year disqualification, Pechstein initiated appeal arbitration proceedings before the CAS, which dismissed her appeals and upheld the decision of the international sports federation. After the CAS award, Pechstein made two separate applications to the Swiss Federal Supreme Court. The first one was to set aside the award and the second one was for its revocation. However, both applications of the athlete were dismissed.

Following these proceedings, Pechstein filed an action for damages against the ISU before the Landgericht München I (LG). She claimed for her economic losses due to the two-year disqualification and in order to prevent the *res judicata* effect of the CAS award, she alleged that the arbitration agreement was invalid. The LG granted her motion on the invalidity of the arbitration agreement because it was unilaterally imposed by the sports federation but still recognized the *res judicata* effect of the CAS award, since Pechstein had not raised an objection to the CAS Panel's jurisdiction throughout the proceedings.

Pechstein appealed the decision to the OLG, which rendered an interim decision and stated that the arbitration agreement was invalid and the CAS award would not have *res judicata* effect because its recognition would be a violation of the German public policy on the grounds of the "Act Against Restraints of Competition" (Gesetz gegen Wettbewerbbeschränkungen). The decision of the OLG was based on the findings that the ISU abused its dominant position by imposing the arbitration agreement unilaterally and that the neutrality of the CAS was in question due to its

1 Oberlandesgericht München, 15 January 2015, Az. U 1110/14 Kart., *available at* https://openjur.de/u/756385.html (last visited 2 February 2016).

"structural imbalance in favor of the sports federations"[2]. This interim decision was appealed by the ISU to the German Supreme Court (Bundesgerichthof) and the latter has not yet decided on the case. Despite that, the decision of the OLG caused an earthquake effect in sports law because if it were upheld by the Bundesgerichthof, this would open the way for the athletes to challenge the enforceability of CAS awards before national courts. Apparently, it will also trigger the questions related to the compatibility of the rules imposed by the monopolist sports governing institutions with European Union (EU) competition law.

Res Judicata Effect of the CAS Award in Germany

Pursuant to Article R28 of the CAS Code, the seat of arbitration of the CAS is Lausanne, Switzerland and therefore the CAS arbitration proceedings will be governed by the Swiss arbitration law. Chapter 12 of the Swiss Federal Statute of Private International Law (PIL) contains provisions on international arbitration and its Article 176 defines the field of this chapter's application as follows: "The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland." As both conditions are fulfilled in the given case, there is no controversy on the application of Chapter 12 of the PIL.

Article 191, which is within the same chapter, prescribes that the sole forum to file an action to set aside an arbitral award is the Swiss Federal Supreme Court. However, as Pechstein's applications to set aside and revoke the award were dismissed by the Swiss Federal Supreme Court, her solution to challenge the CAS award was to initiate new proceedings with a claim for damages against the ISU before German courts. Although the prayer for relief was different from the one before the CAS Panel, it was obvious that the German court's analysis would mean a *de novo* review of the matter already decided by the CAS.[3]

Despite that, the OLG did not dismiss the case and declared that the CAS award did not have *res judicata* effect on grounds of Article V (2) (a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The court's reasoning was that the unilateral imposition of the arbitration agreement by the ISU constituted a violation of the German public policy, i.e. the antitrust

2 Favre-Bulle, X., 'Pechstein v. Court of Arbitration for Sport: How Can We Break The Ice', in *New Developments in International Commercial Arbitration 2015*, Geneva/Zurich 2015, p. 315 at 323 (Müller, C. et al. eds.).

3 *Id.*, p. 327.

law that "bans an undertaking placed in a dominant position from imposing contractual conditions that differ from what they would be in a normal competitive environment".[4]

Monopolistic Position of Sports Governing Bodies

The "Act Against Restraints of Competition" prescribes that an undertaking shall be deemed as dominant in a given market, if "it has no competitors or is not exposed to any substantial competition, or has a paramount market position in relation to its competitors".[5] In its decision, the OLG determined that the ISU has a monopolistic position given the fact that it is the only supplier in the market for ice skating world championships. It is a matter of fact that almost all national and international sports federations have this monopolistic position in order to maintain the uniformity of the rules and the organization of competitions in the given sports area. This dominant position of the sports federations goes thus far that they are deemed to have a *quasi-state* power over their members, which can be compared to the power of a state over its citizens.[6] Within this framework, it is almost impossible for the athletes not to accept the conditions and rules imposed by the sports federations because otherwise they would not be able to take license or attend the competitions organized by these federations.

It is undisputable that the athletes do not freely consent to arbitration agreements but these are imposed upon them by the sports federations and the Olympic committees.[7] The question is whether this unilateral imposition constitutes *per se* an abuse of the dominant position or can be justified by legitimate purposes given the specificity of sports. The prevailing opinion that was also crystallized in the case law is the second one. The rules and arbitration agreements imposed unilaterally by the sports governing bodies are deemed as valid, as long as they have legitimate objectives such as "good progress and operation of the sport competitions", "equal opportunities for the athletes" and "timeliness of dispute resolutions".[8]

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4 Duval, A., 'The Pechstein Ruling of the Oberlandesgericht München – Time for a New Reform of CAS?', *Asser International Sports Law Blog* (19 January 2015), available at: http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas (last visited 2 February 2016).

5 Gesetz gegen Wettbewerbbeschränkungen, **§ 19,** para. 2, *English translation available at* http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html (last visited 2 February 2016).

6 Rigozzi, A., 'L'arbitrabilité des Litiges Sportifs' in *ASA Bulletin*, Vol:21, No:3, p. 501 at 530-531, *available at* http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn25118 (last visited 2 February 2016).

7 Pinna, A., 'Les Vicissitudes du Tribunal Arbitral du Sport', *Gaz. Pal.*, 19-20 May 2014, p. 38, *quoted in* Maisonneuve, M., *L'Arbitrage des Litiges Sportifs*, Paris 2011, p. 292, para. 717.

8 *Id.* p. 313-314.

The OLG also accepted that the imposition of an arbitration agreement referring to the CAS does not constitute *per se* an abuse of the market power, since this is justified by the necessity of a uniform sports jurisdiction instead of the intervention of different state jurisdictions in the disputes between the athletes and the sports federations related to international competitions. The OLG stated that this would prevent that divergent decisions are rendered in similar cases and thus facilitate to maintain equal opportunities for the athletes.

Structure of CAS, Its Independence and Neutrality

The OLG first underlined that the imposition of the arbitration agreement by the ISU would not constitute *per se* an abuse of its dominant position but then concluded that there is such abuse in the given case, when one takes the structural imbalance of the CAS into account. According to the OLG, the sports governing bodies have a significant influence on the mechanisms of appointing the arbitrators and this influence threatens the independence and neutrality of the CAS.

Article S6 (3) of the CAS Code prescribes that the list of arbitrators be appointed by the International Council of Arbitration for Sport (ICAS). As this is a closed list, it can be said that there is a limited party autonomy concerning the appointment of arbitrators. However, this does not seem to be the biggest problem about the structure of the CAS, as the the Swiss Federal Supreme Court also rightly stated: There is a long list of arbitrators among which each party can choose the most appropriate one according to different criteria such as nationality, language and sport practiced by the athlete.[9]

According to the OLG, the main problem lies with the composition of the ICAS, which is the sole actor in the compilation of the list of CAS arbitrators. According to Article S4 of the CAS Code, the ICAS is composed of 20 members, among which four members are appointed by the international sports federations; four members are appointed by the Association of the National Olympic Committees; four members are appointed by the International Olympic Committee (IOC); four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes and the last four members are appointed by the sixteen members of the ICAS listed above. When this composition is analyzed, it can be clearly seen that the members of the ICAS are mostly appointed by the sports governing bodies, whereas the athletes' unions, clubs or other stakeholders of the sport industry do not have any active role

9 Schweizerisches Bundesgericht, 27 May 2003, BGE 129 III 445, para. 3.3.3.2. *available at* http://www.polyreg.ch/bgepub/Band_129_2003/BGE_129_III_445.html (last visited 2 February 2016).

in this process. Taking into consideration that the list of arbitrators is compiled by the ICAS, the OLG concluded that this structure would enable the sports governing bodies to have a greater influence on the appointment of arbitrators and this influence would bring the neutrality of the CAS into question, in particular in the disputes between the sports governing bodies and the athletes, which is the case of Pechstein, who was banned by the ISU from competitions for two years.

Having said that, this is not the only reason emphasized by the OLG. According to the court, another important structural deficiency is that Article 54 of the CAS Code stipulates a direct intervention of the President of the Appeals Arbitration Division of the CAS with the appointment of arbitrators in a given dispute. The provision prescribes that the President of the Appeals Division shall appoint the sole arbitrator, if a sole arbitrator is to be appointed and if three arbitrators are to be appointed, the President of the Appeals Division shall appoint the President of the Panel. As the President of the Appeals Division is one of the twenty members of the ICAS, the OLG concluded that the sports federations can have an indirect influence on the President of the Panel.

Subsequently, the OLG found that Pechstein would not have consented to the arbitration agreement referring to the CAS with its current structural imbalance, if the ISU had not the monopolistic position in the market that allowed it to impose such agreement upon the athlete. As a result, the court decided that the ISU abused its dominant position in the market and the arbitration agreement, which was the consequence of this abuse, was construed as invalid on grounds of the German public policy.

Evaluation According to EU Competition Law

The possible future impacts of this decision on European sports law should be analyzed within the framework of EU competition law, in particular in terms of Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the abusive conduct by undertakings of a dominant position. As professional sport constitutes an economic activity, it is evaluated under the scope of EU law[10].

The first encounter of the EU law and sport was the *Walrave* judgment of the European Court of Justice (ECJ)[11], where the matter of dispute was a competition rule prescribing that the members of a team must be from the same nationality and

10 Weatherill, S., *European Sports Law: Collected Papers*, The Hague 2014, p. 150.

11 European Court of Justice, 12 December 1974, C-36/74, *available at* http://curia.europa.eu/juris/showPdf.jsf?text=&docid=88848&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=483679 (last visited 2 February 2016).

the rule was claimed to be against the prohibition of national discrimination under EU law. The court found no violation by emphasizing that the restriction based on nationality was of "purely sporting interest" and it would not constitute a violation, as long as it remains limited to its proper objective.[12]

Although there were several sports related disputes before the ECJ after *Walrave*, the *Meca-Medina* judgment[13] became the first one that addressed the application of EU competition law to regulatory rules in sport.[14] In the case, the athletes claimed that certain rules adopted by the IOC and implemented by the International Swimming Federation relating to doping control were incompatible with EU rules on competition and freedom to provide services. The court first underlined that "the mere fact that a rule is purely sporting in nature does not exclude the application of the TFEU"[15]; however then found that the anti-doping rules do not constitute a restriction of competition incompatible with the common market, since they were justified by a legitimate objective, which is to ensure healthy rivalry between athletes, and the rules were proportionate with this purpose.[16]

In conclusion, we can say that the ECJ applies a gradual test in order to determine whether there is a violation when applying the EU law to sports related disputes. First of all, it analyzes whether the rule/practice is of a "purely sporting interest", but an affirmative answer to this question does not suffice to exclude the application of EU law, unless the rule/practice is related to a non-economic activity. If it reflects a "purely sporting interest" and has an economic effect on the market at the same time, the rule/practice will be subject to EU law.[17]

Then the court would ask whether the rule/practice has a legitimate purpose and whether it is limited to and proportionate with this purpose. The test of proportionality requires a transparent, objective and non-discriminatory application of the rule.[18] In the case that the rule in question passes this test as well, it can escape from the finding of a violation in virtue of the specificity of sports.

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12 Pijetlovic, K., *EU Sports Law and Breakway Leagues in Football*, The Hague 2015, p. 102-103.

13 European Court of Justice, 18 July 2006, C-519/04 P, *available at* http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d55f4d7bbf4b1243bdb8dbf8966a3a76b3.e34KaxiLc3eQc40LaxqMbN4Oc3aKe0?text=&docid=57022&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=478759 (last visited 2 February 2016).

14 Pijetlovic, K., p. 179.

15 European Court of Justice, 18 July 2006, C-519/04 P, para. 27.

16 *Id.* at para. 45.

17 Parrish, R., *Sports Law and Policy in the European Union*, Manchester/New York 2003, p. 100.

18 Siekmann, R.C.R., *Introduction to International and European Sports Law: Capita Selecta*, The Hague 2012, p.121.

The decision of the OLG might motivate the athletes, who are unhappy with the CAS awards, to refer similar cases to their respective national courts.[19] In such a scenario, the gradual test conducted by the ECJ would gain more importance. In the *Pechstein* case, the unilateral imposition of the arbitration agreement may be deemed to have legitimate purposes such as timeliness of the resolution of sports related disputes, the uniformity of the jurisdiction in similar cases and the necessity to provide the athletes with equal opportunities. However, it is disputable whether this practice of the sports federations would pass the last threshold, which is the proportionality test, given the fact that the institutional structure of the CAS is at stake for the first time. It is open to discussion whether the indirect influence of the sports governing bodies on the appointment of arbitrators through the ICAS would suffice to conclude that the imposition of the arbitration agreement is not proportionate with the above stated purposes.

If the Bundesgerichthof is convinced by the finding of the OLG and upholds its decision, this would be the signal flare of a reform in the CAS and ICAS that would allow other stakeholders of the sport industry, such as the athletes and the clubs, to gain a more active role in the compilation of the list of CAS arbitrators.

[19] Favre-Bulle, X., p. 348.

BIBLIOGRAPHY

Duval, A., 'The Pechstein Ruling of the Oberlandesgericht München – Time for a New Reform of CAS?', *Asser International Sports Law Blog* (19 January 2015).

Favre-Bulle, X., 'Pechstein v. Court of Arbitration for Sport: How Can We Break The Ice', in *New Developments in International Commercial Arbitration 2015*, Geneva/Zurich 2015 (Müller, C. et al. eds.).

Maisonneuve, M., *L'Arbitrage des Litiges Sportifs*, Paris 2011.

Parrish, R., *Sports Law and Policy in the European Union*, Manchester/New York 2003.

Pijetlovic, K., *EU Sports Law and Breakway Leagues in Football*, The Hague 2015

Rigozzi, A., 'L'arbitrabilité des Litiges Sportifs' in *ASA Bulletin*, Vol:21, No:3.

Siekmann, R.C.R., *Introduction to International and European Sports Law: Capita Selecta*, The Hague 2012.

Weatherill, S., *European Sports Law: Collected Papers,* The Hague 2014.

CASE LAW

European Court of Justice, 12 December 1974, C-36/74

European Court of Justice, 18 July 2006, C-519/04 P

Oberlandesgericht München, 15 January 2015, Az. U 1110/14 Kart.

Schweizerisches Bundesgericht, 27 May 2003, BGE 129 III 445.

INTERNET SOURCES

http://curia.europa.eu.

http://ebooks.cambridge.org.

http://link.springer.com.

https://openjur.de.

http://www.asser.nl.

http://www.gesetze-im-internet.de.

http://www.kluwerarbitration.com.

http://www.oapen.org.

http://www.polyreg.ch.

http://www.tas-cas.org.