



ICC Institute Newsletter - Issue 14

Editor: Michael Polkinghorne, White & Case LLP, ICC
Institute Council Member



INTRODUCTION FROM THE EDITOR



Dear Members,

In this "remote-working" edition of the ICC Institute newsletter, you will find contributions from **Clifford Hendel and Gary Smadja on transparency and legitimacy in sports law arbitration**, reflections from Piotr Nowaczyk on the origins and evolution of arbitration, and an account of the "Wake up (with) Arbitration!" round table held in Paris on 30 January 2020 (at a time where it was still possible to gather around a round table), on the theme: "The professor-arbitrator, a professional arbitrator?". This edition also includes an interview with renowned international arbitrator Pierre-Yves Gunter.

WORD FROM THE CHAIRMAN



One of the founders and a very active member of the Council of the Institute left us. Van Vechten Veeder, better known as V.V. Veeder or as Johnny Veeder passed away on 8th March 2020. A legend in the field of international arbitration, he actively contributed to the creation and development of the ICC Institute, providing the Council with visionary ideas and an indefectible support.

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A Riff on the Legal Saga of Claudia Pechstein – Litigation as a Sub-Optimal Means of Advancing Transparency and Legitimacy in Sports Arbitration

Clifford J. Hendel and Gary Smadja¹

La legitimidad del Tribunal de Arbitraje Deportivo (“TAD”) como “corte suprema del deporte” ha sido cuestionada en los últimos años, debido, en particular, a su supuesto desequilibrio a favor de los intereses de las federaciones, en supuesto detrimento de los intereses de atletas profesionales.

Además de haber sido abordado por numerosos artículos académicos y recibido una amplia cobertura de la prensa, en dos series de batallas judiciales (o “sagas”) paralelas, varios tribunales nacionales e internacionales se han pronunciado sobre la cuestión.

Una de esas sagas (la saga “TPO”) acaba de empezar. La otra (“Pechstein”) llega a su fin. El resultado de casi diez años de litigación, que culminó recientemente ante el Tribunal Europeo de Derechos Humanos, está lejos de ser revolucionario: la necesidad, en aras de transparencia y confianza en la administración de la justicia arbitral, de llevar a cabo audiencias públicas como regla general en procedimientos donde hay cuestiones de hecho o de credibilidad (como en cualquier caso disciplinario), un cambio que el TAS ya había anticipado.

Así, los autores cuestionan la oportunidad de garantizar la legitimidad del TAS por medio de estrategias judiciales que in fine no necesariamente constituyen un medio idóneo ni eficiente para lograr cambios estructurales y aumentar la confianza en la justicia deportiva.

I. INTRODUCTION

Two parallel, complex, multi-faceted and multi-jurisdictional legal challenges have called into question in recent years the existing structure of international sports, and in particular, the architecture of its dispute resolution system crowned by the so-called “Supreme Court of Sports Law”², the Court of Arbitration for Sport (“CAS”).

After more than a decade of litigation before the CAS, the Swiss Federal Tribunal (“SFT”), the panoply of German courts and the European Court of Human Rights (“ECHR”), German speed skating champion Claudia Pechstein’s series of challenges to her 2009 doping conviction are now all-but concluded. Despite pronouncements of the German courts of first instance and intermediate appeal that, had they been confirmed, would have shaken the very foundations of international sports arbitration and of the CAS, in 2016 the German Supreme

¹ Clifford J. Hendel is Founder of HENDEL IDR, a Madrid-based firm focused on international dispute resolution, acting as arbitrator, mediator, counsel and consultant. Admitted as an attorney in New York, an abogado in Madrid, an avocat à la Cour in Paris and a solicitor of the Supreme Court of England and Wales, he is Deputy Chairman of FIFA’s Dispute Resolution Chamber, an arbitrator of the FIBA Basketball Arbitral Tribunal (BAT), and a former long-time arbitrator of the Court of Arbitration for Sport (CAS). Gary Smadja is a Madrid-based associate of ALLEN & OVERY, whose practice focuses on international arbitration. A French national, he is an avocat à la Cour in Paris. The views expressed in this article are exclusively those of the authors. This article was originally published in Spain Arbitration Review, n° 35/2019 at pps. 209 et. seq.

² An expression coined by the SFT in the “Lazutina” case (the Tribunal quoting Antonio Samaranch, ex-President of the International Olympic Committee, and principal architect of the CAS) and in common usage since. See SFT, ATF 129 III 445, Judgment of 27 May 2003.

Court (“**BGH**”)³ joined its Swiss counterpart⁴ in giving its seal of approval to the international sport system’s status quo. More recently, in October 2018⁵, the ECHR did essentially the same. Save unexpected surprises at the German Constitutional Court, whom Pechstein has petitioned to hear her challenge of the BGH’s 2016 decision, this rollercoaster of a legal saga will have ended with a whimper, not a bang.

The other ongoing multi-front legal challenge to the international sporting system involves a series of claims brought by the fund Doyen Sports and its nominees, including Belgian third division football club RCF Seraing, challenging the recent and controversial prohibition of third party ownership (“**TPO**”) of federative rights of players by the *Fédération Internationale de Football Association* (“**FIFA**”), football’s global governing body. As in the case of Pechstein, the battle is being fought on various fronts. Both the CAS⁶ and the SFT⁷ have rejected the claims and their attacks on the structure of the CAS. But proceedings in national courts (in this case, in Belgium) have been commenced; early victories there -- albeit more apparent than real⁸ -- by the challengers have received broad and surely exaggerated initial coverage in the press⁹, which the governing body of the CAS itself (the International Council

³ Bundesgerichtstof (“**BGH**”) (German Federal Supreme Court), Case KZR 6/15, Judgment of 7 June 2016. An English translation of the Judgment is available at: https://www.tas-cas.org/fileadmin/user_upload/Pechstein___ISU_translation_ENG_final.pdf.

⁴ SFT, 4A_612/2009, Judgment of 10 February 2010, *Claudia Pechstein v. International Skating Union*; SFT, 41_144/2010, Judgment of 28 September, 2010, *Claudia Pechstein v. International Skating Union*.

⁵ ECHR, judgment of 2 October 2018 in the case of *Mutu and Pechstein v. Switzerland* (applications no. 40575/10 and no. 67474/10). The judgment is available in French at: <https://hudoc.echr.coe.int/eng#%7B%22languageisocode%22:%5B%22FRE%22%5D%2C%22appno%22:%5B%2240575%2F10%22%2C%2267474%2F10%22%5D%2C%22documentcollectionid%22:%5B%22CHAMBER%22%5D%2C%22itemid%22:%5B%222001-186434%22%5D%7D>

⁶ CAS, 2016/A/4490, *RFCS Seraing v. FIFA*, Award of 9 March, 2017.

⁷ SFT, 4A_260/2017, Judgment of 20 February 2018 (motion to set aside the CAS Award TAS 2016/A/4490). In essence, the appellants failed to convince the SFT that the CAS was not sufficiently independent (including from a financial perspective) vis-à-vis the Federations in general, and the FIFA in particular. Their arguments relating to the Award being in violation of public order also failed. A redacted French version of the Judgment can be accessed at: https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F20-02-2018-4A_260-2017&lang=fr&type=show_document&zoom=YES&. For an analysis of the CAS Award and the decisions of national courts, see D. Mavromati, “SFT Judgment 4A_260/2017 in the TPO case between FC Seraing v. FIFA & the Brussels Court of Appeal Decision: A parallel Universe?”, 10 September 2018, available at: <http://sportlegis.com/2018/09/10/the-swiss-federal-judgment-in-the-third-party-ownership-case-fc-seraing-v-fifa-and-the-decision-of-the-brussels-court-of-appeal-a-parallel-universe/>; see also P. Marzolini, D. Durante, “Legittimità del Tribunale Arbitrale dello Sport: *game, set, match?* La recente giurisprudenza del Tribunale federale svizzero e della Corte Europea dei Diritti dell’Uomo”, *Rivista dell’arbitrato*, no. 4/2018, pp. 655 – 677.

⁸ In an Interlocutory Judgment of 29 August 2018, the Brussels Court of Appeal determined that it had jurisdiction to hear the plaintiffs’ request for interim measures (which it rejected) made in the context of proceedings brought in the national courts, notwithstanding the arbitration clause contained in the FIFA Statutes, which had been relied upon by FIFA and the other defendants to challenge the jurisdiction of the Belgian courts. The Court of Appeal held that the broad FIFA arbitration clause failed to identify a “*defined legal relationship*” as required to constitute a valid arbitration agreement under Belgian law.

As suggested by some authors, any spillover effect of the Judgment can be avoided by more careful and precise drafting of arbitration clauses. See M. Draye and B. Jesuran, “Brussels Court Holds Arbitration Agreement in FIFA Statutes Invalid: Final Call or Half-Time Whistle for CAS Arbitration in Sports Disputes?”, *Kluwer Arbitration Blog*, 20 October 2018, available at: <http://arbitrationblog.kluwerarbitration.com/2018/10/20/brussels-court-holds-arbitration-agreement-fifa-statutes-invalid-final-call-half-time-whistle-cas-arbitration-sports-disputes-2/>. See also, D. Mavromati, “The validity of FIFA’s arbitration clause and the independence of the CAS: A detailed review of the RFC Seraing cases”, 4 October 2018, available at: <https://www.lawinsport.com/topics/articles/item/the-validity-of-fifa-s-arbitration-clause-and-the-independence-of-the-cas-a-detailed-review-of-the-rfc-seraing-cases>.

⁹ See e.g., *Le FC Seraing met une claqué à la FIFA*, *l’Echo*, 31 August 2018; *Sports legal system shaken by ruling in Seraing case*, *AS*, 6 Septembre, 2018.

of Arbitration for Sport or “**ICAS**”) took pains to moderate¹⁰. An eventual ECHR challenge may also be filed in this case, once national judicial instances are exhausted.

It is of course impossible to predict the outcome of the still-unfolding TPO saga. But it is clear that it will be several years before the dust has settled. If past is precedent, one might be tempted to speculate that, as with the Pechstein saga, possible lower court victories for the “anti-system” TPO plaintiffs might be set aside or moderated by the courts of last jurisdiction of the countries in question and/or by the ECHR. And one might be tempted to further speculate that the mere pendency of the litigation might delay or defer reforms which otherwise might have moved forward faster and further.

All of which invites reflection as to whether legal challenges -- no matter how sophisticated and multi-jurisdictional they may be -- of the sort launched by Pechstein and the TPO opponents are indeed effective ways of bringing change to the international sports law system; or whether, on the other hand, the results of these sagas suggest that legal challenges might be ineffective, or at least inefficient, for this purpose -- if not to say even counterproductive.

This latter conclusion would suggest that the law, as wielded and shaped by the courts, is too blunt an instrument to effect changes (whether revolutionary or merely evolutionary), some of which may well be desirable and inevitable, but which perhaps could and should be generated and procured by stakeholder (bottom-up) action rather than by judicial (top-down) fiat.

II. THE PECHSTEIN LEGAL SAGA

Unlike the journeyman footballer Jean-Marc Bosman, whose name will forever be associated with the liberalisation and globalisation of the structure of professional football/soccer due to the 1995 decision of the European Court of Justice (“**ECJ**”) striking on the grounds of European law various restrictions on the free movement of footballers¹¹, Claudia Pechstein will be remembered as an extraordinary and extraordinarily successful athlete.

But even beyond her formidable cache of metals (including nine Olympic medals, five of which being gold) in a speedskating career spanning three decades, the German legend is already equally if not more famous as a tenacious and formidable litigant in the arena of sports law¹².

¹⁰ In a media release of 11 September 2018 (2016/AR/2048), the ICAS/CAS noted that “*most articles and comments on this matter do not properly reflect the reasons expressed by the Brussels Court of Appeal regarding the jurisdiction of CAS,*” and took pains to limit the issue before the Belgian court to the specific wording of the CAS clause in the FIFA statutes, stressing that such wording does not affect the jurisdiction of CAS globally, nor the status of the sports arbitration mechanism or the CAS system generally.

¹¹ A household name for sports law and arbitration practitioners, Bosman’s legal battle led to the ECJ Judgment of 15 December 1995 (in Case C-415/93), holding that article 48 of the Treaty of Rome on the freedom of workers precludes the application of (i) “*rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, upon the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee*” and (ii) “*rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States*”. Bosman’s counsel from his 1995 case is part of the team currently advising Doyen Sports in the TPO litigation described above.

¹² For a chronological account of Pechstein’s judicial battles up to and including the BGH ruling of 7 June 2016, see D. Mavromati, “The Legality of the Arbitration Agreement in favour of CAS under German Civil and

Pechstein's legal career began in 2009, after the International Skating Union ("ISU") found her to have committed an anti-doping violation for blood-doping and imposed a two-year suspension from competition. After decisive losses in Switzerland (**A**), she bounced back to with seemingly-spectacular wins in Germany, particularly at the intermediate appeals level, which however were then resoundingly overturned by the BGH (**B**), but her legal marathon ended, at least apparently, on a bittersweet note at the international level of the ECHR (**C**).

A. Switzerland - CAS and SFT

Pechstein's first series of attacks against the sanction, and the sports arbitration world generally, occurred in Switzerland. This was logical and inevitable: the ISU statutes (like those of other international federations) subject its decisions to appeal to the CAS¹³, and the legal seat of the CAS and its awards is Lausanne, Switzerland¹⁴. Thus, an appeal to CAS and a subsequent annulment action before the SFT¹⁵ are the time-honored and customary routes to challenge sport sanctions, whether involving anti-doping violations or other matters.

The CAS heard and promptly rejected Pechstein's appeal of the 2009 ISU decision, confirming the two-year ban on the athlete. In its award issued on 25 November 2009¹⁶, the CAS Tribunal noted in particular that "[t]he jurisdiction of the CAS has been explicitly recognised by the parties in their briefs and in the Order of Procedure they have signed"¹⁷.

In 2010, the SFT rejected her action to annul the CAS award¹⁸, and a subsequent request for revision of the award¹⁹. In the set-aside action, Pechstein made a number of procedural applications, calling into question the functioning of CAS and its decision-making process²⁰. She also included a full-scale attack on the structure and operations of the CAS, asserting that (i) the CAS itself was not independent, (ii) the president of the Tribunal was partial, (iii) the International Olympic Committee ("IOC") and the international sporting associations could have influenced the decision-making process via the CAS Secretary General and that her rights (iv) to a public hearing and (v) to be heard were both violated.

Competition Law – The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016", 29 June 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800044.

¹³ See ISU Constitution and General Regulations of 2018, Article 26. The version applicable to Pechstein's case is quoted by the ECHR in its 2 October Judgment (*op. cit.* note 5), at 50.

¹⁴ Code of Sports-related Arbitration (version in force as from 1 January 2019), Article R28: "*The seat of CAS and of each Arbitration Panel (Panel) is Lausanne, Switzerland*".

¹⁵ The grounds for annulment under the Swiss Private International Law Act ("PILA") are provided by Article 190 par. 2, which reads: "*The award may only be annulled: a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted; b) if the arbitral tribunal wrongly accepted or declined jurisdiction; c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim; d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated; e) if the award is incompatible with public policy.*"

¹⁶ CAS, 2009/A/1912, *P. v. International Skating Union (ISU)* & CAS, 2009/A/1913, *Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)*, Award of 25 November 2009.

¹⁷ *Ibid.*, at "Law, 3."

¹⁸ SFT, 4A_612/2009, Judgment of 10 February 2010, *Claudia Pechstein v. International Skating Union*.

¹⁹ SFT, 41_144/2010, Judgment of 28 September 2010, *Claudia Pechstein v. International Skating Union*.

²⁰ Pechstein requested, *inter alia*, that the CAS "*be ordered to disclose to what extent its Secretary General or third parties influenced the judgment under appeal. In particular, how the judgment under appeal was amended after the application of the Appellant to reopen the proceedings and how these amendments came about should be disclosed*".

The SFT, following a jurisprudential line deferential to arbitration in general and particularly supportive of CAS and the sports arbitration system which it crowns²¹, flatly rejected all of Pechstein's arguments²². Interestingly, while not finding that her right to a public hearing had been violated by the CAS in rejecting Pechstein's application to allow her manager to attend the hearing, the SFT noted that "*in view of the outstanding significance of the CAS in the field of sport, it would be desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process*"²³.

Her Swiss parkour ended on 28 September 2010, when the SFT rejected her request for revision of the CAS Award²⁴. Most litigants would have stopped there. But not the tenacious Claudia Pechstein. Instead, she filed two actions outside of Switzerland. Nine years later, the vicissitudes of these cases can now be discussed and their consequences evaluated.

B. Germany

On the one hand, Pechstein filed a damages claim against the ISU and the German skating federation in the German courts (seeking compensation of EUR 3.5 million for the allegedly unlawful ban) asserting, among other things, that the arbitration agreement embedded in the ISU statutes was insufficient to evidence real and effective consent to arbitration, and thus the CAS was without jurisdiction to hear her appeal of the ISU sanctions decision.

The German first instance court in Munich (Landgericht München or "**LG**") rejected her claim for damages due to the *res judicata* effect of the CAS Award on the German court, since Pechstein had not invoked the invalidity of the arbitration agreement at an earlier stage. It did hold, however, that it had jurisdiction to hear the matter, finding that no valid consent to arbitration had been given, because of the monopolistic structure of the ISU and the athlete's lack of choice regarding the arbitration agreement, in violation of the European Convention of Human Rights (the "**Convention**")²⁵.

This 2014 ruling triggered an enormous tremor in the world of sports arbitration, raising the potential that the SFT's more benevolent view of the consent-by-reference concept²⁶

²¹ For a comprehensive review of CAS and SFT jurisprudence on the conditions of validity of arbitration clauses contained in contracts or in the rules of sports associations, see D. Mavromati, "Arbitration Clause in the Contract or in the Rules of the Federation in Disputes Brought Before the CAS", 1 September 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573612.

²² In particular, the SFT was not convinced by Pechstein's factual presentation from which she derived her legal arguments. See Judgment of 10 February 2010 (*op. cit.* footnote 4), at 2.4.2: "*[t]he Appellant's legal assertions are preceded by her own thorough presentation of the facts, in which she describes the course of events and the proceedings from her point of view. At various points as in her further grounds for appeal, she deviates from the factual findings of the CAS or widens them without asserting any substantiated exceptions to the binding character of the factual findings. To that extent, her submissions must remain unheeded*".

²³ *Ibid.*, at 4.1.

²⁴ Pechstein in essence failed to convince the SFT that the results of newly discovered scientific methods which were not available at the time of the arbitration proceedings constituted new facts or evidence sufficiently significant as to make probable a different decision by the CAS, had they been considered.

²⁵ LG, Az. 37 O 28331/12, Judgment of 26 February 2014, *Claudia Pechstein v. International Skating Union*, available at: <https://openjur.de/u/678775.html>.

²⁶ In the "*Cañas*" case (another household name for sports law practitioners), the SFT had to examine the validity of a waiver of appeal against a CAS award signed by a professional athlete. In a judgment of 22 March 2007, the SFT explained the reasons for its liberalism and flexibility in examining the validity of arbitration clause by

employed by federations worldwide as the very bedrock of sports arbitration would now be questioned by no less than the German courts²⁷.

On appeal by Pechstein, the Munich regional appellate court (Oberlandgericht or “**OLG**”) agreed in a landmark 2015 decision that it had jurisdiction to hear the matter, albeit for different reasons than those of the first instance court. The OLG rejected the LG’s findings on the invalidity of the arbitration clause due to lack of consent by the athlete and its incompatibility with the Convention²⁸. However, it found the CAS to be structurally imbalanced *i.e.*, tilted in favor of federations and against athletes. The OLG focused especially on two “*main particularities of the CAS: the way arbitrators are nominated on CAS’ closed list of arbitration; [and] (ii) the nomination process of the president of the panel*”²⁹. On both topics, the influence on the CAS (both direct and indirect) of the federations was in essence deemed too significant for CAS proceedings to be considered to provide a sufficiently neutral forum to professional athletes³⁰. On this basis, the court concluded that the imposition of arbitration on athletes constituted an abuse of a dominant position for purposes of German competition law³¹. Again, shock waves rippled immediately through the world of sports arbitration.

But in 2016, the BGH, in a resounding victory for the CAS and the *status quo* of the sports arbitration system, reversed the appellate court decision³², confirming both the validity of the incorporation-by-reference arbitration clause³³ and the independence and impartiality

reference, which it balanced against a more rigorous approach with regards to waiver of appeals: “*this logic is based on the continuing possibility of an appeal acting as a counterbalance to the “benevolence” with which it is necessary to examine the consensual nature of recourse to arbitration where sporting matters are concerned*” (SFT, 4P.172/2006, Judgment of 22 March 2007, *Guillermo Cañas v. ATP Tour and CAS*, at 4.3.2.3; English translation available at: <http://law.marquette.edu/assets/sports-law/pdf/2012-conf-canas-english.pdf>).

For an examination of this judgment from the perspective of whether CAS arbitration is of a consensual nature or not, see A. Duval, “Not in my Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport”, *MPIL Research Paper Series No. 2017-01*, available at: <https://ssrn.com/abstract=2920555>. For a comprehensive review of CAS and SFT jurisprudence on the conditions of validity of arbitration clauses contained in contracts or in the rules of sports associations, see D. Mavromati, “Arbitration Clause in the Contract or in the Rules of the Federation in Disputes Brought Before the CAS”, 1 September 2014, *op. cit.* note 21.

²⁷ In its Judgment, the LG found this benevolence to be contrary to Articles 6 and 13 of the Convention. See in particular the explanations of the LG at III. 3 bb).

²⁸ OLG, AZ. U 1110/14 Kart., Judgment of 15 January 2015, at II. 2. Bbb). The judgment can be accessed, in German, at: <https://openjur.de/u/756385.html>.

²⁹ A. Duval, B. Van Romuy, “The compatibility of forced CAS arbitration with EU competition law: Pechstein reloaded”, 23 June 2015, p. 22. Electronic copy available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621983.

³⁰ OLG, Judgment of 15 January, 2015 (*op. cit.* note 28), at II. 3 aaa) – bbb).

³¹ For an argument that the OLG could have come to the same conclusion under EU competition law, see A. Duval, B. Van Romuy, “The compatibility of forced CAS arbitration with EU competition law: Pechstein reloaded”, 23 June 2015, *op. cit.* note 31.

³² BGH, Judgment of 7 June 2016 (*op. cit.* note 3).

³³ The BGH found at 55 that Pechstein had voluntarily consented to CAS arbitration by signing the registration form provided by the ISU, adding that it was “*neither established nor alleged that she was forced to do so by any unlawful threat or misrepresentation or by physical coercion*” (references are made to the English translation referenced *supra.*, note 3).

of the CAS³⁴, and rejecting the idea that the federation-imposed CAS arbitration clause reflected the abuse of a dominant position³⁵.

In so doing, Germany's top court aligned itself very closely with the position of the SFT. Pechstein has petitioned the German Constitutional Court to review this decision. As of this writing, the court has not decided whether or not to hear the appeal. Insiders suggest that the court may be unlikely to accept to review the case; time will tell.

C. ECHR

I. The Background

In parallel with her German litigation, in 2010 Pechstein filed a claim against Switzerland before the ECHR, alleging violation by the CAS and the SFT of her right to a fair trial as provided by Article 6(1) of the Convention.

Eight years later (the ECHR is notoriously overwhelmed by its caseload and understaffed to deal with it efficiently), the case was decided on 2 October 2018. The decision was rendered by a "*petite chambre*" i.e., a 7-member panel and not by the full contingent of 17 ECHR judges, by way of a 5:2 vote over a vigorous dissent on one of the key issues, as discussed below. Pechstein requested to have the case referred for rehearing by the full ECHR ("*Grande Chambre*"), as provided in the Convention for cases raising serious questions affecting the interpretation or application of the Convention or serious issues of general importance. Her request was rejected on 5 February 2019³⁶. The October 2018 decision is thus final, pursuant to Article 44(2)(c) of the Convention.

II. The Decision

a. "Forced Arbitration" and Article 6(1): The Right to a Public Hearing

The case, which was consolidated with a case brought by the Romanian footballer Adrian Mutu raising similar claims addressed a number of issues.

The ECHR first considered whether the agreement to CAS arbitration reflected in the ISU's statutes constituted a voluntary waiver by Pechstein of her rights under Article 6(1).

³⁴ *Ibid.*, at 25: "The CAS represents such an independent and neutral instance. Unlike a federation or association tribunal [...], it is not incorporated into any particular federation or association. As an institution, it is independent of the sports federations and Olympic Committees that support it [...]; it is intended to ensure uniform jurisdiction across all federations".

³⁵ *Ibid.*, at 48: "The balancing of interest required both under sec. 19 para. 4 no. 2 and under sec. 19 para. 1 of the Act against Restraints of Competition, old version, shows that the Second Defendant has not committed any abuse. The request for an arbitration agreement designating the CAS as the Court of arbitration is definitely justified from an objective point of view and does not contradict the general values enshrined in the law. In particular, this request is in no way contrary to the Plaintiff's right of access to the courts, her rights of professional freedom (Art. 12 of the German Constitution) and her rights under Art. 6 ECHR. This also means that the arbitration agreement cannot be considered invalid pursuant to sec. 138 of the German Civil Code".

³⁶ See the communication from the ECHR of 5 February 2019 (CEDH 053 (2019)), available at : <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6321714-8260087&filename=D%C3%A9cisions%20du%20coll%C3%A8ge%20de%20la%20Grande%20Chambre%20-%20f%C3%A9vrier%202019.pdf>.

Article 6(1) of the Convention provides in essential part as follows: *“In the determination of his civil rights and obligations [...], 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 various circumstances] [...].”*

In this regard, the panel decided unanimously that -- unlike in the case of commercial arbitration, in which waivers of Convention protections are recognised as effective since they are voluntary (“free, lawful and unequivocal”) -- Pechstein’s waiver was forced or non-voluntary in nature, and thus ineffective. The panel concluded that if she wanted to practice her discipline at the highest level, she had no real choice but to accept the ISU’s arbitration clause; her consent was thus, *de facto*, forced within the line of ECHR case law involving arbitration clauses imposed by law³⁷. This finding, according to the Court, calls for the full application of the guarantees provided by Article 6(1)³⁸. The panel unanimously concluded, in a finding which is likely to have broad impact both within and without the world of sports arbitration, that Pechstein had not effectively waived her Article 6(1) rights and thus was entitled to them in the CAS proceeding³⁹.

The panel accordingly concluded that Pechstein’s right to a public trial before the CAS had been denied⁴⁰ in light of the controverted factual issues being aired in the proceedings, and the fact that the sanction against the athlete was (obviously) capable of having negative effects on her professional reputation⁴¹.

The panel went on to note that no public hearing was required in respect of her annulment action before the SFT, a proceeding which by its nature is limited essentially to purely legal considerations not involving a rehearing of factual matters of clear reputational impact as were aired at the level of the CAS⁴². For this violation of Article 6(1), damages against Switzerland were assessed in the amount of EUR 8,000.

On the very day of the ECHR panel decision, the ICAS/CAS posted a media release on its website summarizing the same. Insofar as the public hearing aspect is concerned, the media release indicated that the CAS had already envisioned the possibility of having public hearings in its future and much larger installations at Palais de Beaulieu in Lausanne⁴³, expected to be operational in two or three years’ time.

The CAS then quickly proceeded to amend its rules to reflect the ECHR decision. Effective 1 January 2019, Article R57 of the Code of Sports-related Arbitration now provides in relevant part that: *“At the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Such request may however be denied [in various circumstances, including] where publicity would prejudice the*

³⁷ ECHR, Judgment of 2 October 2018, *op. cit.* note 5, at 113 – 115.

³⁸ *Ibid.*, at. 95.

³⁹ *Ibid.*, at 115.

⁴⁰ It is of perhaps anecdotal interest only to note that the panel may have misunderstood or been misinformed about the actual proceedings at the CAS; that is to say, the CAS award reflects that Pechstein did not actually explicitly request a public hearing as the decision states, but rather only asked that one individual close to her (her manager) be allowed to sit in at the hearings. The CAS panel denied this individual’s presence in the hearing room on account of space limitations.

⁴¹ ECHR, Judgment of 2 October 2018, *op. cit.* note 5, at 182 – 184.

⁴² *Ibid.*, at. 185 – 188.

⁴³ ICAS/CAS, media release of 2 October 2018.

interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public [...]".

In so doing, and as the ICAS/CAS itself stated in its media release of 5 February 2019, the rule change implemented the "recommendation" of the ECHR to allow public hearings in disciplinary and/or ethics cases⁴⁴.

b. The Independence and Impartiality of the CAS

But the public hearing issue, although it may well be a prod to greater transparency in general at the CAS (and elsewhere in both the sporting and non-sporting worlds), prompting faster and broader publication of awards and greater disclosure of operations and procedures and discussion of possible changes to them, is probably of limited interest in the end.

The main event in the Pechstein ECHR case, which occupied a much larger portion of the majority decision and triggered a particularly pointed dissent by two of the panel's seven judges -- including, interestingly, the Swiss appointee -- involves the question of whether the structure of the CAS was or was not such as to entitle it to be treated as an independent and impartial tribunal established by law within the meaning of Article 6(1) of the Convention.

The majority concluded that the structure of the CAS was not such as to generate an absence of independence and impartiality, *i.e.*, that it was sufficiently independent and impartial. The majority considered -- despite the facts that the ICAS was (at the relevant time) composed entirely of people from sporting federations and (at the relevant time) had capacity to name, together with the federations, the members of the closed list of (at the relevant time) some 300 CAS arbitrators -- that in the absence of substantiated allegations of lack of independence and impartiality of any of the three actual arbitrators on Pechstein's panel, there was no basis to conclude that independence and impartiality was lacking⁴⁵.

The reasoning of the decision on this key issue of the case is, at best, a bit opaque. In the words of an author who is one of the leading experts on the issue and quite critical of the existing architecture and operations of the CAS:

"In my view, the court is right on one point. The financing of the CAS by the [federations] is not per se threatening the independence of the CAS and should actually be welcomed as an adequate form of quasi-public financing of sporting justice. However, this is true only if the ICAS and the CAS administration are stringently separated from the bodies that are supposed to be checked by the CAS and whose decisions it is reviewing. Quite paradoxically the Court recognises the influence of the [federations] on the ICAS, which was evident at the time the Pechstein case was heard and is still apparent nowadays (the [federations] nominate 12 individuals out of the 20 members of the ICAS and the ICAS is headed by an IOC Vice-president), but it does not deem it to be sufficiently problematic to challenge the independence and impartiality of the CAS. This is a strange conclusion for a court specialised in procedural justice [...]. The ICAS does not only control who gets to be appointed as a CAS arbitrator, it also controls who gets to preside over the Appeal and Ordinary Divisions of the CAS, and who gets to be appointed as CAS Secretary General. All of

⁴⁴ ICAS/CAS, media release of 5 February 2019, "*The matter Pechstein/Mutu/CAS/Switzerland is now over and the ECHR judgment of 2 October 2018 becomes final and binding*".

⁴⁵ See in particular at 57, where the Court, despite having found in the same paragraph that the federations had a real influence in the appointment mechanism ("*exerçaient une influence réelle*"), nonetheless considered itself unable to conclude on this sole basis that the arbitrators list was composed of people who, taken individually, were not sufficiently independent and impartial from the federations.

this happens without any minutes of the ICAS meetings being published, thus without any transparency on the reasons that led to the appointment of X over Y. This alone should have pushed the ECtHR to have some serious concerns over the appearance of control by the [federations] over the ICAS and, therefore, over the CAS. Moreover, and what I feel is the major argument speaking against CAS independence from the [federations], even if one accepts the Court's point that an athlete will be able to find a CAS arbitrator on the list who is not biased, in appeal cases the president of the panel will be ultimately nominated by the President of the Appeals Division [...]. This simple institutional setup, easy to reform but still in place, is the Gordian knot of the control of the [federations] over the CAS. The court simply ignored this argument [...]. In doing so, it decided to side with a system that is at odds with the core of its own jurisprudence on the independence and impartiality of tribunals, as powerfully outlined by the dissent. Maybe, the court felt it had already done enough and it did not want to destabilise the CAS further, but it certainly missed a great opportunity to provide a fairer judicial process to thousands of athletes worldwide"⁴⁶.

The dissent strikes a powerful point when it highlights that according to the jurisprudence of the very ECHR, personal independence of individual arbitrators is not enough if the structure of the organisation does not display (at least in appearance), a sufficient degree of independence and impartiality. According to the dissenting judges, the majority failed to apply a reasoning it would have applied to other national courts, which should have led the ECHR to a finding of violation of Article 6(1) on this ground: in a particularly biting passage, the dissent points out that the ECHR would never give its blessing to a labor arbitral institution composed almost entirely of management representatives even if the individual actually entrusted with a particular mandate was independent and impartial⁴⁷.

In any event, as noted above, on 5 February 2019, the ECHR – surprising some observers, including the authors -- issued a communication indicating that the case would not be referred to the *Grande Chambre* and that the *Petite Chambre*'s 5:2 decision had thus become final and definitive. The rather flaccid majority opinion is now the view of the ECHR; the vigorous and apparently compelling dissent coexists and is potentially available for further reference and jurisprudential development, but it is of no present legal effect.

III. REFLECTIONS AND CONCLUSION

A. A Missed Opportunity?

One often hears critics of intemperate and inopportune remarks being chastised for "missing an opportunity to keep silent". The ECHR's Pechstein decision -- and in particular, the decision to leave standing the unsatisfying 5:2 decision of the *Petite Chambre* notwithstanding the much more incisive dissent tellingly joined by the Swiss judge -- appears to the authors to have been a missed opportunity for the Court to have spoken up on an issue that manifestly it finds troubling.

⁴⁶ A. Duval, "The "Victory" of the Court of Arbitration for Sport at the European Court of Human Rights: The End of the Beginning for the CAS", *Asser International Sports Law Blog*, 10 October 2018, available at: <https://www.asser.nl/SportsLaw/Blog/post/the-victory-of-the-court-of-arbitration-for-sport-at-the-european-court-of-human-rights-the-end-of-the-beginning-for-the-cas>.

⁴⁷ Dissenting opinion, especially at 13 – 16. For a different appraisal of the dissent, see P. Marzolini, D. Durante, "Legittimità del Tribunale Arbitrale dello Sport: *game, set, match?* La recente giurisprudenza del Tribunale federale svizzero e della Corte Europea dei Diritti dell'Uomo", *op. cit.* note 7, pp. 676 – 677.

B. A Riff of a Suggested Explanation

Why was this opportunity missed? Conspiracy theorists might be quick to conclude that behind-the-scenes political or quasi-political machinations might have swayed the ECHR (just as these theorists would explain both the SFT's dogged defense of the CAS over the years and the German Supreme Court's rallying in 2016 to the same position).

Yet other, less Machiavellian, explanations are possible. The explanation that the authors believe (and would like to believe) is that in the end, the courts -- and especially top-level courts -- whose decisions have a precedential character, tend to be prudent and cautious in exercising their powers, and tend to act via incremental rather than revolutionary changes.

Cognizant that courts, whether national or supra-national are not legislators⁴⁸, that competition, stakeholder concerns and other factors will always drive evolution in the structures and *modus operandi* of social institutions and that a court's function is essentially one of deciding on a thumbs-up/thumbs-down basis whether a given structure/procedure is sufficient, rather than to indicate any and all measures to make it perfect or more perfect, the decisions of the SFT, the German Supreme Court and the ECHR in the Pechstein saga can perhaps be understood as being cut from the same mold: they may all find aspects of the CAS structure and procedure far from perfect, and may hint in dictum or declare in pointed dissents as to specific aspects of concern, but in general and while perhaps occasionally "holding their nose" as to some of these aspects, they find the existing system to be generally acceptable -- imperfect, yes, but good enough to pass legal muster, i.e., to deserve, globally, a thumbs-up.

Under this view, the pronouncements of these courts should not necessarily be understood (as some consider the CAS has understood them) to exonerate or bless or vindicate the CAS and its existing structure and procedures. In fact, changes had already been implemented between 2009 (when the CAS rendered the Pechstein award) and the recent ECHR judgment. For instance, the quota system through which the ICAS formed the list of CAS arbitrators pursuant to Article S 14 of the Code of Sports-related arbitration and which, according to the ECHR itself, gave the federations a real degree of influence upon the nomination mechanism,⁴⁹ was substantially modified as from 1 January 2012⁵⁰, a change that must be welcomed from the perspective of independence of CAS arbitrators. Another welcome change, viewed from the same perspective, came the same year as Pechstein's legal debut, when the CAS prohibited arbitrators nominated on the list from appearing as counsel before the CAS⁵¹, thereby banning "double-hatting", a practice that has sparked controversy in arbitration in general.

⁴⁸ Even though one may recall that back in 1995, the ECJ stated that "*although the practical consequences of any judicial decision must be weighed carefully, this cannot go as far as to diminish the objective character of the law and compromise its application on the ground of the possible repercussions of a judicial decision*" (ECJ Judgment of 15 December 1995, *op. cit.* footnote 11, at 77).

⁴⁹ ECHR, Judgment of 2 October 2018, *op. cit.* footnote 5, at 157: "*Si la Cour est prête à reconnaître que les organisations susceptibles de s'opposer aux athlètes dans le cadre de litiges portés devant le TAS **exerçaient une réelle influence dans le mécanisme de nomination des arbitres en vigueur à l'époque des faits** [...]*" (emphasis added).

⁵⁰ Under new Article S14, "*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*".

⁵¹ Code of Sports-related Arbitration, Article S18: "*CAS arbitrators and mediators may not act as counsel for a party before the CAS*".

While those incremental changes must be applauded, it remains the case that some of the core structural features which are seen as problematic by observers (notably as to the provenance of the ICAS members, and the ICAS/CAS control over appointment of the president in appeal cases) are still in place.

Yet, it is almost inevitable that legal challenges to the very core of the CAS invite or require it to hunker down and defend itself. Equally, it is almost inevitable, if and when the legal challenges are ultimately rejected by the top judicial organs, as in the case at hand, that the CAS feels a sense of vindication and relief with the results.

But it would be a shame if during the pendency of the cases and especially thereafter the consequence of the challenges is to slow or postpone evolution and modernization of the structure and operations of the CAS. As mentioned, certain positive changes in this regard were implemented between the filing of the Pechstein cases in Germany and before the ECHR and their decision by the BGH and the ECHR. Others are said to be under consideration today, e.g., possible expansion of the ban on “double hatting” from individual lawyers to law firms. In the authors’ view, a “gun-to-the -head” requirement of change such as an adverse SFT or ECHR decision might require would be traumatic and destructive and thus would not be optimal. But equally sub-optimal would be allowing the pendency of results of such challenges to delay or tamp down changes genuinely troubling to stakeholders and observers, and thus detrimental to the long-term stability of the institution.

C. Conclusion

So long as cases of the Pechstein and Seraing variety continue to be filed and wend their way slowly through the courts, the CAS may understandably be reluctant to move robustly towards some of the changes that would seem essential to allow the CAS to maintain and develop its role as the Supreme Court of Sports Law.

Paradoxically, then, it may be that the strategy of bringing these overarching interests into play in these mega-litigations may actually result in delaying or even defeating the adoption of some of the most relevant reforms that (at least on the surface) the claims pursue. Pechstein and the TPO opponents may, by their broad, no-holds barred strategy, have improved the prospects of their prevailing in their particular cases (in the end, this is their principal if not exclusive aim), but it is far from clear if in so doing they are really advancing the overarching, structural issues which their claims raise.

All in all, these developments suggest that the legal structure of sports law and arbitration (that is, not only that of the CAS itself, but also the way cases are brought to CAS through the federations’ rules) is bound to evolve, to adapt to an increasingly demanding legal environment. In this regard, EU competition law may be one of the corpus of rules through which future changes can be expected⁵². Again, time will tell.

⁵² CAS appeal arbitration came under another – perhaps less expected – form of scrutiny: the EU Commission’s (“EC”). In a summary decision of 8 December 2017, the EC found that the ISU “eligibility rules” through which the ISU can impose severe penalties (up to a lifetime suspension) upon speed skaters who participate in competitions not approved by ISU were in breach of EU competition law. The consequences of the EC’s findings at 268 *et. seq.* should be closely monitored by sports arbitration practitioners, as the EC found that while “[a]rbitration is a generally accepted method of binding dispute resolution and agreeing on an arbitration clause as such does not restrict competition [...]. **However, the Commission takes the view that the Appeals Arbitration rules reinforce the restrictions of competition that are caused by the Eligibility rules**” (emphasis added). Details of the case, including the summary decision in its public version can be found at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40208.

What would appear clear for the moment, though, is the judicial route to change may not be optimal. Courts are too slow: by the time they issue decisions, the realities on the ground may have changed. They are too rigid, generally limited to black-and-white decisions in a world of many shades of grey. Change would better and more effectively come from stakeholder consultation, adoption of best practices, indeed experimentation: bottom-up, not top-down.