Constitutionalizing the Court of Arbitration for Sport

The Return of Claudia Pechstein

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The Return of Claudia Pechstein

Constitutionalizing the Court of Arbitration for Sport

Claudia Pechstein is an exceptional athlete. On ice, she seems immortal, skating through her 8th Winter Olympics in February 2022 in Beijing (and still finishing at a more than honorable 9th place of the mass start event). In the court room, she has shown the same determination (to the point of incurring personal bankruptcy) and refused to back down from a bitter and expensive legal struggle. Since 2009, she is fighting the International Skating Union (ISU) over a doping sanction (see the original ISU decision), which deprived her from participating in the Vancouver Olympics in 2010. She appealed the decision to the Court of Arbitration for Sport in Lausanne (see the CAS award), challenged unsuccessfully the ensuing award before the Swiss Federal Tribunal (see the SFT’s first decision and its refusal to allow a revision), lodged an application in November 2010 against Switzerland before the ECtHR and prevailed 8 years later in a ground-breaking decision (more on it later), while pursuing damages before the German courts against the ISU. It is this latter leg of her judicial odyssey which witnessed a new (quite unexpected at this point) twist at the Bundesverfassungsgericht (the Federal Constitutional Court) on 12 July (English press release here). Indeed, after failing to prevail in first instance before the LG München in 2014 and then getting the OLG München to reject the validity of a CAS arbitration clause on the ground that it was contrary to antitrust rules, she had famously lost on appeal before the Bundesgerichtshof (the highest German civil court), which quite controversially endorsed the validity of the CAS arbitration clause (see my blogs here and here at the time). It is this judgment which was now set aside by the Bundesverfassungsgericht (BVerfG), almost six years after it was rendered. This blog offers a critical review of some of the key aspects of the decision, focusing in particular on the BVerfG’s analysis of the validity of CAS arbitration clauses and on its assessment of the compatibility of CAS proceedings with fundamental rights.

Why the CAS matters

The decision is interesting beyond the German context because it concerns one of the most active and at the same time under-researched global courts: The Court of Arbitration for Sport (CAS). In 2020, the CAS received 957 applications, the overwhelming majority (811) of
which were applications appealing decisions taken in first instance by sports governing bodies (SGBs). Most of the fundamental legal disputes arising in the context of international sports end up being decided by the CAS. Last week, for example, the CAS condened the exclusion of Russian football teams from the competitions of UEFA and FIFA. In short, the CAS is a crucial institutional actor in the transnational governance of sports. Formally, it operates as an arbitral body subjected to the Swiss private international law rules. Accordingly, its legitimacy is in theory grounded in the autonomy of its users to decide to have recourse to its services in order to resolve a particular dispute. However, as pointed out by the ECtHR in its Pechstein decision in 2018, athletes are in general forced to submit to the jurisdiction of the CAS if they wish to entertain a professional sporting career at the international level. This constellation raises difficult questions central to the BVerfG’s decision: Is forced arbitration not a contradictio in terminis? And, what are the consequences in terms of due process rights of those subjected to such a forced arbitration?

Is CAS arbitration arbitration?

The first crucial issue presented to the BVerfG is linked to the legitimate foundations of CAS arbitration. In other words, is the competence of the CAS grounded in the consent of the parties concerned or can its jurisdiction be justified by other reasons? Traditionally, arbitration as a jurisdiction of exception to state courts is tolerated only because the parties freely decide to turn to it in order to deal with a particular dispute. The idea of arbitration is grounded in the supposedly rational choice of private parties to keep their dispute confidential or to submit it to arbitrators with specific expertise in the issue at hand (although creeping mandatory arbitration has been debated in the United States). Arbitration is, thus, conceived as an efficient private and autonomous choice of the parties to part with statal justice for reasons which are their own. This consensual foundation does not fit well, however, with the practical reality underpinning the recourse to international arbitration in the sporting context. Indeed, while many (often conflicted) commentators have been repeating the mantra of the free consent of athletes to CAS arbitration, it has been clear to a number of observers (for my own take see here) that its jurisdiction was primarily stemming from arbitral clauses included in the statutes of the SGBs or the entry forms to international sporting competitions, which athletes are not at liberty to refuse if they wish to engage in a professional sporting career at the international level. As documented elsewhere, this led to recurring legal convolutions, reaching an apex with the decision of the BGH concluding that the consent of Claudia Pechstein to arbitrate her disputes with the ISU was both fremdbestimmt (directed by a third-party) and free (similar to the Swiss Federal Tribunal’s insistence that waivers to its review of CAS awards imposed by SGBs were forced, but the consent to CAS arbitration was not). In effect, the attempts at reconciling the specific characteristics of sports arbitration with the traditional model of private arbitration amount to an Orwellian discourse in which what can only be qualified as forced must systematically be rebranded as free in order to fit in the arbitration mold. All these legal gymnastics are aimed at avoiding the difficult question of finding another fundament for the existence of the CAS.
The ECtHR in its Pechstein (and Mutu) decision had the good idea to cut through the Gordian Knot and to finally state what no other court had dared: CAS arbitration is forced arbitration (paras 109-115). As pointed out by the Strasbourg judges, Claudia Pechstein’s “only choice […] was between accepting the arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level” (para. 113). The BVerfG’s is less bold in this regard and decides to cling to the idea that recourse to the CAS remains grounded primarily in party autonomy (paras 39-41). It did acknowledge in passing the governance function of the CAS and, in particular, its necessity in order to provide a uniform international sporting justice and to fight doping, supporting the latter claim by weirdly stating that the World Anti-Doping Code adopted by the World Anti-Doping Agency, a Swiss foundation, amounts to binding international law (para. 40). However, instead of tackling the question of the forced nature of CAS arbitration head-on, the BVerfG insisted that if a party to a contract has the power to unilaterally determine the content of that contract, it is the law’s responsibility to protect the fundamental rights of each party involved, in order to avoid that for one of the parties the exercise of private autonomy turns into heteronomy (Fremdbestimmung) (para. 41). In other words, the BVerfG proposes to solve the issue of the legitimate foundation of CAS arbitration by rebalancing the unequal contractual relationship between the parties through a stricter review of the compatibility of CAS arbitration with fundamental rights. This corrective approach is an artifice aimed at formally preserving the traditional public/private distinction which is under extreme pressure in the context of transnational sports law and governance. It also opens the door further to allowing forced arbitration beyond the sporting context by recognizing that arbitration can be legitimately imposed by powerful private parties, as long as German courts exercise a cautious check on the compatibility with fundamental rights of the arbitral processes concerned. Whether this solution does justice to the nature of the governance relationship between SGBs and athletes is in my view doubtful. It would have been more valuable to openly acknowledge the forced nature of CAS arbitration, as the ECtHR did, and to identify more clearly post-consensual foundations for the existence of the CAS. The latter move would be a first step towards recognizing the public function of the CAS and the ensuing urgent need to reform its institutional structure and operation in order to better reflect that function.

**Parroting the ECtHR: The BVerfG and public hearings at the CAS**

The ECtHR deduced from its conclusion that Claudia Pechstein was subjected to forced arbitration that, therefore, CAS proceedings ought to fully comply with the due process requirements stemming from Article 6 §1 ECHR (para. 115). When assessing the compliance of CAS arbitration with these requirements, the ECtHR concluded that the unavailability of a public hearing before the CAS, despite Claudia Pechstein’s explicit request for one, violated Article 6 §1 ECHR (paras 178-183). On this issue, the BVerfG endorses the ECtHR’s reasoning and makes numerous references throughout its decision to the jurisprudence of
the Strasbourg court. The court’s finding that Claudia Pechstein could not (at the time of the BGH’s decision) request a public hearing before the CAS is the main basis for the annulment of the BGH’s decision.

The effects of the BVerfG’s decision on the CAS are unlikely to be very profound, however. Shortly after the Pechstein decision of the ECtHR, the CAS already changed its rules to allow for public hearings in some circumstances. More specifically, Article R57 of the Code of Sports-related Arbitration was amended and now states 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”. However, it also provides that: “Such request may however be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the 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 November 2019, we witnessed a first (very) public (and not totally smooth) hearing based on this provision with the live streamed CAS proceedings in the Sun Yang case. Nevertheless, the CAS has also recently denied several requests for public hearings (see here and here). The Pechstein decision of the BVerfG might increase the pressure on CAS panels to tread with care when dealing with requests for public hearings, doing otherwise could expose their awards to challenges before the German courts.

**The Elephant in the judgment: The doubtful independence of the CAS**

Finally, the BVerfG’s judgment is remarkable for the conspicuous absence of an assessment of the independence of the CAS, in spite of the arguments raised by Pechstein’s lawyers in this regard. This question is particularly significant because the CAS is the main judicial institution which checks the decisions taken by the SGBs. There is often no realistic alternative for athletes to overturn what can be a career-ending decision. Mapping the many institutional links between the Olympic Movement and the CAS would be too lengthy for the purpose of this blog, but the dissenting opinion of Judge Keller and Serghides under the Pechstein decision of the ECtHR offers a rigorous overview of these institutional entanglements (paras 5-17). The two judges convincingly argued that the institutional set-up of the CAS, without considering the potential individual conflicts of interests of some of its arbitrators, cannot but lead to the conclusion that it is insufficiently independent from the Olympic Movement to comply with the requirements of Article 6 §1 ECHR. Accordingly, the ECtHR’s endorsement of the independence of the CAS in its Pechstein decision (paras 150-159) is very difficult to square with its own case-law on independence of judiciaries. Unfortunately, the BVerfG declined to challenge head-on the ECtHR on this point (para. 53). However, the judges did stress in general terms that the essence of judging implies that it must be done by an independent third party, a principle which is applicable to arbitration if it is to exclude the jurisdiction of national courts (para. 53). As Prof. Adolphsen pointed out in
his earlier blog on the BVerfG's decision, it is now for the OLG München to determine anew the validity of the CAS arbitration clause. While the CAS will be able to argue that it has changed its rules with regard to public hearings, it would be interesting to see the Munich Court challenge again (as it did in its original decision overturned by the BGH) the validity of the arbitration clause on the basis of the lack of independence of the CAS. In any event, Claudia Pechstein is a precious gift that keeps giving both on ice and in the courtrooms.