

Sports arbitration – Consent, independence and impartiality

By Elizabeth Brimer SC¹

Abstract

Elizabeth Brimer SC introduces readers to the theme of arbitration in sport. In particular, Ms Brimer SC examines features of sports arbitration which distinguish it from commercial arbitration, focussing especially on agreements to arbitrate, consent and the independence and impartiality of the Court of Arbitration for Sport (CAS), which is governed by the International Council of Arbitration for Sport. She weaves her discussion of these features into a fascinating case study involving German speed skater, Claudia Pechstein, who challenged the independence and impartiality of CAS after it dismissed her appeal against a two-year ban issued by the International Skating Union for doping offences. Noting an inherent contradiction in the current system that athletes are required to ‘consent’ to CAS’s jurisdiction if they wish to compete in their sport at all, Ms Brimer SC highlights the critical need for the continued development of a fair arbitration and dispute resolution process for athletes.

Introduction

In this article, I look at particular features of sports arbitration which distinguish it from commercial arbitration. I focus on the agreement to arbitrate, consent and the independence and impartiality of the Court of Arbitration for Sport, particularly in relation to the appointment of arbitrators.

Consent is fundamental to arbitration.² Once parties agree to arbitrate, the jurisdiction of national courts is excluded and the dispute is determined by an independent arbitrator.³ Arbitration as opposed to litigation in national courts is attractive to commercial parties because they can construct a dispute resolution system of their choice.⁴ They can choose matters including the seat of the arbitration. They can designate the number of arbitrators, the qualifications it is agreed they must have, the procedure for the appointment of arbitrators and matters relevant to the procedure to be followed.

In the sporting context, the agreement to arbitrate is found, often buried in a series of interlocking documents constituting a contract, incorporating international agreements. At all levels of sport, from grassroots through to elite, a simple membership form, registration for an event or an association’s regulations may pick up a sport’s code of conduct, which refers to an anti-doping policy, which picks up

¹ Elizabeth Brimer SC is a barrister at the Victorian Bar.

² Blackaby, Partasides QC, Redfern and Hunter *Redfern and Hunter on International Arbitration* (Oxford University Press 2015) Sixth ed. ‘The most important function of an agreement to arbitrate...is that of making it plain that the parties have indeed consented to resolve their disputes by arbitration. This consent is essential: without it, there can be no valid arbitration’ at para 1.53 p 16.

³ Ibid at para 1.40 p.13

⁴ M Pryles “Limits to Party Autonomy in Arbitral Procedure” https://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf page 2.

the national body's rules, which incorporates the World Anti-Doping Code (**the WADC**) which submits disputes exclusively to CAS.⁵

In this way:

*'...sports arbitration is far from the traditional idea of arbitration being the consensual alternative dispute adjudication process that we read about in every textbook on arbitration...It is clear that sports arbitration is fundamentally non-consensual in nature, since athletes have no other choice but to agree to whatever is contained in the statutes or regulations of their sports governing bodies.'*⁶

The lack of free choice on the part of the athlete; they sign or don't compete, brings into sharp focus the need for an independent and impartial tribunal and a fair dispute resolution process. The independence and impartiality of CAS has been challenged at times over the years.⁷ Changes have been made to the structure of CAS in response to issues regarding the independence and impartiality of CAS raised by athletes.⁸ More recently, the issues raised in respect of the structure of CAS have been in the context of a series of cases brought by *Claudia Pechstein (Pechstein)* stemming from a ban imposed on her by the International Skating Union (**ISU**) in 2009 for blood doping.⁹ The discussion has centered around the need to balance the desirability of uniform regulation and dispute resolution supported by arbitral law in international sport with reform to ensure appropriate transparency and fairness.¹⁰

In October 2018, the European Court of Human Rights (**the ECHR**) handed down a decision in *Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018) (the ECHR Pechstein decision)* involving the question whether CAS is an independent and impartial tribunal established by law in accordance with Article 6 of the *European Convention on Human Rights (the Convention)*. Central to that issue were matters relating to the structure of CAS and the appointment of arbitrators.

To understand the issues dealt with by the ECHR, it is necessary first to understand a little of the structure of CAS at the relevant time, and the background to the long running Pechstein saga. It ought be noted at this point that on 1 January 2019, a number of changes were made to the *Code of Sports Related Arbitration* (in force as from 1 January 2017) (**the 2017 Code**) including to reflect changes to the structure of CAS.¹¹

⁵ The seat of CAS is Lausanne, Switzerland, see *Code of Sport Related Arbitration* (in force as from 1 January 2019) Article S1 (the 2019 Code). For a discussion of the requirements for validity of an arbitration clause by reference see Mavromati & Reeb *The Code of the Court of Arbitration for Sport, Commentary Cases and Materials* (Kluwer Law International 2015) (Mavromati & Reeb) p.35.

⁶ A Rigozzi and F Robert-Tissot (2015) '*Consent in Sports Arbitration: It's Multiple Aspects*' in Geisinger and Trbaldo de Mestral (eds) *Sports Arbitration: A Coach for other players?* ASA No 41 p59 <https://lk-k.com/wp-content/uploads/2015/10/RIGOZZI-ROBERT-TISSOT-in-ASA-Special-Series-41-Sports-Arb.-A-Coach-for-Other-Players-2015-Consent-in-Sports-Arb.-Its-Multiple-Aspects-pp.-59-94.pdf>. It is recognized that there are circumstances in commercial arbitration where the element of consent is 'less real', for example in a tender situation where the arbitration agreement is not realistically open to be negotiated. See also Redfern & Hunter at para 1.53 p.16 in relation to other examples where consent is 'less real'.

⁷ The independence and impartiality of CAS was challenged by *Elmar Gundel (Gundel)* in 1992. See CAS 92/63G v /FEI in Digest of CAS Awards 1986-1998, and then in the Swiss Federal Tribunal (**SFT**) – 15 March 1993 (ATF 119 II 271). The SFT recognized CAS as a true court of arbitration. See also Mavromati & Reeb p.3 for a discussion of the 2003 decision of the SFT in the matters of *Larissa Lazutina* and *Olga Danilova* (two Russian cross country skiers) in which the '*SFT dissected the current organization and structure of ICAS and CAS, concluding that the CAS was not 'the vassal of the IOC' and was sufficiently independent of it.*' Nevertheless the SFT found that the structure could be improved.

⁸ For an outline of the changes to CAS up until 2015 see Mavromati & Reeb Chapter 1 Introduction p.3.

⁹ Pechstein has always maintained her innocence.

¹⁰ See article by Nick De Marco *Compelled Consent – PECHSTEIN & the Dichotomy and Future of Sports Arbitration* at https://www.blackstonechambers.com/news/analysis-compelled_consent/

¹¹ The changes are noted, where relevant, in the footnotes and addressed in more detail at the end of the article.

Summary of the structure of CAS

CAS can hear disputes relating to sport including disputes of a commercial nature, for example in relation to a sponsorship agreement and those of a disciplinary nature, such as doping matters. Until 1 January 2019, CAS had two divisions; the appeals arbitration division and the ordinary division. For disputes resulting from contractual relations or torts, the ordinary arbitration procedure was applicable, or where, for example, the sport designated the CAS as the first instance hearing body in relation to a doping matter in respect of its national level athletes. For disputes resulting from decisions taken by the internal bodies of sports organisations, the appeals arbitration procedure was applicable.¹²

The International Council of Arbitration for Sport (**ICAS**) is the governing body of the CAS. It manages the administration and finances of CAS.¹³ ICAS appoints CAS arbitrators to a list of arbitrators.¹⁴ In choosing an arbitrator, parties are limited to those appointed by ICAS to the list.¹⁵ ICAS can remove arbitrators from the list and resolves challenges to and removal of arbitrators in relation to arbitrations.¹⁶

The composition of ICAS is also important. It is composed of 20 members.¹⁷ Four are appointed by International Sports Federations (**ISFs**).¹⁸ Four are appointed by the Association of National Olympic Committees, four by the IOC and four chosen by those twelve members already appointed ‘*after appropriate consultation with a view to safeguarding the interests of athletes*’.¹⁹ Finally, four are chosen by those 16 ‘*chosen from among personalities independent of the bodies designating the other members of ICAS*’.²⁰ In other words, only four members of ICAS are *required* to be independent from global sports governing bodies.

The President of ICAS is also the President of CAS.²¹ The current President is also Vice President of the International Olympic Committee and President of the Australian Olympic Committee. The President of the CAS Divisions are also elected from the members of ICAS.²²

Summary of the background to the Pechstein saga

Pechstein was a German Speed Skating Champion. In July 2009 she was banned for two years by the International Skating Union (**ISU**). An in-competition blood test showed elevated levels of red blood cells indicating doping. Pechstein appealed to CAS and her appeal was dismissed.²³

¹² Mavromati & Reeb p.6

¹³ Ibid p.5. See also Article S2 of the 2019 Code ‘*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. It is also responsible for the administration and financing of CAS*’.

¹⁴ Article S6.3 of the 2017 Code. Changes made to the process effective from 1 January 2019 include the appointment of a permanent Membership Commission which proposes arbitrators for appointment by ICAS.

¹⁵ Or now to one or more lists. See Article S3 of the 2019 Code.

¹⁶ Article S6.4 of the 2017 Code and Article S6.5 of the 2019 Code. Challenges to and removal of arbitrators is now effected through the Challenge Commission.

¹⁷ Article S4 of the 2017 Code and the 2019 Code.

¹⁸ For cases involving national level athletes WADA and the IFs have a right to appeal to CAS with respect to the decision of the national level reviewing body, which makes the IF a party to that arbitration.

¹⁹ Article S4d of the 2017 Code and the 2019 Code.

²⁰ Article S4.e of the 2017 Code and the 2019 Code.

²¹ Article S9 of the 2017 Code and the 2019 Code. At present, the President is John Coates. Elections for the positions of ICAS President, Vice-Presidents, Division Presidents and their deputies will be held in May 2019 – See CAS Media Release dated 28 December 2018 at https://www.tas-cas.org/fileadmin/user_upload/ICAS_media_release_-_ICAS_2019-2022.pdf.

²² Article S6.2 of the 2017 Code and the 2019 Code.

²³ CAS 2009/A/1912 *Claudia Pechstein v/ International Skating Union* Arbitral Award at <https://www.isu.org/claudia-pechstein-case/2198-arbitral-award-cas/file>. For a summary of the award see ISU Press Release dated 27 November 2009 at <https://www.isu.org/claudia-pechstein-case/2207-court-of-arbitration-for-sport-cas-2-year-ban-confirmed/file>

She appealed the decision of CAS to the Swiss Federal Tribunal (SFT) challenging the independence and impartiality of the CAS Panel and CAS itself.²⁴ The SFT dismissed the appeal and confirmed the validity of the CAS award. Pechstein sought a ruling from the ECHR in respect of that decision, which is dealt with below.

In Germany, Pechstein sued the ISU and German Skating Federation for damages on the basis that the ban was unlawful applying German competition law.²⁵ At issue was the validity of the arbitration clause with the ISU to refer the case to CAS, given the structural imbalance between Pechstein and the sports federations, which formed a monopoly. Pechstein had no choice but to sign the agreements if she wanted to pursue her career as a professional athlete. At first instance, the Court, the Landesgericht Munchen (LG), found that the absence of free consent was sufficient to invalidate the arbitration clause, but despite this, dismissed her claim.²⁶

On appeal, the Munich Court of Appeal, the Oberlandesgericht (OLG) did not consider that making athletes' participation in competitions contingent on their agreement to arbitration *in general* was an abuse of a dominant position, however, as the ISU was the only provider in the market for speed skating, it had a monopoly and a dominant position and the exclusive arbitration clause was an abuse of the ISU's dominant position. Further, the structure of CAS and the system for appointing arbitrators was biased in favour of sports federations.²⁷ It was therefore contrary to public policy to recognize the CAS award. Pechstein's appeal was allowed.

On appeal to the German Federal Tribunal, the Bundesgerichtshof (BGH) in June 2016, the BGH found that the acceptance by athletes of the arbitration clause in favour of the CAS does not constitute an abuse of a dominant position.²⁸ It further found that CAS is a 'genuine arbitral tribunal'. The mandatory list of arbitrators constituted by the ICAS does not affect the equality of the parties as the interests of sports federations and of the athletes are aligned in the fight against doping, and the advantages of having a uniform international sports jurisdiction is for the benefit of sports federations and athletes. The Court noted changes to the procedural rules since the previous decision regarding the nomination of arbitrators.

The 2018 ECHR decision

As mentioned earlier, Pechstein sought a ruling from the ECHR that her human rights had been violated. Namely, her right to a fair trial under Article 6(1) of the Convention. Pursuant to Article 6(1):

*'In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'*²⁹

²⁴ see Case 4A_612/2009. See also article by Paul Czarnota 'Validity of Sports Arbitration Awards rendered by the Court of Arbitration for Sport' 28 May 2015 <https://www.commbarmatters.com.au/2015/05/28/validity-of-international-sports-arbitration-awards-rendered-by-the-court-of-arbitration-for-sport/>

²⁵ For a summary of the decision of the Munich District Court in English see Peter Burt's Blog 'Sports Arbitration: Munich Court Finds Arbitration Clause Invalid in Pechstein Case' Dispute Resolution Germany 26 February 2014 <http://www.disputeresolutiongermany.com/2014/02/sports-arbitration-munich-court-finds-arbitration-clause-invalid-in-pechstein-case/>

²⁶ The fact that the arbitration agreement was void was held not to preclude recognition of the CAS award. Ibid.

²⁷ It is important to note that at the time of this decision, the IOC, IFs and National Olympic Committees (NOCs) had the right to propose a certain number of arbitrators to the CAS Panel. See CAS Media release in response to the decision on 7 June 2016 at https://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf

²⁸ For the English translation of the decision see https://www.tascas.org/fileadmin/user_upload/Pechstein_ISU_translation_ENG_final.pdf. For a summary of the decision in English see CAS Media Release dated 7 June 2016 at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_07.06.16_English_.pdf

²⁹ See www.wchr.coe.int for the Convention.

Pechstein alleged that CAS was not an independent and impartial tribunal and that CAS failed to provide her with a public hearing.³⁰ The ECHR first had to decide whether Pechstein had waived her Article 6(1) rights by accepting the arbitration clause and therefore voluntarily waiving certain rights enshrined in the Convention, including Article 6(1). The ECHR found that she had not waived her rights by consenting to the arbitration clause because her consent was not freely given. The only option open to Pechstein was to accept the arbitration clause and participate in her sport, or refuse the clause and give up her profession.

Having decided that Pechstein had not waived her rights under Article 6(1), the court dismissed all claims except the one concerning the right to a public hearing. In summary:

- There is an interest in allowing sporting disputes, particularly those with an international dimension to be submitted to a specialized international arbitral tribunal;
- The funding of CAS by sports entities is not sufficient to establish a lack of independence or impartiality;
- The system of a mandatory list of arbitrators complies with the constitutional requirements of independence and impartiality;
- However, CAS should have allowed a public hearing.

From 1 January 2019

A number of changes have been made to the structure of CAS and to the 2017 Code effective from 1 January 2019. In summary, there are now three divisions of CAS; the Ordinary Arbitration Division and the Appeals Arbitration Division (as before) and a new Anti-Doping Division of CAS. The Anti-Doping division:

*'...constitutes Panels, whose responsibility is to resolve disputes related to anti-doping matters as a first-instance authority or as a sole instance. It performs, through the intermediary of its President or her/his deputy, all other functions in relation to the quick and efficient running of the proceedings pursuant to the Procedural Rules (Articles A1 et seq)'*³¹

A further change is the establishment of three Commissions; the CAS Membership Commission, the Legal Aid Commission and the Challenge Commission. The CAS Membership Commission is *'...composed of two ICAS Members appointed pursuant to Article S4d. or e. of the Code, one of them being appointed as commission chair, and by the three Division Presidents. The CAS Membership Commission is responsible to propose the nomination of new CAS arbitrators and mediators to the ICAS. It may also suggest the removal of arbitrators and mediators from the CAS lists.'*³²

The Legal Aid Commission is *'...composed of the ICAS President as commission chair and by the four ICAS Members appointed pursuant to Article S4 d. of the Code. The Legal Aid Commission shall exercise its functions pursuant to the Guidelines on Legal Aid.'*

The Challenge Commission is *'...composed of an ICAS Member to be appointed from outside the IOC, IFs and ANOC selection and membership and who shall act as commission chair, and by the 3 Division Presidents, less the President of the Division concerned by the specific procedure for challenge, who is*

³⁰ For a detailed summary of the decision in English see CAS Media Release dated 2 October 2018 at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf

³¹ Article S20b of the 2019 Code. The first instance hearings are conducted in accordance with the Arbitration Rules for the CAS Anti-doping Division. See http://www.tas-cas.org/fileadmin/user_upload/Arbitration_Rules_applicable_to_the_CAS_Anti-Doping_Division_Jan_2019.pdf

³² Article S7a of the 2019 Code.

*automatically disqualified. The Challenge Commission shall exercise its functions pursuant to Articles R34 and R35 of the Code.*³³

Whilst ICAS still appoints the arbitrators who constitute the list of CAS arbitrators, it is on the proposal of the CAS Membership Commission.³⁴ Appointments of the two ICAS members to the Membership Commission, one of whom is the Commission Chair, comes from the four members appointed after appropriate consultation with a view to safeguarding the interests of athletes³⁵ and/or from those four personalities independent of the bodies designating the other members of ICAS.³⁶ ICAS can still remove arbitrators from the lists,³⁷ however this is now done through its Challenge Commission.³⁸ The ICAS Member to be appointed to the Challenge Commission and who acts as the Commission Chair is to be appointed from outside the IOC, IFs and ANOC selection and membership.

In relation to the holding of public hearings, in response to the 2018 ECHR's Pechstein decision, Procedural Rule R57 of the CAS Procedural Rules has been amended to include the following:

'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 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 interest of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already published.'

It is well accepted that an arbitrator's independence is assessed *'...by the perception of a reasonable observer.'*³⁹ CAS has previously stated that *'It is always prepared to listen and analyze the requests and suggestions of its potential users ie the athletes, sports federations and other sports entities, in order to continue its development with appropriate reforms...the CAS will continue to improve and evolve with changes in international sport and best practices in international arbitration law.'*⁴⁰ The changes to the 2019 Code are part of that evolution to address issues of independence and impartiality that have been raised in the context where sports arbitration is *'fundamentally non-consensual in nature'*.⁴¹

³³ Article S7c of the 2019 Code.

³⁴ It ought be noted that of the members of ICAS nominated by the IOC whose terms commenced on 1 January 2019, all are chosen from outside IOC membership. In respect of those four nominated by the ANOC, three are chosen from outside ANOC membership.

³⁵ Article S4 d. of the 2019 Code.

³⁶ Article S4 e. of the 2019 Code.

³⁷ Article S6. 4 of the 2019 Code.

³⁸ Article S6. 5 of the 2019 Code.

³⁹ Mavromati & Reeb p.139.

⁴⁰ See CAS Media Release op.cit 25 and CAS Media release dated 7 June 2016.

⁴¹ Ibid 6.