**[The Pechstein ruling of the Oberlandesgericht München - Time for a new reform of CAS?](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas)**

[Antoine Duval](http://www.asser.nl/SportsLaw/Blog/author/Antoine-Duval)

On 15 January 2015, the earth must have been shaking under the offices of the Court of Arbitration for Sport (CAS) in Lausanne when the Oberlandesgericht München announced its decision in the Pechstein case. If not entirely unpredictable, the decision went very far (further than the first instance) in eroding the legal foundations on which sports arbitration rests. It is improbable (though not impossible) that the highest German civil court, the Bundesgerichtshof (BGH), which will most likely be called to pronounce itself in the matter, will entirely dismiss the reasoning of the Oberlandesgericht. This blogpost is a first examination of the legal arguments used (Disclaimer: it is based only on the [official press release](http://www.justiz.bayern.de/gericht/olg/m/presse/archiv/2015/04642/index.php), the full text of the ruling will be published in the coming months).

***The Pechstein Saga***

Few are able to remember the start of Claudia Pechstein’s legal crusade through all available jurisdictions in the northern hemisphere[[1]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn1" \o "). Thus, a concise summary of the previous episodes is in order. Claudia Pechstein is a German Speed-Skater, multiple Olympic Gold Medallist and World Champion. In 2009, she was one of the first athletes caught for doping on the basis of the blood profiling system introduced by the International Skating Union (ISU)[[2]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn2" \o "). Henceforth, the ISU banned her from all competitions for two years. This triggered a long and embroiled legal saga. She appealed the ban in front of the Court of Arbitration for Sport (CAS), based on an arbitration agreement included in her license with the national and international federations. The CAS [dismissed](http://isuprod.blob.core.windows.net/media/108941/arbitral-award-cas.pdf) (CAS 2009/A/1912 & 1913 and CAS OG 10/04) her claims and confirmed the two-year ban. Subsequently, she contested (twice!) the award in front of the Swiss Federal Tribunal ([Case 4A\_612/2009](http://www.swissarbitrationdecisions.com/sites/default/files/10%20fevrier%202010%204A%20612%202009.pdf), 10 February 2010 and [Case 4A\_144/2010](http://isuprod.blob.core.windows.net/media/102869/28-septembre-2010-4a-144-2010.pdf), 28 September 2010), but was both times unsuccessful. Her case is also [pending](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117166) before the European Court of Human Rights. Meanwhile, she started an action for damages (around € 4 Million) in front of the local Court of Munich (Landesgericht München). This Court released its [judgment](https://openjur.de/u/678775.html) on 26 February 2014, despite recognizing the invalidity of the arbitration clause, it considered that the award’s *res judicata* effect was to be recognized because Pechstein did not contest the competence of CAS when she appealed the ISU’s decision to it. Pechstein decided to appeal the judgment to the Oberlandesgericht München, which in its decision from 15 January 2015 embraced her claims.

***The Decision of the Oberlandesgericht München***

The overall position of the Oberlandesgericht concerning the CAS award is straightforward. The court considers the arbitration clause between the ISU and Claudia Pechstein as contrary to German (and maybe European) antitrust law, which is part of German public policy, and, therefore, refuses on the basis of Article V (2) (b) [New York Convention of 1958](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) to recognize the validity in Germany of the CAS awards rendered in the Pechstein case. But, why is it so?

First of all, the judges point out a typical (but often overlooked) fact about International Sports Governing bodies: they are monopolists. In other words, they control the market(s) for international sports competitions and nowadays (at least in [speed-skating](http://www.lawinsport.com/articles/item/dutch-speed-skating-duo-files-eu-antitrust-complaint-against-the-international-skating-union)) no professional athlete can afford, if he is to live from his sport, to miss those competitions. Yet, German antitrust law bans an undertaking placed in a dominant position from imposing contractual conditions that differ from what they would be in a normal competitive environment. Hence, the Court held that the ISU was unlawfully imposing onto Claudia Pechstein the signing of a CAS arbitration clause. But, is a forced arbitration clause *per se* constitutive of an antitrust violation? The Court is subtler. In fact, it acknowledges that an arbitration clause imposed by a Sports Governing Body does not constitute *per se* an antitrust violation. To the contrary, the Court clearly states that there are good reasons (for example the uniform application of anti-doping regulations) to subject the resolution of sporting disputes between athletes and Sports Governing Bodies to a unique world court for sport. What is the problem then?

In the eyes of the German court, the problem lies with CAS and its institutional set-up. First of all, the Sports Governing Bodies (International federations, NOCs and IOC) have a decisive influence on who is potentially called to be an arbitrator in CAS arbitration. Here, without clearly alluding to it in the press release, the Court has the closed list of CAS arbitrators in mind. In short, only a predefined number of people can act as arbitrators before CAS. Those arbitrators are appointed on the CAS list by ICAS, the CAS code in force at the time of the case foresaw that 3/5 of the arbitrators were appointed upon proposals made by the Sports Governing Bodies[[3]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn3" \o "). This has changed. As from the 1 January 2014 the ICAS is free to appoint whomever it deems appropriate on the list[[4]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn4" \o "). Nevertheless, the Court finds that, at least for the time Pechstein was facing the CAS, the Sports Governing Bodies were in a structurally favourable position regarding the composition of the arbitral panel. In practice, athletes were forced to ratify this disequilibrium due to the monopoly of Sports Governing Bodies on the access to international sporting competitions.

Furthermore, the German judges consider that this imbalance plagues also the nomination process of a president of an arbitral panel. Indeed, under article R54 of the CAS Code, the president of the CAS Appeals Arbitration Division is responsible to nominate the presidents of the panels[[5]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn5" \o "). However, the president of the CAS appeals division is himself nominated by the ICAS[[6]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn6" \o "), which consists mainly of representatives of the Sports governing bodies[[7]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn7" \o "), and is often a personality close to them[[8]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn8" \o "). Currently, the ICAS has 20 members, of which 14 have (or had) direct ties with Sports Governing bodies and none is connected to the existing athlete’s unions. This institutional bias entrenches the structural imbalance in favour of the Sports Governing Bodies already identified by the Court apropos the closed list of arbitrators. Thus, the independence of the panel cannot be guaranteed and the fairness of the arbitral process safeguarded. Therefore, in light of the monopolistic position of the ISU and the lack of independence of CAS panels, the imposition of an arbitration clause depriving the athlete of her constitutional right to a judge constitutes a breach of German antitrust law.

Consequently, and contrary to the first instance Landesgericht[[9]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn9" \o "), the Oberlandesgericht refuses to recognize, on the basis of Article 5 par. 2  b) of the 1958 New York Convention, the validity of the CAS awards invoked by ISU to oppose the damage claims raised by Pechstein. The Court leaves open the question of the damage claims, the partial ruling on the jurisdiction being susceptible to an appeal to the highest German civil Court, the BGH.

***Towards a Gundel 2.0 for CAS: Reform or die!***

The Pechstein Saga is not finished yet; an appeal to the BGH by ISU is to be expected. However, one should not underestimate the symbolic value of the Oberlandesgericht’s ruling and the threat it constitutes to the work of CAS. Indeed, if the ruling were to be confirmed by the BGH it would basically imply that CAS awards are unenforceable in German courts and that athletes may therefore (successfully or not) claim damages against the Sports Governing Bodies imposing sanctions on the basis of these awards. From the press release it remains unclear whether the decision is based solely on German antitrust law or also on EU antitrust law. Nonetheless, this decision might also be constructed as an abuse of a dominant position in the sense of article 102 TFEU and could gain validity in the EU as a whole. This would be a dramatic setback for sports arbitration, nothing short than the death of CAS.

But, it need not come to such extremity. As recognized by the Oberlandesgericht, the CAS fulfils an important function in the sporting world. It is a necessary institution to provide a level legal playing field when issues of doping or transfers are leading to acrimonious transnational disputes. Additionally, it also has advantages for the athletes, as it is usually perceived as cheaper and faster than state justice[[10]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn10" \o "). All of this is duly acknowledged in the decision. In short, what the German Court is asking for is an institutional reform of CAS. This restructuring would entail a fundamental reshuffling of the internal functioning of the CAS. Indeed, the German judges have identified the two main weak points of CAS, the forced arbitration coupled with its lack of independence[[11]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn11" \o "). The forced arbitration can be accepted if, and only if, the structural independence of CAS from the Sports Governing Bodies is warranted[[12]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn12" \o "). The challenge to CAS can be formulated as follows: cut the ties that bind you to the Sports Governing Bodies or we will not accept the validity of the arbitration clause underpinning your competence.

In fact, the CAS was at a fairly similar (less dramatic) crossroad after the Gundel case of the Swiss Federal Tribunal in 1993[[13]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn13" \o "). In the Gundel case, the SFT recognized the independence of CAS but also clearly indicated that it would not do so if the IOC were a party to a dispute in front of CAS. This led to what is known as the Paris agreement, an in depth structural reform of CAS[[14]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn14" \o "). Mainly, the ICAS was created to separate the management of CAS from the IOC. The SFT expressed its satisfaction with the reforms in its famous Lazutina case and blessed the CAS with the full recognition of its independence[[15]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn15" \o "). This, however, did not mean that the recognition of the independence of CAS was legally a given beyond Switzerland. To the contrary, it was (and is) still hotly debated in the literature[[16]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftn16" \o "). Now, the German court basically says the Paris agreement is not enough, we need a new one, ensuring that athletes (and other stakeholders like clubs or supporters) get a true say in the ICAS. It is time for the CAS’s institutional structure to better reflect the diversity of actors affected by its decisions. If not, CAS awards will not be recognized in Germany and, by extension, the entire territory of the EU, thus leading the sports justice into a profound crisis.

[[1]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref1" \o ") All the relevant legal documents are available on her website at <http://www.claudia-pechstein.de/gerichtsunterlagen.php>

[[2]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref2" \o ") On the dispute see D. McArdle, ‘Longitudinal Profiling, Sports Arbitration and The Woman Who Had Nothing to Lose. Some Thoughts on *Pechstein v International Skating Union”*, available at <https://dspace.stir.ac.uk/bitstream/1893/3356/1/Pechstein%20final.pdf>

[[3]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref3" \o ") Article S14 CAS Code, edition 2004

[[4]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref4" \o ") The new article S14 CAS Code reads as follows**:**

**«**In establishing the list of CAS arbitrators, ICAS shall call upon personalities 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 and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes. »

[[5]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref5" \o ") Article R54 CAS Code 2004 (and 2014) reads as follows: “If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel upon appointment of the arbitrator by the Respondent and after having consulted the arbitrators.”

[[6]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref6" \o ") Article S6 par.2 CAS Code 2004 (and 2014)

[[7]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref7" \o ") Article S4 CAS Code 2014 foresees that:   
« ICAS is composed of twenty members, experienced jurists appointed in the following manner :

1.     four members are appointed by the International Federations (IFs), viz. three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of the Winter Olympic IFs (AIOWF), chosen from within or outside their membership;

2.     four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;

3.     four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;

4.     four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;

5.     four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS. »

[[8]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref8" \o ") The current president, Corinne Schmidhauser,is a member of the Legal Committee of the Fédération Internationale de Ski (International Ski Federation). It is surely telling that Thomas Bach, the current IOC president, was her predecessor at that post.

[[9]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref9" \o ") The first instance Court (Landesgericht München) considered that due to Pechstein’s appeal and lack of contestation of the CAS’s competence, the award had gained res judicata effect. See paragraphs  IV.2) of the judgment.

[[10]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref10" \o ") A point made by D. Yi, ‘Turning medals into metal:  Evaluating the Court of Arbitration for Sport as an International tribunal’, available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1024&context=student_papers>

[[11]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref11" \o ") Antonio Rigozzi has highlighted these weaknesses in his Phd thesis, see A. Rigozzi *L’arbitrage international en matière de sport*, Bruylant, 2005, pp.273-349 and 421-426. See also, M. Maisonneuve, *L’arbitrage des litiges sportifs*, L.G.D.J, 2011, pp. 141-221 and pp. 267-313.

[[12]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref12" \o ") In principle the Swiss Federal Tribunal has a similar view outlined in the Cañas case ([4P.172/2006](http://law.marquette.edu/assets/sports-law/pdf/2012-conf-canas-english.pdf)), but it considers that the CAS already offers « sufficient guarantees of independence and impartiality » (par. 4.3.2.3.). Thus, its assessment of the CAS’s independence is diametrically opposed to the one conducted by the Oberlandesgericht.

[[13]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref13" \o ") *Decision 4P.217/1992* of 15 March 1993 (Gundel v FEI), ATF 119 II 271, translated in CAS Digest I,.p. 545

[[14]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref14" \o ") For an introduction on the Paris agreement see, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html#c74>

[[15]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref15" \o ") Decision *4P.267–270/2002* du 27 mai 2003, Lazutina c. CIO, ATF 129 III 445, Bull. ASA 2003, p. 601

[[16]](http://www.asser.nl/SportsLaw/Blog/post/the-pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas" \l "_ftnref16" \o ") For a recent contribution to this debate see A. Vaitiekunas, *The Court of Arbitration for Sport : Law-making and the question of independence*, Stämpfli Publishers, 2014