Kluwer Competition Law Blog

Sport arbitration and competition law: Long-awaited verdict of the Bundesverfassungsgericht gives Pechstein new hope

Julia Kleen (Rosenstein & Rolf & Frohoff) · Tuesday, July 26th, 2022

Background

More than 13 years ago, speed skater Claudia Pechstein had an abnormal blood sample, which she had to give as part of a doping control. She was subsequently banned in 2009 by the International Skating Union (ISU) for two years. The Court of Arbitration for Sport (CAS) confirmed this ban in 2009. According to the rules of the CAS at the time, Pechstein was not entitled to a public hearing. A corresponding request was not granted. Pechstein was also unsuccessful before the Swiss Federal Court in 2010.

In the meantime, it turned out that the blood sample had only been conspicuous due to a genetically caused blood anomaly.

Pechstein appealed against the decision of the Swiss Federal Court to the European Court of Human Rights (ECtHR), before which she in 2018 partially prevailed in a much-publicized decision.

Contrary to the arbitration agreement reached in favor of the CAS, Pechstein also sought recourse to German state courts. In particular, she demanded damages from the ISU and the national speed skating federation.

The German courts first had to deal with the effectiveness of the arbitration clause in order to be able to establish their jurisdiction. Like the court of first instance, the District Court Munich I (LG München I) before it in 2014, the Higher Regional Court of Munich (OLG München) in 2015 declared itself competent and considered the arbitration clause to be invalid pursuant to § 19 of the German Competition Act, the Gesetz gegen Wettbewerbsbeschränkungen (GWB), which is the German national abuse of dominance provision. It applied competition law, since it qualified the ISU as an undertaking within the meaning of competition law. According to the court, the arbitration agreement violated competition law and was therefore null and void. The court argued that the speed skating federation acted in an abuse of a dominant position by requiring Pechstein to agree to the arbitration agreement, as it is prohibited for a dominant undertaking under § 19 GWB to demand fees or other terms

and conditions that deviate from those that would very probably result from effective competition.

The ISU successfully appealed against the ruling of the OLG München to the Federal Court of Justice (BGH), which ruled in 2016 in a sensational decision that the CAS is a true arbitration court and therefore no jurisdiction of German state courts can be assumed. In addition, the BGH constructed an "external determination" with regard to the agreement of the arbitration clause, but nevertheless assumed that this had been concluded "voluntarily" and, thus, not in abuse of a dominant position.

The ECtHR assessed this question differently two years later. It ruled that the conclusion of the arbitration agreement had not been voluntary and saw a violation of Art. 6 ECHR due to the non-granting of the public procedure. In this case, Pechstein was able to achieve a partial success and received damages in the amount of EUR 8,000.

Pechstein filed a constitutional complaint against the decision of the BGH with the German Constitutional Court, the Bundesverfassungsgericht (BVerfG). In particular, she claimed a violation of the right to be heard, Art. 6 ECHR.

This blogpost analyses the decision of the BVerfG on this constitutional complaint.

The decision of the BVerfG

The BVerfG has ruled that the constitutional complaint is well-founded and that Pechstein's right to justice pursuant to Art. 2 (1) in conjunction with Art. 20 (3) of the German Constitution, the Grundgesetz (GG), is violated. Article 20 (3) GG because the BGH misjudged the significance of the right to publicity of the proceedings. It complains that the BGH did not sufficiently consider the importance of the principle of publicity as an element of the entitlement to the protection of justice in the question of whether the arbitration agreement is invalid due to its abusiveness pursuant to § 19 GWB. Furthermore, the BVerfG clarifies that the guarantee of justice can go beyond the guarantees of Art. 6 (1) ECHR.

The BVerfG does not explicitly address the question of the voluntariness of the arbitration agreement, which had occupied the other courts. However, it emphasises that in these cases it is considered necessary that the arbitral proceedings guarantee effective legal protection and meet minimum standards under the rule of law. The minimum requirements for the structure of the arbitral proceedings covered by the arbitration agreement would have to be designed in such a way that the fundamental rights of both contracting parties are safeguarded in order to prevent the self-determination of one contracting party from turning into a foreign determination, in cases where one party has such weight that it can de facto unilaterally determine the content of the contract.

Legal aspects

Significance of the principle of publicity

The BVerfG – like the ECtHR beforehand – sees a violation of the principle of publicity by the CAS statutes in force at the time of the proceedings before the CAS in the form of a lack of entitlement to a public hearing. It complains that the importance of the principle of publicity as an element of the right to justice has not been sufficiently taken into account by the BGH in the question of whether the arbitration agreement is invalid because it results from an abuse of a dominant position pursuant to § 19 GWB.

Already after the judgment of the ECtHR, the rules of the CAS have been amended to the effect that, in principle, public proceedings may be requested. However, this request can also be rejected for various reasons. For example, R57 of the CAS Code states: "Such request may however be denied in the interest of morals, public order, national security, […]". How broadly the term "interest of morals" is to be understood in this context remains to be seen. On the basis of the BVerfG's decision, it cannot be conclusively assessed whether the current rules of the CAS now take sufficient account of the principle of publicity.

Compulsory Arbitration Justified by Increased Demands on Rule of Law Principles

The BVerfG bypasses the question of the requirement of voluntariness in the agreement of the arbitration clause and formulates that by ensuring the protection of fundamental rights positions of the contracting parties, it can be ensured that self-determination does not turn into external determination. It thus implies that arbitration proceedings which sufficiently safeguard the protection of fundamental rights positions are "self-determined". In the opinion of the BVerfG, this apparently also applies if, at the time the arbitration clause is concluded, the content of the contract is in fact unilaterally determined by an overpowering party. Making the question of self-determination dependent on the design of the imposed procedure does not appear convincing.

"Conditions under international law" not an argument for compulsory arbitration

The BVerfG's assumption that an arbitration agreement is necessary to guarantee an internationally uniform sports jurisdiction and to combat doping in international sports competition, also in view of the conditions under international law resulting from Art. 13.2.1 of the World Anti-Doping Code (WADC), and as such cannot be objected to under constitutional law (para. 40), is irritating.

Contrary to what is suggested, no conditions under international law arise from the WADC itself. Rather, it is the central set of rules of the World Anti-Doping Agency (WADA), which is a foundation under private law, subject to Swiss law and to be classified as a public-private partnership. So far, individual passages of the WADC have only gained relevance under international law through the UNESCO Convention against Doping in Sport, which contains, among other things, almost verbatim passages of the WADC. However, Art. 4 para. 2 of the UNESCO Convention against

Doping in Sport makes it clear that the WADC itself is not part of the convention.

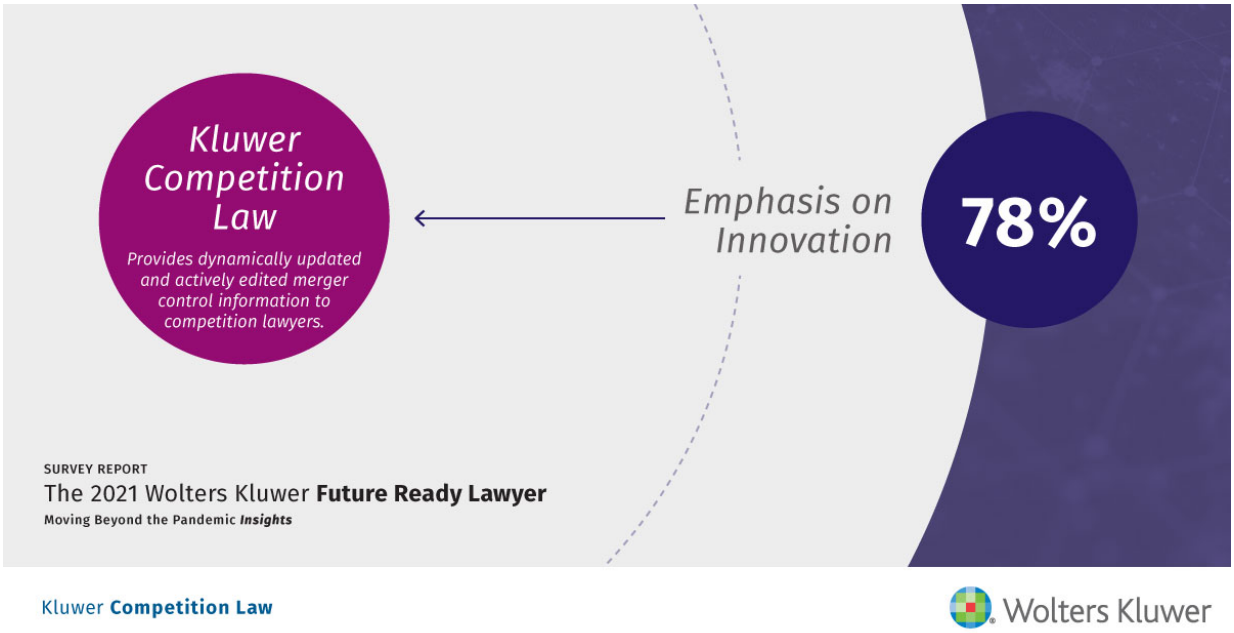
The argument of preconditions under international law is therefore not convincing, since such preconditions cannot in any case arise directly from the WADC.

Conclusion and outlook

As in the past, the BVerfG is guided by the case law of the ECtHR. It considers arbitration in sports to be necessary to guarantee an internationally uniform sports jurisdiction and to be constitutionally unobjectionable, thus strengthening the CAS. At the same time, it clarifies that the requirements for the design of the arbitration procedure in these cases must sufficiently guarantee the protection of fundamental rights positions. The focus of the decision is on the insufficient consideration of the principle of publicity of the proceedings in the assessment of the effectiveness of the arbitration clause by the BGH.

Since the CAS statutes have been adapted in the meantime with regard to a right to a public hearing, the CAS presumably does not see itself under pressure to act, even though exceptions to publicity are possible under the current regulations and the relevant clause as such could still be the subject of future proceedings.

How the OLG München will assess the effectiveness and legality of the arbitration clause under consideration of these standards under the abuse of dominance provision of § 19 GWB and, if necessary, decide in the matter, remains to be seen.



This entry was posted on Tuesday, July 26th, 2022 at 8:30 am and is filed under Source: OECD">Abuse of dominance, Arbitration, Germany, Sport
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