

Invalidity of arbitration agreement when lack of choice to refuse it

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On 28 February 2014, the Regional Court of Munich rendered a decision in the matter opposing German speed skater Claudia Pechstein to the ISU (Judgment of the Regional Court of Munich I, Case Number 37 O 28331/12; the judgment is not final). This decision is sending waves through the sports arbitration community.

In a matter that started as a doping dispute and was brought to the CAS, the Munich Court decision held that arbitration agreements that are included into agreements entered into by athletes in order to enter into a competition are invalid, because athletes have not voluntarily accepted arbitration as a means of dispute resolution. In addition, the Court considered that there was a structural imbalance between athletes and the sports unions because the latter held a monopolistic position.

However, the Court dismissed the case on the merits, holding that the award rendered by the Court of Arbitration for Sport (CAS) had *res judicata* effect and could therefore not be vacated.

This decision raises once again the often debated issue of autonomy of the parties in sports arbitration (I). In addition, it raises the interesting issue of whether and under what circumstances an award rendered despite the invalidity of the arbitration agreement has *res judicata* effect and be enforced (II).

(I). The Munich Court held that because the arbitration agreement was included into an agreement that the athlete had to sign in order to participate in a competition, her ability to refuse this arbitration agreement was limited, and therefore she could not be deemed to have had the choice to enter into it.

This issue touches upon the issue of consent of the parties to arbitration as a means of dispute resolution, an issue that often arises in sports arbitration in the context of arbitration agreements included by reference.

Arbitration clauses entered into by reference are agreements that refer to another agreement where only the latter contains an arbitration clause. This type of agreement is often found in the context of sports arbitration. Typically, the athlete does not sign up to the statutes of the particular sports federation which include the arbitration provision. The statutes of the local club or regional federation that he joins only refer to the statutes of the international federation.

The Munich Court had to apply Swiss law to the part of the decision that concerned the ISU (the other defendant was the German Speed Skating Association and to this part of the decision, German law was applied). In Switzerland, a general reference to statutes containing an arbitration clause has been upheld by the Supreme Court, as long as the athlete ratified the agreement in writing and there is a possibility to challenge the award. Yet the Munich Court held that Swiss case law ran contrary to the guarantees of the European Human Rights Convention.

(II). In an even more surprising twist, despite holding that the arbitration agreement was invalid, the Munich court held that it could not give a ruling on the issue of the doping suspension because *res judicata* had attached to the award. The Munich court considered that *res judicata* was allowed to happen because at the time of the referral to the CAS, the structural imbalance between the parties had been removed: the competition was over and Mrs Pechstein was represented by counsel.

The reason for the Court's ruling is that Mrs Pechstein only raised the question of the invalidity of the arbitration agreement after the award had been rendered to her disadvantage. In other words, she had chosen to proceed with the arbitration proceedings and raised the issue of the potential invalidity only when her claims were rejected in the arbitration.

One wonders however if the Court's reliance on the res judicata doctrine is the proper motivation. Res judicata happens by the passage of time. If no challenge is brought against the award within a certain time after it was rendered, the availability of challenge is foreclosed. Res judicata can however not cure the invalidity of an arbitration agreement.

But lack of good faith can prevent a party from raising a defense after the fact, once the tribunal has ruled against that party. It seems therefore that it was Mrs Pechtein's apparent bad faith that landed her into trouble. In that sense, the decision of the Munich Court is correct.

This decision sheds in interesting light on a related issue, that of due process. Of course, due process relates to the access to courts, but it remains an important issue in sports arbitration.

In my blog posts of 2 March and 13 July 2011, I reported on two decisions of the Swiss Supreme Court, the first one where the Supreme Court had considered the challenge of a CAS award withdrawn after the appellant had failed to pay the advance on costs, and the second one where the Supreme Court considered that the appellant still had standing to bring a challenge against a CAS award imposing the payment of an indemnity on the appellant after the appellant had paid the indemnity and the FIFA had lifted the related suspension. Both cases arose out of the same set of facts. In my view, the Supreme Court had spotted the difficulties, from the point of view of due process, raised by its first award and took the opportunity of the second challenge to correct them.

The Munich court decision is not one that deals directly with due process. But it is nevertheless illustrative of the concern that state courts currently have with the protections offered to athletes in sports arbitration proceedings, as was also apparent from the above-reported Swiss Supreme Court decisions. This is a concern that the sports arbitration community should pay attention to.

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