

Decision of the Bundesgerichtshof in the "Pechstein Case".

Executive Summary:

"The Cartel Penal of the Bundesgerichtshof did not follow the plaintiff's argumentation. He decided that the lawsuit is inadmissible in consideration of the invocation of an arbitration agreement.

Although the respondent is dominating in the market of the organization of international skating competitions. Whether the request to sign an arbitration agreement which provides the sole jurisdiction of CAS constitutes an abuse of a dominant position is determined on the basis of an extensive balancing of both parties mutual interests. As a result of such balancing the Cartel Penal could not establish an abusive conduct of the respondent.

CAS is a „genuine“ Court of Arbitration referred to in §§ 1025 ZPO (German Code of Civil Procedure). Neither CAS itself nor the specific arbitral tribunal are integrated in any kind of organization such as a Court of a Federation or an Association.

This cannot be precluded by the fact that arbitrators have to be chosen from a closed list and that such list is prepared by a body to which mainly representatives of International Sports Associations and Olympic Committees belong. Such provision does not constitute a structural imbalance in the composition of the specific arbitral tribunal. Because federations and athletes do not face each other as camps driven by fundamentally conflicting interests. Rather the fight against doping worldwide is in the interest of the federations as well as the athletes. The benefits related to single international Arbitration such as harmonized standards and rapid decisions apply not only for federations but also for athletes. Any residual imbalance of the federations is compensated by the code of procedure of CAS, ensuring a sufficient individual independence and neutrality of the arbitrators. The Federation involved in the particular proceedings before CAS – in this case ISU – and the athlete have to choose one arbitrator each from a list including more than 200 persons. These arbitrators together assign the chair of the arbitral tribunal. An arbitrator considered to be partial can be refused. The losing party has the possibility to request for jurisdictional safeguarding at the competent Swiss Federal Supreme Court. The Swiss Federal Supreme Court can review the CAS award to some extent and, if necessary, set it aside.

The plaintiff has signed the arbitration agreement voluntarily. The fact that she acted determined by others since she would have not been able to compete otherwise does not render the agreement invalid. Since the balancing of both parties mutual interests based upon § 18 GWB (Act Against Restraints of Competition) results in the objective justification of the use of the arbitration clause which is not contrary to the values of the law.

The right to access to justice of the plaintiff as well as her right to free practice of her profession must be balanced against the autonomy of the Respondent as federation. Eventually, access to the internationally competent Swiss Courts is granted to the Plaintiff after completion of the arbitration proceedings. Therefore the right of access to the German Courts in particular does not exist.