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# **The Court of Arbitration for Sport - An assessment of its structure and jurisdiction**

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## **A. Introduction**

'Olympism seeks to create a way of life based on [...] respect for universal fundamental ethical principles.'<sup>1</sup> This statement as the first fundamental principle of the Olympic Charter perfectly reflects the need for an international legal regulation of the globalized professional sport.

### **I. The development of sport and its special features**

The development of globalisation in different areas of life also expanded the scope of competition in sport. The internationality of sport raised its economic relevance and therefore its commercial impact. These developments can be observed in several fields. Especially in popular sports like football, the amounts of money that are paid for the services of single athletes increase continuously. The Brazilian football star Neymar Junior, who was recently transferred from Barcelona to Paris for a total amount of €408 million<sup>2</sup> and earns €450 million during his five years of contract with Paris Saint Germain<sup>3</sup> illustrates the extreme financial interests in sports nowadays. Expensive sponsoring activities of global business companies like Red Bull, Volkswagen and many others, whose business activities do not concern sport at all, confirm this evaluation of international professional sport. The existence of these diverse international interests in the results of competitions and their underlying decisions as well as the variety of disciplines of different sports require a strict universal regulation.

Besides the internationality, another special characteristic attribute of sport is its fast-moving nature. Several decisions regarding the special rules of sport immediately affect the course of the game in question and therefore must be made rapidly and without delay in order to maintain the entertainment value for the audience. Furthermore, the set of rules regulating the different disciplines often requires a very specific knowledge and expertise.

For these reasons the law concerning sport and its unique features is predominantly dealt with by courts of arbitration rather than state courts. Sports law covers all the

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<sup>1</sup> Olympic Charter, Fundamental Principles available at [https://stillmed.olympic.org/Documents/olympic\\_charter\\_en.pdf](https://stillmed.olympic.org/Documents/olympic_charter_en.pdf), accessed on 7 February 2018.

<sup>2</sup> €222 million transfer fee + €46 million taxes + €100 million bounty for Neymar + €40 million bounty for Neymar.

<sup>3</sup> €90 million a year including taxes.

law governing the practice of sports<sup>4</sup> and was in 1949 already referred to as the only case of a birth and formation of an independent and complex legal system in modern times<sup>5</sup>. The scope of involved parties reaches from athletes and team owners to agents, advertisers as well as journalists and media outlets.

## II. Outline of this dissertation

This dissertation examines the system and history of arbitration in sport, assessing its benefits, problems and potential. It reveals and considers the special features of sports and the consequential needs for the way of dispute settlement in this area. For this purpose, at first a brief overview about the concept of arbitration in general is given, followed by an objective description of the history and structure of the Court of Arbitration for Sport as the most important dispute settlement body in sports. By reference to these ascertained developments regarding its composition and operation, the quality of the Court of Arbitration for Sport will be evaluated and its common criticism will be analysed in detail.

Moreover, in this context, the necessity of state control for sports arbitration will be revealed, making specific reference to a main case study of *Claudia Pechstein vs. the International Skating Union* which will help to illustrate the manifestations of the acquired problems and their context in practice. The case study thereby also reveals the different approaches of the various courts that dealt with the case and hence serves to reflect on their assessments. For these reasons, the case of Claudia Pechstein will be studied in detail, starting with the background of the case and illuminating all the judicial proceedings from the Court of Arbitration for Sport up to the Federal Supreme Court of Germany.

The thesis then examines whether the found results also apply from South African perspective and hence can be transferred to South African law as well. Finally, it attempts an outlook in respect of the future of arbitration in international sports. To this effect, the dissertation tries to provide solutions for the problems of the Court of Arbitration for Sport by considering the interests of all involved parties and thereby lend credence to the respective arbitral judgements.

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<sup>4</sup> Michael Beloff, Tim Kerr, Marie Demetriou, *Sports Law* (1999) 5.

<sup>5</sup> Giannini, *Rivista di Diritto ed Economia dello Sport* (1949) 10, 17.

## **B. The Court of Arbitration for Sport**

### **I. The concept of arbitration**

Arbitration in general is a peaceful way of dispute resolution by a third person. The legal term, however, 'signifies an institution which consists in the settlement of a certain category of disputes by judges who are chosen by the litigants'<sup>6</sup>. The settlement of disputes by arbitration has prevailed since ancient times. The first transmission of an arbitral trial is found in Homer's Iliad and deals with a dispute about the inequality of the shields of Achilles, Aias and Archilochos during festival games. The question of wining by illegal means was settled through arbitration<sup>7</sup> which confirms the practicality of this way of dispute settlement in term of sports. This practice of resolving disputes between athletes during the games carried on and can be found in Homer's Odyssey<sup>8</sup> as well.

Regarding international law, arbitration means the method of settlement of international disputes by bringing the dispute to a third party who is empowered to decide with binding effect for the involved parties. In a broader understanding, international arbitration also comprises all judicial types which are excluded from the compulsory jurisdiction of the international or the national courts and instead are chosen by the consent of the opposing parties.<sup>9</sup> Whilst judicial decisions are made by an already existing and prescribed system, the composition and structure of the panel of arbitration can be agreed on by the parties of the dispute. Therefore, an agreement between the parties is required which determines the organisation and procedure of the decision-making. In contrast to other methods of dispute settlement, as for example mediation, the settlement through a judgement of an arbitral panel must always be based on the application and interpretation of law.

## **II. The history of the Court of Arbitration for Sport**

### **1. The establishment of the Court of Arbitration for Sport in 1984**

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<sup>6</sup> Ioannou, K & Perrakis, S 'Introduction in International Justice' (1984) *Tetradia International Law*, 123.

<sup>7</sup> Homer *Iliad* 573-610.

<sup>8</sup> Homer *Odyssey* 97-258.

<sup>9</sup> Ioannou, K & Perrakis, S op cit note 6, 123-24.

Whilst various sport disputes like questions regarding the Olympic Games for example, refer to the Olympic Charter or to statutes of national and international sport associations, a great number of unusual disputes cannot be categorized this easily and hence do not come within the jurisdiction of an institution of the Olympic Movement. This ambiguity and the earlier described process of globalisation with its resulting internationality of sport raised the question of the appropriate forum for legal proceedings regarding international as well as unclassified sport disputes. In order to achieve legal certainty and equal treatment of all athletes and to prevent the opportunity of 'forum shopping' as well as state control through ordinary state courts, the International Olympic Committee decided to create the Court of Arbitration for Sport as a universal, uniform and specialised arbitral court for sports law.<sup>10</sup>

The idea to establish such a tribunal came up for the first time in the Olympic Congress in Baden-Baden in 1981 by the President of the International Olympic Committee, H.E. Juan Antonio Samaranch and was approved by the International Olympic Committee in Rome 1982.<sup>11</sup> In 1983, the International Olympic Committee formally ratified the statutes of the Court of Arbitration for Sport in New Delhi, which entered force on 30 June 1984.<sup>12</sup>

The Court of Arbitration for Sport is located at the headquarters of the International Olympic Committee in Lausanne, Switzerland and held its first arbitration proceedings in 1986. According to article 5 of the Statute for the Court of Arbitration for Sport the following parties qualify to submit a case to the Court of Arbitration for Sport, if they can prove a legitimate interest: the International Olympic Committee, National Olympic Committees, International School Sport Federations, Organizing Committees for Olympic Games, sports associations, national federations, 'and in a general way, any natural person or corporate body having the capacity or power to compromise'.<sup>13</sup>

However, the Court of Arbitration for Sport struggled to gain acceptance especially from those for whom it seemed to have been established. One of the reasons was that it was totally financed by the International Olympic Committee. Moreover, the Pres-

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<sup>10</sup> Louise Reilly 'An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes' (2012) *Journal of Dispute Resolution* 63.

<sup>11</sup> Bruno Simma 'The Court of Arbitration for Sport' (2006), Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds) *The Court of Arbitration for Sport 1984–2004*, 21

<sup>12</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>

<sup>13</sup> Statute of the Court of Arbitration for Sport, art. 5, reprinted in James A.R. Nafziger *International Sports Law* (1988) at 221.

ident of the Court of Arbitration for Sport was chosen by the president of the International Olympic Committee and had to be a member of the International Olympic Committee. This dependence on the International Olympic Committee kept many athletes and other potential parties away from submitting their cases to an unfamiliar and obscure jurisdiction.<sup>14</sup>

In order to entrench its jurisdiction by anchoring pre-formulated arbitration clauses into the statutes of the national and international federations, the Court of Arbitration for Sport published a Guide to Arbitration<sup>15</sup>, which tried to incorporate the Court of Arbitration for Sport as the appellate body for the decisions of the federations' disciplinary tribunals. Yet, the scepticism of the federations was too big to simply adopt these clauses as the Court of Arbitration for Sport was still not totally accepted as an undoubted independent panel. The fact that the statute of the Court of Arbitration for Sport could not be modified without a resolution of the International Olympic Committee increased this suspicion.<sup>16</sup>

## **2. The establishment of the International Council of Arbitration for Sport**

In consequence of the lack of independence of the Court of Arbitration for Sport from the International Olympic Committee many decisions of the Court of Arbitration for Sport were challenged by athletes.<sup>17</sup> One of them was the German horse rider Gundel who originally appealed to the Court of Arbitration for Sport regarding to an International Equestrian Federation (FEI) horse-doping decision, which had suspended and fined him.<sup>18</sup> The tribunal of the Court of Arbitration for Sport confirmed the decision of the FEI with the result that Gundel brought the Case to the Swiss Federal Tribunal claiming that the Court of Arbitration for Sport was not an independent court of arbitration under Swiss law.<sup>19</sup>

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<sup>14</sup> Darren Kane 'Twenty Years On: An Evaluation of the Court of Arbitration for Sport' (2003) 4 *Melbourne Journal of International Law* 611, 614; Richard McLaren, 'A New Order: Athlete's Rights and the Court of Arbitration at the Olympic Games' (1998) 7 *Olympika: The International Journal of Olympic Studies* 1, 5.

<sup>15</sup> Court of Arbitration for Sports, *Guide to Arbitration* (1991).

<sup>16</sup> Code of Sports-related Arbitration, s 8(2).

<sup>17</sup> Darren Kane op cit note 14.

<sup>18</sup> Gilbert Schwaar 'CAS' (1993) 309 *Olympic Review* 305, 305.

<sup>19</sup> Richard H. McLaren 'Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror' (2010) 20 *Marquette Sports Law Review* 305.

Although the decision of the Swiss Federal Tribunal ruled that the Court of Arbitration for Sport was a ‘true arbitral tribunal’<sup>20</sup> and independent from the FEI, it contained a landmark statement which indicated that the independence of the Court of Arbitration for Sport would be very doubtful as soon as the International Olympic Committee itself became an involved party in proceedings before the Court of Arbitration for Sport. This statement caused several reforms of the Court of Arbitration for Sport<sup>21</sup> which were approved with the signing of the ‘Agreement concerning the Constitution of the International Council of Arbitration for Sport’ on 22 June 1994 in Paris, known as the ‘Paris Agreement’<sup>22</sup>. The major alteration provided by the agreement was the establishment of the International Council of Arbitration for Sport (ICAS) in 1994, which was created to organise, finance and control the Court of Arbitration for Sport independently from the International Olympic Committee. In general, in consequence of the Gundel decision and its containing statement about the independence of the Court of Arbitration for Sport, the whole organisation of the tribunal was reconstructed in order to ensure its independence from all kinds of potential influences.<sup>23</sup> The new structure and organisation of the Court of Arbitration for Sport and the International Council of Arbitration for Sport will be described in the following chapter.

### **III. The organisation of the Court of Arbitration for Sport**

#### **1. Divisions and jurisdiction**

Besides the above-mentioned creation of the International Council of Arbitration for Sport, the reform mainly concerned the structure and proceeding of the Court of Arbitration for Sport. Although numerous procedural rules of the Court of Arbitration for Sport remained the same, some important changes were made. Firstly, the tribunal was divided into the Ordinary Arbitration Division and the Appeals Arbitration Division. The Ordinary Arbitration Division deals with first instance disputes which are based on a valid arbitral agreement between the involved parties. In general, it

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<sup>20</sup> *G v Federation Equestre Internationale* (1993) Digest of CAS Awards I 561-70.

<sup>21</sup> The restructuring of the CAS was approved with the signing of the Agreement Concerning the Constitution of the International Council of Arbitration for Sport in June 1994.

<sup>22</sup> Agreement Concerning the Constitution of the International Council of Arbitration for Sport (ICAS), 22 June 1994.

<sup>23</sup> Richard H. McLaren op cit note 19.

addresses sports-related contractual disputes for example regarding sponsoring or the distribution of TV rights.<sup>24</sup>

The Appeals Arbitration Procedure concerns appeals challenging decisions by disciplinary bodies of the national or international federations which incorporated an Court of Arbitration for Sport arbitration clause in their statute regarding appeals against their disciplinary decisions such as doping suspensions or disputes concerning transfers of athletes from one Club to another.<sup>25</sup> In this regard, the term 'Appeals' is quite misleading as the procedure constitutes a first instance decision by the Court of Arbitration for Sport rather than an internal legal remedy.

Moreover, the Court of Arbitration for Sport started to offer an additional way of dispute settlement by way of mediation, which has been used only once until now.<sup>26</sup> Apart from that, another change of the procedure of the Court of Arbitration for Sport was the limitation of the availability of the 'advisory opinion procedure'. From 1994 on, this practice was no longer offered on an existing dispute that could also be brought before the Court of Arbitration for Sport. Furthermore, the opportunity to request such an opinion about the interpretation of incompatibility of the regulations of a National Olympic Committees or of the International Olympic Committee was from now on only reserved for the International Olympic Committee, International Federations, National Olympic Committees and the Organising Committees for the Olympic Games.<sup>27</sup>

Besides these changes of the procedures of the Court of Arbitration for Sport, its structure was predominantly changed by the creation of the International Council of Arbitration for Sport, whose establishment - according to the Code of Sports-Related Arbitration (Court of Arbitration for Sport Code) - was the principal measure to guarantee the independence of the Court of Arbitration for Sport and the rights of the parties.<sup>28</sup> To fulfil its task to protect the rights of the parties, the International Council of Arbitration for Sport is empowered to create regional as well as so called 'ad hoc' divisions.<sup>29</sup> Whilst the introduction of the former serves to expand the presence of the Court of Arbitration for Sport outside of Europe, the latter are established in

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<sup>24</sup> Corina Luck *Arbitration in Football: Issues and Problems highlighted by FIFA's Experiences with the Court of Arbitration for Sport* (2004) 4.

<sup>25</sup> *Supra* note 16, s 20.

<sup>26</sup> Darren Kane *op cit* note 14.

<sup>27</sup> 'Advisory Opinions' (2002) Digest of CAS Awards II 697.

<sup>28</sup> *Supra* note 16, s 2, s 6(5)(1)-(5)(3).

<sup>29</sup> *Supra* note 16, s 6(8).

accordance with the host of a certain event like the Olympic games in order to fulfil the need for a local, fast acting body during games so as to ensure the effective legal protection of the athletes during the games.<sup>30</sup>

## 2. Composition

Section 4 of the Court of Arbitration for Sport Code reads as follows:

'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.'

Summarized, twelve out of the twenty jurists of which the International Council of Arbitration for Sport consists, are elected by the International Federations, National Olympic Committees and the International Olympic Committee (each elect four). These twelve members subsequently elect four more members 'chosen after appropriate consultations with a view to safeguarding the interests of the athletes'<sup>31</sup>. Finally, the 16 already elected members chose the last four jurists 'from among personalities independent of the bodies designating the other members of the ICAS'.<sup>32</sup> These twenty members of the International Council of Arbitration for Sport then again elect the President of the Court of Arbitration for Sport after consultation with the International Olympic Committee, the Association of Summer Olympic International Feder-

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<sup>30</sup> Supra note 16, s (4).

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

ations, the Association of the Winter Olympic International Federations and the Association of the National Olympic Committees.<sup>33</sup>

The members of the Court of Arbitration for Sport are elected by the members of the International Council of Arbitration for Sport in the same ratios as the latter are elected.<sup>34</sup> At any one time, there are at least 150 members included by the list of arbitrators for the Court of Arbitration for Sport, which are appointed for a renewable term of four years.<sup>35</sup>

The particular formation of the Court of Arbitration for Sport which holds the judicial proceeding, normally consists of three arbitrators unless the Court of Arbitration for Sport in the face of the nature and importance of the specific case considers a single arbitrator appropriate or the parties agree on it.

If the panel consists of three arbitrators, each of the parties chooses one of them out of the pre-existing list of arbitrators. In the Ordinary Arbitration Division, the third arbitrator is chosen by agreement of the two designated arbitrators as the president of the panel or if they do not come to an agreement, chosen by the President of the Ordinary Arbitration Division. Under a procedure of the Appeals Arbitration Division, the President of the Division directly chooses the president of the panel.

#### **IV. Problems and criticism**

Although the Court of Arbitration for Sport is widely accepted as the highest sports tribunal, it is heavily criticized at the same time. Especially the athletes for whom the Court of Arbitration for Sport seemed to have been established do not feel themselves represented. This scepticism is mainly based on three points of criticism, namely the lack of independence and impartiality of the Court of Arbitration for Sport, the difficulties regarding the enforcement of the Court's awards and the mandatory nature of the pre-dispute arbitration clauses. The validity of these three arguments will be evaluated in this chapter.

##### **1. The independence of the Court of Arbitration for Sport**

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<sup>33</sup> Supra note 16, s 6(2).

<sup>34</sup> Supra note 16, s 14.

<sup>35</sup> Supra note 16, s 13.

One of the basic principles of arbitration in general is the independence and impartiality of the arbitrator.<sup>36</sup> All of the most widely accepted international arbitration rule-making bodies - like the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) - provide rules emphasizing the importance of impartial and independent arbitrators.<sup>37</sup> Article 6(1) of the European Convention on Human Rights even explicitly determines that the principle of independence and impartiality of the court is part of the right to a fair trial<sup>38</sup> which includes arbitral courts<sup>39</sup> as well. This principle serves not only to ensure the independence of the arbitral procedure and the impartiality of its panel in the form of the particular formation of the Court of Arbitration for Sport but also contains an institutional component.<sup>40</sup> Therefore, the Court of Arbitration for Sport as an institution has to be independent and impartial.

#### a) Statements of the Swiss Federal Tribunal

The independence of the Court of Arbitration for Sport was firstly examined by the Swiss Federal Tribunal. According to the Code of Sports-related Arbitration, a decision of the Court of Arbitration for Sport is final and binding on the parties, subject only to judicial review by the Swiss Federal Tribunal.<sup>41</sup> Therefore, an award of the Court of Arbitration for Sport can be subject of a challenge by one of the parties at the Swiss Federal Tribunal, which is based in Lausanne as well.<sup>42</sup> Article 190(2) of the Swiss Federal Code of Private International Law sets the very limited scope for the possibility to challenge such a decision of the Court of Arbitration for Sport:

‘The award may only be annulled:

- a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
- b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
- c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of

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<sup>36</sup> Alan Redern & Martin Hunter *Law and Practice of International Commercial Arbitration* (1991) 218.

<sup>37</sup> *Ibid.*

<sup>38</sup> Article 6(1) of the European Convention on Human Rights.

<sup>39</sup> Frowein & Peukert *Europäische Menschenrechts Konvention EMRK-Kommentar* (2009) 150.

<sup>40</sup> *Ibid.*

<sup>41</sup> General Information about the CAS available at <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited 7 February 2018).

<sup>42</sup> R Cloete *Introduction to Sports Law in South Africa* (2005) 216.

the items of the claim;

d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;

e) if the award is incompatible with public policy.’

The above mentioned German horse rider Gundel brought his case to the Swiss Federal Tribunal questioning the independence of the Court of Arbitration for Sport in consequence of its decision regarding his doping suspension<sup>43</sup>. In this way, he urged the Swiss Federal Tribunal to examine the issues of independence.<sup>44</sup> At this time the links between the Court of Arbitration for Sport and the International Olympic Committee were too obvious to deny a close relationship between them as the Court of Arbitration for Sport was founded and funded only by the International Olympic Committee. Furthermore, the President of the Court of Arbitration for Sport was chosen by the president of the International Olympic Committee among the members of the latter and the statute of the Court of Arbitration for Sport could not be modified without a suggestion of the International Olympic Committee.<sup>45</sup> However, the Swiss Federal Tribunal considered the Court of Arbitration for Sport to be sufficiently independent and impartial ‘true arbitral tribunal’.<sup>46</sup> Nevertheless, it indicated concerns regarding the independence and impartiality for cases in which the International Olympic Committee itself became an involved party.<sup>47</sup> As these concerns were mainly based on the direct financial and structural links between the International Olympic Committee and the Court of Arbitration for Sport, the International Olympic Committee as a reaction interposed the International Council of Arbitration for Sport as a financing and controlling body in order to remove the doubts about the independence of the Court of Arbitration for Sport.

#### b) Progress through the International Council of Arbitration for Sport

In consequence of the establishment of the International Council of Arbitration for Sport and the related structural reforms, the Court of Arbitration for Sport enjoyed even more approval by the Swiss Federal Tribunal which held that the Court of Arbitration for Sport was independent enough to consider it ‘more akin to a judicial au-

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<sup>43</sup> Supra note 20.

<sup>44</sup> Richard H. McLaren op cit note 19.

<sup>45</sup> Supra note 13.

<sup>46</sup> Supra note 20.

<sup>47</sup> Richard H. McLaren op cit note 19.

thority independent of the parties<sup>48</sup> and its decisions ‘true awards, equivalent to the judgements of state courts’<sup>49</sup>. Although these statements indicated that further challenges of the decisions of the Court of Arbitration for Sport based on a lack of independence would most likely be rejected, several athletes like the suspended Chinese swimmers<sup>50</sup> and the Azerbaijan field hockey team<sup>51</sup> tried to overrule the tribunal’s reasoning. In these cases, it was held that ‘even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings’<sup>52</sup> and that the Swiss Federal Tribunal ‘does not review whether the arbitration court applied the law, upon which it based its decision, correctly’<sup>53</sup>. Therefore, the legitimacy and independence of the Court of Arbitration for Sport was expressively confirmed by the Swiss Federal Tribunal.

#### c) Analysis of the independence of the Court of Arbitration for Sport

As the International Olympic Committee created, organized and fully funded the Court of Arbitration for Sport until its reform in 1994 there is little doubt that the links between the Court of Arbitration for Sport and the International Olympic Committee were too strong to accept the Court of Arbitration for Sport as a truly independent Court of arbitration by that time. Back then, all of the possible judges were chosen either by the International Olympic Committee, International Federations, National Olympic Committees or the president of the International Olympic Committee<sup>54</sup>. Therefore, no space was left for the representation of the interests of the athletes. In fact, the predominant International Olympic Committee clearly used its powerful position as the funder and organizer to look after its own interests rather than after those of the athletes. The implementation of International Council of Arbitration for Sport and its related structural changes improved the situation for the athletes in some degree and apparently reduced the links between the Court of Arbitration for Sport and the International Olympic Committee. The establishment of the

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<sup>48</sup> *A. & B. v IOC* (2003) Digest of CAS Awards III 684–88.

<sup>49</sup> *Ibid.*

<sup>50</sup> *N. J. Y. W. v FINA* (1999) Digest of CAS Awards II 779

<sup>51</sup> *X. v Federation Internationale de Hockey* (2008), 4A\_424/2008.

<sup>52</sup> *Supra* note 50.

<sup>53</sup> *X. v Federation Internationale de Hockey* *supra* note 51 at 6.

<sup>54</sup> Stephen A Kaufmann ‘Issues in International Sports Arbitration’ (1995) *13 Boston University International Law Journal* 527.

International Council of Arbitration for Sport served to prevent direct influence by the International Olympic Committee. An example for the improved separation between the different institutions is the prohibition for the member of the International Council of Arbitration for Sport to serve as arbitrators at the Court of Arbitration for Sport or to act as council for any of the parties.<sup>55</sup> However, despite these improvements coming along with the establishment of the International Council of Arbitration for Sport, not all doubts about the independence of the Court of Arbitration for Sport have been removed.

aa) The composition of the International Council of Arbitration for Sport

The supposedly independent International Council of Arbitration for Sport is not at all free of influence by the International Olympic Committee. In fact, the above illustrated process of the composition of the International Council of Arbitration for Sport is dominated by the significant influence of the four members elected by the International Olympic Committee itself and the other eight members elected by sport federations and associations. These totalled twelve members then again elect the remaining eight members including only four members which are not allowed to come from one of the sport federations. Therefore, all of the members of the International Council of Arbitration for Sport including even the only four ostensibly 'independent' members are indirectly chosen by the federations and associations.

In contrast to this, there is still no guarantee for the representation of the athletes' interests. Art S4(d) of the Code states that four members of the International Council of Arbitration for Sport are elected 'after appropriate consultation with a view to safeguarding the interests of the athletes',<sup>56</sup> but even these ostensibly 'athlete-friendly' members are chosen by the pre-elected members chosen by the sport federations and associations. Besides that, the provision of Art S4(d) of the Code is too uncertain and vague to ensure the athletes' representation. The wording of the provision does not determine the exact extent of these 'consultations' and even leaves open the possibility to ignore the athletes' suggestions as these are not binding.

bb) The composition of the panel of the Court of Arbitration for Sport

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<sup>55</sup> R H McLaren 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes' (2000-2001) 35 *Valparaiso University Law Review* 379, 83.

<sup>56</sup> *Supra* note 16, s 4(d).

Regarding a legal proceeding, the athlete party to a dispute may choose one of the three arbitrators of the particular formation of the Court of Arbitration for Sport but only out of the pre-existing list of arbitrators on which he had no direct influence and which is rather created by the International Council of Arbitration for Sport, directly and indirectly appointed by the federations and organisations as seen above. Even if the athlete manages to find an impartial arbitrator in that list of arbitrators, he is most certainly still confronted with a federation or organisation inclined second arbitrator chosen by his opponent. But even if this procedure of appointment results in a panel of two unbiased arbitrators or at least two arbitrators with directly opposite and thus balanced predispositions and attitudes, the unbalanced International Council of Arbitration for Sport still maintains indirect influence on the bias of the panel. Whilst in an Appeals Arbitration Procedure the third member and president of the formation is chosen directly by the International Council of Arbitration for Sport, in a procedure at the Ordinary Arbitration Division the president of the panel is agreed on by the two already appointed arbitrators or if they cannot agree, by the president of the division as well. As (at best) the two party appointed arbitrators balance out they will most certainly not agree on the third member of the panel, so that this member as its president will in almost any case be appointed by the president of the respective division of the Court of Arbitration for Sport which is elected by the federation-elected International Council of Arbitration for Sport. Needless to say, that the president of the panel will decide the dispute if the two other arbitrators cannot find a consensus. In this context Straubel noted that

‘with two votes potentially predetermined, this leaves the panel President to break the deadlock. Then, because the panel President plays the critical tie-breaking role, his appointment becomes, perhaps, the pivotal event in deciding who wins the case.’<sup>57</sup>

Therefore, the indirect impact of the federations and organisations on the appointment of the International Council of Arbitration for Sport not only continues to have an effect on the exclusive list of arbitrators of the Court of Arbitration for Sport but also on the particular formation of the Court of Arbitration for Sport and as illustrated possibly even on its bias.

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<sup>57</sup> Michael Straubel ‘Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better’ (2005) *Loyola University Chicago Law Journal* Vol 36 1235.

cc) The funding of the Court of Arbitration for Sport

Since the establishment of the International Council of Arbitration for Sport the Court of Arbitration for Sport no longer receives its entire funding from the International Olympic Committee. Instead the International Olympic Committee, the International Federations, and the National Olympic Committees each contribute one third of the funding.<sup>58</sup> However, looking like a balanced system, it is still a one-sided system of funding as the entire amount is provided by the Olympic governing bodies.

dd) Conclusion about the independence of the Court of Arbitration for Sport

In summary, the improvements regarding the independence and impartiality of the Court of Arbitration for Sport have been a step in the right direction. Nevertheless, the reforms mainly aimed to safeguard the acceptance of the Court of Arbitration for Sport as an independent court of arbitration and to maintain its own jurisdiction. From the viewpoint of the International Olympic Committee the implemented changes might have been the lesser evil compared to a denial of the independent status of the Court of Arbitration for Sport by the international legal community. To prevent such a denial and the associated total loss of influence on the legal sport-proceedings, the International Olympic Committee rather dropped its direct and obvious influence to some degree by pretending to aim for a completely independent and 'athlete-friendly' court of arbitration. By taking a closer view to the implemented rules, the factual imbalanced power structure in favour of the International Olympic Committee and other federations reveals. In this context, one should bear in mind that the Court of Arbitration for Sport may no longer be exclusively dominated by the International Olympic Committee but that the composition and structure favours the interests of the sport organisations and federations in general which are most commonly of the same nature. A single athlete who is challenging a decision of such a federation before the Court of Arbitration for Sport apparently has a clear competitive disadvantage right from the start. The ostensibly structural changes hence turn out to be of a hypocritical nature in whose consequence against the findings of the Swiss Federal Tribunal the Court of Arbitration for Sport remains linked to the sport-

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<sup>58</sup> Supra note 22.

institutions and after all cannot be considered as a truly independent court of arbitration.

## 2. The enforcement of the awards of the Court of Arbitration for Sport

Besides its lack of independence, the Court of Arbitration for Sport is also often criticized for difficulties regarding the enforcement of its awards. To facilitate the enforcement of international arbitral awards in general, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>59</sup>, also referred to as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959.<sup>60</sup> By now, it has been ratified by 157 states.<sup>61</sup> The New York Convention has been called ‘the single most important pillar on which the edifice of international arbitration rests’<sup>62</sup> and ‘perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.’<sup>63</sup>

A state which is party to the convention is required to acknowledge private arbitral agreements as well as to recognize and enforce arbitration awards from other contracting states.<sup>64</sup> The Convention is highly esteemed as it ensures a quite uncomplicated way of gaining recognition and enforcement of foreign arbitral awards.<sup>65</sup> Nevertheless, it contains some exceptions to this general rule of which the most important are examined in the following:

### a) Article V(1)(e) of the New York Convention

Article V(1)(e) of the Convention states that at the request of the party against whom it is invoked, domestic courts may refuse to enforce an award ‘if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of

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<sup>59</sup> The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958

<sup>60</sup> Wikipedia: Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>61</sup> Ibid.

<sup>62</sup> Wetter ‘The Present Status of International Court of Arbitration of the ICC’ (1990) 1 *American Review of International Arbitration* 91.

<sup>63</sup> Mustill ‘Arbitration: History and Background’ (1989) 6 *Journal of International Arbitration* 43.

<sup>64</sup> Supra note 60.

<sup>65</sup> Stephen A Kaufmann op cit note 54, 537.

which, that award was made'.<sup>66</sup> Therefore, the enforcement of the award of Court of Arbitration for Sport could be refused by a domestic court if the defendant manages to successfully challenge the decision of the Court of Arbitration for Sport in front of the Swiss Federal Tribunal and hence annul the award. Thus, the critical question is, whether the Swiss Federal Tribunal recognizes the validity of the decisions of the Court of Arbitration for Sport.<sup>67</sup> Until 1993 it remained uncertain how the Swiss courts would judge in this matter. No certainty that the awards of the Court of Arbitration for Sport could be enforced at the home state of the award holder was given. However, as previously illustrated, in March 1993 the Swiss Federal Tribunal had to decide the Gundel case in which it dealt with the recognition of the validity of the Court of Arbitration for Sport and its awards. As even in this case and hence before the establishment of the International Council of Arbitration for Sport and its related structural reforms, the Tribunal considered the Court of Arbitration for Sport to be a 'true arbitral tribunal'<sup>68</sup> it seems very unlikely that a Swiss Court will annul an award of the Court of Arbitration for Sport because of its lack of independence.<sup>69</sup> Instead, the Swiss Federal Tribunal subsequent to the reforms of the Court of Arbitration for Sport in 1994 held that the awards of the Court of Arbitration for Sport constitute 'true awards, equivalent to the judgements of State courts'<sup>70</sup>. Hence, in the face of the Gundel decision the fulfilment of the requirements of article V(1)(e) in terms of the annulment of an award of the Court of Arbitration for Sport will be very hard to achieve.

#### b) Article V(2)(b) of the New York Convention

Another important exception to the enforcement of an award of the Court of Arbitration for Sport is article V(2)(b) of the New York Convention which states that 'an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country'.<sup>71</sup> The possibility

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<sup>66</sup> New York Convention, supra note 59, art. V(1)(e).

<sup>67</sup> Stephen A Kaufmann op cit note 54, 539.

<sup>68</sup> *G v Federation Equestre Internationale* supra note 20 at 561.

<sup>69</sup> Stephen A Kaufmann op cit note 54, 539; Maureen A Weston 'Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport' (2009) 38 *The Georgia Journal of International and Comparative Law* 99, 119.

<sup>70</sup> *A. & B. v IOC* supra note 48, 689.

<sup>71</sup> New York Convention, supra note 59, art V(2)(b).

to refuse the enforcement of an otherwise binding arbitral award based on the public policy argument is one of the most important exceptions to the general rule of recognition and enforcement of foreign arbitral awards under the New York Convention. Its importance as well as its controversial discussion is caused by its uncertain scope and the fact that its application is totally dependent upon the laws of individual states.<sup>72</sup> In consequence, the binding effect of the New York Convention is relatively loose and can easily be circumvented as its extent is always dependent on state laws which can even be passed in the aftermath. Moreover, the Convention does not give any definition for the meaning of the term 'public policy' and hence leaves the interpretation of its scope open to the national courts which therefore vary in their understanding of the term.<sup>73</sup>

These non-uniform interpretations are not only inconsistent with the introductory first fundamental principle of the Olympic Charter<sup>74</sup> but also contravene with the actual goal of the New York Convention, namely to achieve a uniform recognition and enforcement of international arbitral awards.

To establish a universal and uniform understanding of the term, the International Law Association (ILA) tried to prepare a concept of international public policy but failed to reach a consent as to what should constitute international public policy.<sup>75</sup>

Nevertheless, notwithstanding the legal uncertainty of the wording, the 'interpretation and application of the public policy exception in most jurisdictions is usually on the side of enforcement which is referred to as the pro-enforcement bias. Pro-enforcement itself is seen as a public policy.'<sup>76</sup> One of the most significant national court decisions regarding this pro-enforcement bias is the decision of the Slaney case by the Seventh Circuit,<sup>77</sup> in which the U.S. middle-distance runner Mary Decker Slaney challenged the arbitral award of the International Amateur Athletic Federation which confirmed her doping-violation because of increased levels of testos-

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<sup>72</sup> Sameer Sattar 'Enforcement of Arbitral Awards and Public Policy: Same concept, different approach?' (2011) 4 *Vol. 8(5) Transnational Dispute Management Journal*.

<sup>73</sup> *Ibid.*

<sup>74</sup> 'Olympism seeks to create a way of life based on [...] respect for universal fundamental ethical principles.' Olympic Charter supra note 1.

<sup>75</sup> O Ozumba 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?' (2010) *C.E.P.M.L.P Annual Review (CAR)* available at: <https://uod.app.box.com/s/swl5xiswonvyb6wi3q1539p7178linla>

<sup>76</sup> *Ibid.*

<sup>77</sup> *Slaney v. International Athletic Amateur Athletic Federation and the United States Olympic Committee* (2001) 244 F.3d 580 (7th Cir.), 534 U.S. 828.

terone.<sup>78</sup> Slaney was claiming that such a doping violation would be contrary to U.S. public policy by 'presuming she had committed a doping offense based on a test that is scientifically invalid and discriminatory towards female athletes'.<sup>79</sup> The Seventh Circuit held that the New York Convention's public policy exception is 'exceedingly narrow'<sup>80</sup> as it requires a violation of 'the most basic notions of morality and justice'<sup>81</sup> and that its enforcement needs to 'entail a violation of a paramount legal principle that is ascertained by reference to the laws and legal precedents and from general considerations of supposed public interests'.<sup>82</sup> In accordance with the pro-enforcement bias, Slaney's claim was rejected. Therefore, provided that such an international pro-enforcement bias will consistently be retained, the public policy exception under article V(2)(b) of the New York Convention will neither significantly interfere the awards of the Court of Arbitration for Sport.

Ultimately, as a result of the illustrated Gundel decision on the one hand and the pro-enforcement bias on the other hand, the enforcement of an award of the Court of Arbitration for Sport does not carry unreasonable risks for the succeeding party.

### **3. The voluntary nature of mandatory pre-dispute arbitration clauses**

In order to control the jurisdiction of sport related disputes, sport associations and federations try to avoid national or state controlled courts for such proceedings.<sup>83</sup> An often-alleged reasoning for this effort is the need for a fast, effective and expert dispute settlement body. As explained above the special features of sport and its legal questions indeed require such a special handling. Nevertheless, this goal cannot be pursued at all costs. General principles like the guarantee of access to justice as well as the principles of arbitration must be considered on the one hand just as the freedom of contract on the other hand. All these aspects must be brought into accordance equally.

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Matthew J. Mitten 'Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations' (2009) *Pepperdine Dispute Resolution Law Journal* Vol 10, 63

<sup>83</sup> Jan Paulsson 'Arbitration of International Sports Disputes' (1993) *Arbitration International* Vol 9, 359–70.

To achieve the circumvention of the state controlled courts, sport associations and federations usually include pre-dispute arbitration clauses in their license contracts.<sup>84</sup> These pre-dispute arbitration clauses for future disputes must be clearly distinguished from arbitration agreements for already existing disputes. Whilst the former are often agreed to in a situation in which at least one of the parties does not expect the emergence of such a future legal dispute or just does not think about it, the latter is usually consented when the dispute is already omnipresent for the parties and hence based on a conscious decision. Therefore, the pre-dispute arbitration clauses are much more problematic and require a precise review.

As a matter of fact, such a pre-dispute arbitration clause is often just one of multiple provisions of an extensive contract which for most athletes is very hard to overview. Especially when included in a license contract, athletes might overlook them or just ignore their meaning as they are focussed on receiving their licence. What is more, sport federations in most of the cases even insist on the inclusion of such clauses which makes them so called 'mandatory pre-dispute arbitration clauses' to be distinguished from 'optional (pre-)dispute arbitration clauses'. This mandatory nature and the fact that sport federations have a monopoly position for the professional practicing of their type of sport<sup>85</sup>, confronts the young athletes with the choice between two options: Either to sign the license contract with its pre-dispute arbitration clause in order to exercise their sport professionally and live their dream or to refuse to sign the contract solely because of an arbitration clause which perhaps would never be needed to be applied. The consequences of the second option are obvious: All the hard work and long-time of practice, all the strict sacrifices and immense expenditures suddenly turn out to have been completely needless. The dream of international competitions, possibly even triumphs, awards, fame and great earnings are no more accessible. Instead the athlete finds himself in a helpless situation, maybe even without education for another kind of job. Not to forget that athletes are normally faced with this decision in a relatively young age right before their breakthrough and with a promising career in prospect.

In the light of these alternatives the decision of such young athletes in favour of the contract and the mandatory arbitration clause comes as no surprise. Even if they recognize the incorporated waiver of their right to a traditional court, they most certain-

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<sup>84</sup> Ibid.

<sup>85</sup> John Forster 'Global sports organisations and their governance' (2006) 6:1 *Corporate Governance: The international journal of business in society* 72, 78.

ly do not understand its consequences or at least just do not care about them in this in two respects significant moment for their future.

Because of this lack of alternatives and the associated imbalance of power of the two contracting parties, the question arises whether such mandatory pre-dispute arbitration clauses can still be considered as in accordance with the principle of voluntariness of arbitration. In the face of the above illustrated predicament, it seems to be more than doubtful to consider such a decision as voluntary. The following decisions of state courts demonstrate the different interpretations and their requirements for this voluntariness.

a) In the case of the doping-suspended Basketball player Stanley Roberts the Swiss Federal Tribunal ruled that because of the need for quick, effective and expert decisions the requirement of voluntariness should be interpreted in a broad way as long as the independence and impartiality of the institution is guaranteed.<sup>86</sup>

Roberts - who neither joined the International Basketball Federation or a subordinated federation or club nor signed an arbitration agreement - was bound to the jurisdiction of the Court of Arbitration for Sport just because he tried to challenge a doping suspension by the International Basketball Federations which was originally imposed by the National Basketball Association of North America.<sup>87</sup> In the context of the federation-internal appeal against the suspension, Roberts had to acknowledge the code of procedure of the federation, which in fact contained a referral to the statutes of the International Basketball Federation but not explicitly to the contained arbitration clause. Nevertheless, the panel of the Court of Arbitration for Sport as well as the Swiss Federal Tribunal ruled that the procedure of Roberts suffices to exclude him from traditional courts as the 'principle of trust' requires that a federation-internal appealing athlete expresses a reservation against the jurisdiction of the Court of Arbitration for Sport if he does not accept it.<sup>88</sup> Therefore, even without a direct submission to an arbitration clause, the Swiss Federal Tribunal found that the requirements for arbitration including its voluntariness have been fulfilled which illustrates how

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<sup>86</sup> *Stanley Roberts v Federation Internationale de Basketball* (2001) 4P.230/2000, reprinted in *Bulletin ASA* 2001, 523.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

broad this requirement is interpreted. Moreover, the case clarifies the fundamental inferiority of the athlete within the monopolistic structure of federations.<sup>89</sup>

b) In contrast to this, the Regional Court Frankfurt (Landgericht Frankfurt) in Germany stated in its 'London-decision' that a licence contract containing a mandatory pre-dispute arbitration clause between the German Football Association (Deutscher Fußball Bund) and the former first division club 'FC Homburg' was invalid due to the fact that the Deutscher Fußball Bund misused its economic and social superiority.<sup>90</sup> For this reason, the arbitration clause was agreed under compulsion and hence involuntarily. Nevertheless, the court also ruled that under German law the FC Homburg had a claim for being licensed and that the Deutscher Fußball Bund could not insist on the arbitral jurisdiction as this would only be the case if the arbitral jurisdiction would be necessary in order to maintain the orderly gaming operations.<sup>91</sup> Since the dispute in the 'London-decision' only dealt with questions about the prohibition of certain kinds of shirt-sponsoring and hence did not affect the orderly gaming operations, the arbitration was not held necessary in this sense.<sup>92</sup> Therefore, the case perfectly illustrates how national courts could possibly handle the problem of such mandatory pre-dispute arbitration clauses. However, at the same time it unfortunately does not give an answer to the important question where the interference of the gaming operations begins with the consequence that the arbitral jurisdiction would be required in order to maintain these orderly gaming operations and thus where a mandatory pre-dispute arbitration clause could be valid.

c) According to an approach in the common-law case law, namely by the Court of Appeal of New South Wales<sup>93</sup> and the High Court of England<sup>94</sup>, arbitration clauses are consented voluntarily unless the consent is based on 'undue compulsion'. Since the access to the traditional courts up to that point is waived voluntarily, the guarantee of access to justice as well as the principles of arbitration are not contravened.<sup>95</sup>

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<sup>89</sup> Axel Bruck *Der Sportler und die institutionelle Sportgerichtsbarkeit* (2016) 52.

<sup>90</sup> *FC Homburg v Deutscher Fußballbund* (1989) LG Frankfurt, 2/13 O 194/88.

<sup>91</sup> Axel Bruck op cit note 89.

<sup>92</sup> *Stanley Roberts v Federation Internationale de Basketball* supra note 86, 523.

<sup>93</sup> *Raguz v Sullivan* (2001) reprinted in Bulletin ASA, 335.

<sup>94</sup> *Stretford v The Football Association Limited & Barry Bright* (2006) EWHC 479 (Ch).

<sup>95</sup> R H McLaren 'Sports Law Arbitration by CAS: Is It the Same as International Arbitration?' (2001) 29 *Pepperdine Law Review* 101, 105.

The mere superiority of one of the parties however, does not by itself constitute such an 'undue compulsion'.

d) Another approach to tackle the mandatory pre-dispute arbitration clauses is the concept of unconscionability.<sup>96</sup> Under US-law a contract clause is unconscionable if 'in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract'<sup>97</sup> which requires the 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party'<sup>98</sup>. As illustrated above, the alternatives at choice for the athlete can very well be considered as a lack of opportunity to make such a meaningful choice. Hence, the crucial question becomes, whether the mandatory pre-dispute arbitration clause unreasonably favours the organization imposing the agreement or whether the goal of an internationally uniform, quick, effective and expert decision making body prevails.<sup>99</sup> Therefore, under this approach once again the issue depends on a general balancing of interests which must be made on a case-by-case basis. In this context, one must bear in mind that the impending arbitral proceeding does not necessarily have to be unfair. In fact, the compulsory independence and impartiality of the arbitral proceeding and its remedies should ensure a fair and neutral way of dispute resolution.<sup>100</sup>

e) Under all the above illustrated approaches for the assessment of mandatory pre-dispute arbitration clauses, the legality of such clauses depends on the particular case in question. However, it must be noted that their validity can at most be accepted if the subsequent arbitral proceeding fulfils the requirements of independence and impartiality. A closer look on the assessment of mandatory pre-dispute arbitration clauses will be taken in the following case study of *Claudia Pechstein vs. the International Skating Union*.

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<sup>96</sup> Stephen A Kaufmann op cit note 54, 547.

<sup>97</sup> Uniform Commercial Code s 2-302(1) (1977).

<sup>98</sup> *Williams v. Walker-Thomas Furniture Co.* (1965) 350 F.2d 445 (D.C. Cir. 1965) 449-50.

<sup>99</sup> Stephen A Kaufmann op cit note 54, 547.

<sup>100</sup> Stephen A Kaufmann op cit note 54, 548.

### C. Case study: *Claudia Pechstein vs. the International Skating Union*

In the following chapter the dissertation will make use of a detailed case study of *Claudia Pechstein vs. the International Skating Union*.

#### I. The case study methodology

A case study ‘investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident’.<sup>101</sup>

For this purpose, the case study method will be used in the following for the analysis of the above illustrated legal questions in practice.

Mostly used in social science, the case study method has been adopted to several fields of science including law. A legal case study precisely illustrates the examination of facts in context and thus often entails additional approaches of how the actors grasp the legal phenomena in practice.<sup>102</sup> Such an analysis of existent real-life situations provides a different perspective to a question and calls attention to aspects of the issue which in theory do not seem to exist. Thereby, it ‘may help to understand how laws are understood, and how and why they are applied and misapplied, subverted, complied with or rejected.’<sup>103</sup> As a basis for the application of theoretic ideas and academic approaches, the method also serves as a practical inspection of such ideas and approaches itself. Moreover, it allows deep insights into specific contemporary processes whose conclusions might also be applicable to similar cases and whose results might bring solutions for other phenomena as well.<sup>104</sup> At best, it can even provide requirements under which the so found rule may generally be applied.

Despite these advantages, the case study methodology does not come without its difficulties. A common criticism of the method is that its conclusion can be dependent on a single subject or case which makes it difficult to generalize its findings.<sup>105</sup> For this reason Yin raised the question ‘How can you generalise from a single case?’<sup>106</sup>. He considered the case methodology ‘microscopic’ because of the usually limited

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<sup>101</sup> R K Yin *Case Study Research: Design and Methods* (1994) 2 ed, 17.

<sup>102</sup> Lisa Webley ‘Stumbling Blocks in Empirical Legal Research: Case Study Research’ (2016) 2 *Law and Method*.

<sup>103</sup> Lisa Webley op cit note 102, 3.

<sup>104</sup> Lisa Webley op cit note 102, 4.

<sup>105</sup> Tellis, W. M. ‘Application of a Case Study Methodology’ (1997) *The Qualitative Report Vol 3*, 1-19, available at: <http://nsuworks.nova.edu/tqr/vol3/iss3/1>.

<sup>106</sup> R K Yin op cit note 101 at 21.

sampling cases. Therefore, the reliability and generality of its findings and conclusions are subject to scepticism especially when a small sampling is examined.<sup>107</sup>

Moreover, a common criticism regarding case studies is its supposed 'lack of rigour'. In this context, Yin notes that 'too many times, the case study investigator has been sloppy, and has allowed equivocal evidence or biased views to influence the direction of the findings and conclusions'.<sup>108</sup> In consequence of this lack of rigour and the uncertainty about the capability to transfer a general conclusion from the possibly isolated case, the method is susceptible to biased interpretation of its result.

Nevertheless, the methodology of case studies is used frequently as it often is the only way to create a link between the theoretic assessments and the real-life context.

Thereby it serves at least to illuminate the difficulties of the examined problem and the applicability of the abstract findings in practice.

It is submitted that the advantages of the case study method prevail over its disadvantages. If the above-mentioned risks are recognized in advance, these problems can be prevented by choosing a significant case which reflects a general problem rather than an individual one.

In the case of *Claudia Pechstein vs. the International Skating Union* the enormous significance of the decision of the German national courts and especially of the Federal Supreme Court of Germany was obvious from the start of the dispute. The legal sport community as well as the federations themselves were aware of the wide-ranging signal originating from such a decision. The long-lasting goal of exclusive jurisdiction without the national control of traditional courts was at risk. Therefore, the case was predestined to create another landmark statement regarding sport arbitration in general comparable to the Gundel. The efforts of sport federations to achieve a uniform arbitral system and to include such standardized mandatory pre-dispute arbitration clauses uniformly and invariably into the license contracts between the athletes and the federations greatly contributes to the equal legal treatment of such agreements. Therefore, the above-mentioned risk to incorrectly generalize the findings of an isolated case is reduced so that the Pechstein case can well be used in order to clarify the above presented problem of mandatory pre-dispute arbitration clauses in the specific context of agreements between athletes and federations.

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<sup>107</sup> Zaidah Zainal 'Case study as a research method' (2007) *Jurnal Kemanusiaan* bil.9.

<sup>108</sup> Yin R K op cit note 101 at 21.

For this purpose, a brief overview of the background facts of the case followed by the summarized proceedings will demonstrate in which context the theoretic question of the validity of such agreements usually arises and how wide the consequences of the answer to this question reach. The different approaches of the particular courts will be considered and analysed. Thereby, the scope of the case's relevance is not limited solely to mandatory arbitration clauses but also includes the above discussed question of the independence and impartiality of the Court of Arbitration for Sport.

## II. The background of the case

The case of the well-known German speed skating star *Claudia Pechstein vs. the International Skating Union* is probably the most discussed dispute about the voluntariness of mandatory pre-dispute arbitration clauses. Since the start of her outstanding career in 1988, Pechstein won several medals at World, European and National championships as well as five gold and two bronze medals at the Olympics which makes her one of the most successful winter sport athletes of all time.<sup>109</sup> During the World Championships in Norway 2009 the doping control evidenced that Pechstein had irregular levels of reticulocytes in her blood which exceeded the permitted maximum value. Nevertheless, she was never tested positive as to any forbidden substances during any of her repeated tests. By that time however, the sole irregular blood values sufficed to establish an indirect evidence of doping. In consequence, Pechstein as the first athlete ever was suspended for two years based only on the circumstantial evidence regarding her blood values. Shortly after her suspension the rules of the World Anti-Doping Agency (WADA) changed and the possibility of such a suspension grounded on indirect evidence only was abolished. Meanwhile, various medical experts attest that the irregular levels of reticulocytes in Pechstein's blood were caused by a genetic aberration inherited from her father.<sup>110</sup>

In consequence of her doping-suspension, disciplinary proceedings were also initiated by Pechstein's employer, the German Federal Police. However, as there was no final proof of blood doping the proceedings were stopped. After the refusal of Pechstein's application for unpaid leave in order to be able to continue her training, she suffered a nervous breakdown.

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<sup>109</sup> Wikipedia: Claudia Pechstein.

<sup>110</sup> Ibid.

### III. The judicial proceedings

#### 1. The proceeding at the Court of Arbitration for Sport

In order to take part in international competitions and tournaments organized by the International Skating Union Pechstein initially signed a declaration which excluded her from the access to traditional courts and acknowledged the jurisdiction of the Court of Arbitration for Sport for any legal disputes with the International Skating Union or its members.<sup>111</sup> Additionally, Pechstein signed an athlete-agreement with the Deutsche Eisschnelllauf-Gemeinschaft (DESG) containing a mandatory pre-dispute arbitration clause.<sup>112</sup> This agreement including the arbitration clause was required in order to be supported and nominated by the Deutsche Eisschnelllauf-Gemeinschaft for the international competitions of the International Skating Union. After her doping-suspension because of the increased blood values, Pechstein as well as the Deutsche Eisschnelllauf-Gemeinschaft brought the case to the Court of Arbitration for Sport claiming that Pechstein had never doped and that the irregular levels of reticulocytes in Pechstein's blood were caused by the genetic aberration inherited from her father. Unsurprisingly, in November 2009 the Court of Arbitration for Sport dismissed this appeal and confirmed the suspension, finding no evidence of such an inheritance.<sup>113</sup>

#### 2. The proceeding at the Swiss Federal Tribunal

Subsequently to the confirmation of her suspension Pechstein attempted to challenge the decision of the Court of Arbitration for Sport at the Swiss Federal Tribunal as provided for by the Code of Sports-related Arbitration.<sup>114</sup> Pechstein claimed that because of a new kind of diagnostic analysis developed after the decision of the Court of Arbitration for Sport her genetic aberration could be proven. Therefore, the decision of the Court of Arbitration for Sport should be annulled and the case should be dealt with by the Court of Arbitration for Sport once again. In fact, such a procedure

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<sup>111</sup> *Claudia Pechstein v The International Skating Union and Deutsche Eisschnelllauf-Gemeinschaft* (2014) LG München I 37 O 28331/12.

<sup>112</sup> *Ibid.*

<sup>113</sup> *P. v. International Skating Union* (2009) CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union* (2009), CAS 2009/A/1913.

<sup>114</sup> <http://www.tas-cas.org/en/20questions.asp/4-3-231-1010-4-1-1/5-0-1010-13-0-0>.

generally is possible if one of the parties brings forward new evidence which could not have been brought to the court in the first place, except from those evidences which only occurred after the decision.<sup>115</sup> The new medical expert assessments however, were issued after the decision of the Court of Arbitration for Sport so that their ability to serve as new evidence was doubted by the Swiss Federal Tribunal. Moreover, the tribunal stated that Pechstein had already argued before that her irregular blood-values were caused by a genetic aberration. Hence, the Swiss Federal Tribunal found that the challenge of the decision of the Court of Arbitration for Sport was not justified as it only aimed to achieve a second review of the same facts.<sup>116</sup> In September 2010 the review was dismissed.

### **3. The proceeding at the Regional Court Munich**

After the refusal at the supposed courts for sport disputes, Pechstein tried to sue the International Skating Union and the Deutsche Eisschnelllauf-Gemeinschaft for damages before German state courts. Whilst the International Skating Union imposed the doping ban of Pechstein, the Deutsche Eisschnelllauf-Gemeinschaft was involved in its enforcement. Pechstein requested that the court declare the doping suspension illegal and claimed monetary compensation for lost profit as well as for pain and suffering.

In order to justify its own jurisdiction and hence the admissibility of the claim, the Regional Court Munich had to examine the validity of the arbitration agreements signed by Pechstein. In this context both skating unions argued that Pechstein was bound to the arbitral jurisdiction and its review as well as by the arbitral award with *res judicata* effect. In contrast to this, Pechstein argued that she signed the arbitration agreements involuntarily as it was the only option for her.<sup>117</sup> The Regional Court Munich examined the two different arbitration agreements under the respective law of the place where the arbitration was agreed on. Therefore, the arbitration agreement with the Deutsche Eisschnelllauf-Gemeinschaft was assessed under German law whilst the agreement with the International Skating Union was evaluated under Swiss law. The court held that under German law in situations of an obvious imbalance

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<sup>115</sup> Art. 123 (2)(a). 2 Bundesgerichtsgesetz (BGG).

<sup>116</sup> *Claudia Pechstein v The International Skating Union and Deutsche Eisschnelllauf-Gemeinschaft* (2010) 4A\_612/2009.

<sup>117</sup> *Claudia Pechstein v The International Skating Union and Deutsche Eisschnelllauf-Gemeinschaft* supra note 111.

between the contractual parties, the freedom of contract can be restricted and its outcomes adjusted according to article 138(1) of the BGB (Bürgerliches Gesetzbuch), whilst under Swiss law the provision of article 27(2) ZGB (Zivilgesetzbuch) prohibits an excessive bound of one of the parties. This excessiveness was reasoned with the guarantee of access to justice in section 6(1) ECHR (European Convention on Human Rights). The importance of this right requires that it can only be waived voluntarily. However, in the light of the already examined monopolistic structure of sport federations, athletes have no real choice other than signing such an agreement in order to practice their sport professionally and compete internationally. Thus, the voluntariness of the arbitration agreement which in the view of the court is required under both legal systems, was not fulfilled. Neither was it necessary to object to the agreements as they were void anyway. Nonetheless, the Regional Court Munich held that it could not judge the lawfulness of the doping suspension. According to the judges, the fact that Pechstein and her lawyers entered the proceedings at the Court of Arbitration for Sport without challenging the arbitral proceeding gave legal force its decision.<sup>118</sup>

#### **4. The proceeding at the Higher Regional Court Munich**

Pechstein appealed against the Regional Courts rejection of her claim for compensation against the International Skating Union. However, she accepted the rejection regarding her claims against the Deutsche Eisschnelllauf-Gemeinschaft. The Higher Regional Court Munich (Oberlandesgericht München) confirmed the invalidity of the arbitration agreement between the International Skating Union and Pechstein. In contrast to the reasoning of the Regional Court however, the Higher Regional Court did not justify the invalidity because of provisions of the civil law but because of provision of the competition law<sup>119</sup>. The sole involuntariness of the arbitration agreement does not necessarily make the arbitration agreement void.<sup>120</sup> In fact, there are good reasons for the mandatory arbitration agreements as they ensure a uniform way of dispute settlement and hence equal opportunities for the athletes. Nevertheless, if the athlete had a real choice between a neutral and impartial structured arbitration pro-

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<sup>118</sup> *Claudia Pechstein v The International Skating Union and Deutsche Eisschnelllauf-Gemeinschaft* supra note 111.

<sup>119</sup> Art 134 BGB with art 19(1)(4)(2) GWB old version.

<sup>120</sup> *Claudia Pechstein v The International Skating Union* (2015) U 1110/14 Kart reprinted in *SchiedsVZ* 2015, 40.

ceeding and the one of the federation favouring structured Court of Arbitration for Sport, the athlete would very likely choose the neutral one. Therefore, the mandatory jurisdiction of the imbalanced structured Court of Arbitration for Sport constitutes a misuse of the monopolistic position of the International Skating Union which makes the arbitration agreement void under German competition law.<sup>121</sup> The assumption of an unbalanced structure of the Court of Arbitration for Sport and the International Council of Arbitration for Sport was mainly based on the same arguments that were given in the evaluation of the independence of the Court of Arbitration for Sport in this thesis. Especially the composition of the list of arbitrators disregards the interests of the athletes and hence confirms the impartial nature of the Court of Arbitration for Sport.<sup>122</sup>

Additionally, the Higher Regional Court Munich disagreed with the ruling of the Regional Court of Munich in terms of the legal force of the ruling of the Court of Arbitration for Sport. The recognition of the decision of the Court of Arbitration for Sport would affect the public order as the misuse of the monopolistic position of the International Skating Union constitutes a violation of fundamental elements of the German legal system. The recognition of such an unlawful ruling would keep up this misuse and therefore contravenes the purpose of the provisions of the competition law.<sup>123</sup>

## **5. The proceeding at the Federal Supreme Court of Germany**

The Federal Supreme Court of Germany overruled the decision of the Higher Regional Court Munich by declaring Pechstein's claim inadmissible because of a valid arbitration agreement.<sup>124</sup>

The Court stated that although the International Skating Union has a monopolistic position, the question of misuse of this position depends on a general balancing of interests, which according to the judges did not justify the assumption of a misuse by the International Skating Union. In fact, the court accepted the Court of Arbitration for Sport as a true court of arbitration which in the face of the establishment of the International Council of Arbitration for Sport and the related structural reforms is

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<sup>121</sup> Supra note 119.

<sup>122</sup> *Claudia Pechstein v The International Skating Union* supra note 120, 45.

<sup>123</sup> *Claudia Pechstein v The International Skating Union* supra note 120, 46.

<sup>124</sup> *Claudia Pechstein v The International Skating Union* (2015) KZR 6/15.

independent enough to guarantee a fair trial to the opponents. The composition of the list of arbitrators does not alter the fact that the Court of Arbitration for Sport and its particular formations are sufficiently impartial as the interests of the athletes do not necessarily contravene those of the federations. The court stated that the fight against doping is rather in the interests of both. Moreover, the possibility of a uniform and fast-reacting dispute settlement body brings benefits for the federations as well as for the athletes. Any remaining doubts about the impartiality of the Court of Arbitration for Sport are removed by the rules of procedure of the Court of Arbitration for Sport which ensures the independence and neutrality of the panel. The opportunity to access the Swiss Federal Tribunal emphasizes the sufficiently granted rights of the athletes. Whereas a right to access the national courts of Germany for a review of the already decided case does not exist.<sup>125</sup>

Subsequent to the decision Pechstein and her lawyers announced that they will bring the case to the Federal Constitutional Court of Germany whose judgment is still pending.

#### **IV. Analysis of the case**

The case of *Pechstein vs. the International Skating Union* is probably the most important legal dispute in sports since the reform of the Court of Arbitration for Sport in the aftermath of the Gundel decision. With its decision that mandatory pre-dispute arbitration clauses should generally be void, the Regional Court Munich initially questioned the whole system of arbitration in sports. Based on this assumption, a uniform handling of all sport related disputes would have been impossible to ensure. In contrast to this, the decision of the Higher Regional Court Munich suggested that such mandatory arbitration clauses could be valid if the Court of Arbitration for Sport finally provided an impartial and neutral arbitral procedure by reforming its structure once again. The Federal Supreme Court Germany however, disagreed with this view and held that because of the establishment of the International Council of Arbitration for Sport the composition of the Court of Arbitration for Sport does not justify the assumption of the invalidity of such arbitration agreements. The pending decision of the Federal Constitutional Court of Germany is awaited with interest.

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<sup>125</sup> Ibid.

Ultimately, the legal reasoning for these different decisions must be precisely analysed in order to ultimately evaluate the validity of mandatory pre-dispute arbitration clauses. In this context there are mainly two questions that must be answered and on which the national courts of Germany disagreed: First, does the lack of alternatives for the athletes and the resulting involuntariness of such arbitration agreements necessarily make these agreements void? And if not, does the quality of the procedure at the Court of Arbitration for Sport result in the invalidity of such agreements?

### **1. General invalidity of involuntary arbitration agreements**

In the first instance of the proceedings at the national courts of Germany the Regional Court Munich held that mandatory arbitration agreements with athletes are void per se as they contravene the principle of voluntariness in arbitration.<sup>126</sup> In this context the court precisely illustrated the lack of alternatives for the athletes and the imbalance of powers of the contractual parties. According to its decision, the importance of the right of access to the court which is ensured by the German Constitution (Grundgesetz)<sup>127</sup> as well as by the European Convention on Human Rights<sup>128</sup> requires the arbitration agreement to be completely voluntary. Therefore, a decision made without any serious alternatives cannot bind a party to an arbitration agreement.

In contrast to this, the Higher Regional Court Munich stated that despite this involuntariness, arbitration agreements could be valid if the court of arbitration and its proceeding guarantees a fair trial to both parties as required by the right of access to the court. Notwithstanding its different findings regarding the fair trial with respect to the independence and impartiality of the Court of Arbitration for Sport, the Federal Supreme Court of Germany at least confirmed this statement of the Higher Regional Court Munich. The special features of sports such as its internationality and its fast-moving nature as well as the need for a uniform and consistent handling of all sport disputes require a prescribed arbitral jurisdiction in order to maintain the functionality of sports in general. This legitimate purpose is in accordance with the interests of the athletes as they depend on such a functioning sport system and its uniform rules in order to exercise their sport professionally. Nevertheless, such a sport system and

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<sup>126</sup> *Claudia Pechstein v The International Skating Union and Deutsche Eisschnelllauf-Gemeinschaft* supra note 111.

<sup>127</sup> Article 101 (1)(2) of the German Constitution (Grundgesetz).

<sup>128</sup> Article 6(1) of the European Convention on Human Rights (1950).

more than anything its dispute settlement body - the Court of Arbitration for Sport - needs to fulfil the standards of a fair trial in respect of the requirements of independence and impartiality. Only then, the voluntariness of the arbitral agreement can recede into the background as the need for the protection of the right of a fair trial is ensured anyway.

This finding is also consistent with the German law as article 11 of the recently passed anti-doping law (Anti-Doping-Gesetz) recognizes the right of the federations to insist on an arbitration agreement as a necessary condition for participation in its competitions. Moreover, in 1998 article 1025(2) of the code of civil procedure (Zivilprozessordnung) was removed which originally ruled that an arbitration agreement is void if one of the party uses its economic or social power to force the other party to agree on the arbitration. This general change was justified by the reasoning that under the premise of a balanced composition of the court of arbitration and a fair trial, such an arbitral procedure cannot constitute a disadvantage for any of the parties.<sup>129</sup>

Therefore, the first-instance ruling of the Regional Court Munich in this respect is too general. If pre-dispute arbitration clauses in general are permitted, then the sole superiority of one party or its stronger negotiation position cannot affect the validity of the arbitration agreement just by itself. In fact, a certain degree of imbalance in the negotiation of an agreement for example between a commercial enterprise and private individual is a typical characteristic of negotiations. Therefore, the crucial aspect in this matter is not the imbalance of powers during the negotiation of the pre-dispute arbitration agreement but the imbalance of powers during the arbitral procedure itself. Consequently, a mandatory and hence involuntary arbitration agreement can be valid, as long as the arbitral system provides a fair trial for the disputing parties. However, if the arbitration system or its dispute settlement body is structured in an imbalanced way or if the way of negotiation constitutes a breach of the law such as the misuse of a monopolistic position does, the arbitration agreement nevertheless is void.

This even more applies for licence contracts containing a mandatory pre-dispute arbitration agreement. In the face of the special requirements of sports law, mandatory and hence involuntary arbitration agreements between the athletes and their federations can still be valid as long as the Court of Arbitration for Sport provides a fair

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<sup>129</sup> BT-Drucksache. 13/5274, 34.

and independent procedure in terms of the standards of the right to a fair trial codified by the European Convention<sup>130</sup> of Human Rights as well as by the German Constitution<sup>131</sup>.

## **2. Invalidity based on the structure of the Court of Arbitration for Sport**

Since the validity of mandatory arbitration agreements thus depends on the quality of the provided system of arbitration, the different assessments of the Higher Regional Court Munich and the Federal Supreme Court of Germany have to be considered.

In the face of the above examined question of sufficient independence of the Court of Arbitration for Sport and the concluded lack of such independence, the latest decision of the Federal Supreme Court of Germany seems to be unreasonable.

Firstly, the Federal Supreme Court of Germany partly relied upon wrong facts as a basis for its considerations.<sup>132</sup> The judges assumed that the president of the of the particular formation of the Court of Arbitration for Sport in a procedure of the Appeals Arbitration Division was only appointed by the president of the Appeals Arbitration Division if the parties cannot agree on a president of the formation by their own.<sup>133</sup> However, according to section 54 of the Code of Court of Arbitration for Sport, in the case of an Appeals Arbitration procedure, the president of the formation of the Court of Arbitration for Sport is always directly chosen by the president of the Appeals Arbitration Division.<sup>134</sup> This incorrect factual assumption regarding the composition of the panel could possibly have had an impact on the assessment of the independence of the Court of Arbitration for Sport. But even besides that, the findings of the Federal Supreme Court of Germany do not convince in other respects as well.

Although the fight against doping in theory might be in the interests of the federations as well as of the athletes, the reality is somewhat far from that. In fact, at the Court of Arbitration for Sport, athletes and federations will usually be opponents disputing about contradictions regarding the realization of those doping rules for example. If the composition of the International Council of Arbitration for Sport and

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<sup>130</sup> Supra note 129.

<sup>131</sup> Supra note 127.

<sup>132</sup> Pia Lorenz 'Urteil gegen Claudia Pechstein: BGH entschied auf falscher Tatsachengrundlage' Available at *Legal Tribune Online*: [https://www.lto.de/persistent/a\\_id/19839/](https://www.lto.de/persistent/a_id/19839/).

<sup>133</sup> Supra note 124.

<sup>134</sup> Supra note 16, s 54.

the Court of Arbitration for Sport with its list of arbitrators generally favours the interests of the federations as it does at present, the requirements for a truly independent court of arbitrations are not fulfilled.

By noting that sport federations unexceptionally act in the same interests as the athletes, the Federal Supreme Court of Germany fails to recognize that the interests of the federations and its acting organs - just like those of the athletes - are not always as unselfish and beneficial for the fight against doping as they should be. In fact, in the light of the recent doping scandals in Russia<sup>135</sup> and the bribery scandals at some sport federations<sup>136</sup>, a certain level of distrust against the supposedly good purposes of the federations seems to be more than appropriate. Instead the court's decision naively gives freedom to the federations to act without any impartial and independent legal control. The mistake in this reasoning becomes even more evident if it is transferred to a more usual legal context: Nobody would disagree that an administrative court cannot be influenced by the public authorities just because the proper execution of the administrative system is in the supposed interests of all parties. The same logic applies to arbitration in sports law.

In addition, under the understanding of the Federal Supreme Court of Germany the federations are free to fight doping by any means and at all costs including collateral damages because of collective punishments or suspensions despite unclear states of evidence as happened in the Pechstein case. Such a method however, even though it might be effective in preventing doping, contravenes the principle of a fair trial and most certainly does not match the interests of the athletes who thus - against the finding of the Court - become victims of the structure of the Court of Arbitration for Sport.

Therefore, the imbalanced one-sided structure of the Court of Arbitration for Sport cannot be considered independent enough to guarantee a fair trial to the opponents as the Federal Supreme Court of Germany assumed. Consequently, the result of the required balance of interests turns out differently and hence justifies the assumption that the International Skating Union misused its monopolistic position which makes the arbitration agreement void. The additional conclusion of the Higher Regional

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<sup>135</sup> Luke Harding 'IOC accused of 'backroom deals' with Russia over doping scandal' (2018) The Guardian online available at: <https://www.theguardian.com/sport/2018/jan/12/ioc-accused-of-backroom-deals-with-russia-over-doping-scandal>.

<sup>136</sup> Wikipedia: 2002 Winter Olympic bid scandal.

Court Munich that the recognition of the legal force of such a judgement of the Court of Arbitration for Sport would preserve this misuse is consequent and thus correct.

## **V. Conclusion of the case study**

The case of *Claudia Pechstein vs. the International Skating Union* illustrates the imbalanced structure of the Court of Arbitration for Sport as well as its effects and consequences in practice. It demonstrates how single professional athletes from one day to the other can fall victim to the current federation-friendly system of arbitration for sport and how little they can do to prevent it. Claudia Pechstein was a flagship athlete and world champion whose lifetime achievements have been destroyed by this system. It demonstrates how wrongful the sport federations under the current system can pursue their goals without any truly independent and impartial control if they can merely show that their purposes seem reasonable.

### **1. Conclusion regarding the provided system of arbitration**

As shown for the fight against doping, the federations are free to pursue their interests without any control. This zealous behaviour can quickly become a burden to innocent athletes. A fair trial comparable to public systems of justice is not ensured in this way. This is underlined by the fact that the burden of proof for the origin of the increased blood values was borne by Pechstein who hence had to prove that she inherited a genetic aberration from her father. Such evidence however, is very hard to adduce. On the other hand, the International Skating Union did not have to prove that Pechstein took any forbidden substances. In fact, all the repeated doping-tests never found direct evidence for the ingestion of such prohibited substances. Instead, only the irregular blood values of Pechstein which could have been caused by both possible origins were enough to assume the ingestion of such substances and convict her for doping. Although this possibility of indirect evidence has been removed, it nevertheless is an example for the wrongfulness of the means which the federations can use to pursue their possibly even legitimate objectives without independent and impartial control.

In addition, the current system of appeal at the Swiss Federal Tribunal does not effectively review the procedure of the Court of Arbitration for Sport. Instead, it rather upholds the assessments of the Court of Arbitration for Sport as it still considered it a

truly independent and impartial court of arbitration despite its current structure. Therefore, it seems to be very unlikely that this repeated evaluation will change and that the Swiss Federal Tribunal will critically reflect on the structure of the Court of Arbitration for Sport. The Pechstein case confirms this suspicion. Although the practice of indirect evidence clearly is one-sided, disadvantageous and disproportionate in terms of a fair trial, the Federal Swiss Tribunal has not raised any concerns against this practice. In contrast to all of the three national courts of Germany, the Swiss Federal Tribunal did not even examine the monopolistic position of the International Skating Union, not to mention the questionable independence of the Court of Arbitration for Sport.

In summary, the case provided a clear and sobering example of how the examined structural imbalance in real-life affects the dispute between an athlete and its federation. It shows how disadvantaged a single athlete is against the common interests of the federations and the system of arbitration which favours these interests and their effective implementation. Moreover, it gives a warning of the possible consequences of such uncontrolled bias in favour of the interests of the federations. Against the assumption of the Federal Court of Germany, the interests of the athletes are generally not the same as those of the federations and hence will not be represented equally and effectively if the structure of the Court of Arbitration for Sport does not change. Until then, the recklessness of the sports arbitration system possibly ruins the careers of further innocent athletes for the good of the maintenance of the self-administered justice of the federations.

## **2. Conclusion regarding the review by the German national courts**

Another important aspect of the Pechstein case is the way how the national courts of Germany reviewed the decision of the Court of Arbitration for Sport. All three courts reached different decisions regarding the validity of mandatory pre-dispute arbitration clauses in sports. Whilst the Regional Court Munich held that such agreements are involuntary and thus void, the Higher Regional Court Munich as well as the Federal Supreme Court of Germany stated that such agreements can generally be valid if the federation which insists on the arbitration clause in the context of its licence agreement does not misuse its monopolistic position. In terms of this misuse, in turn, the two latter courts came to different conclusions. These inconsistencies emphasize the legal uncertainty about the validity of most of the arbitration agreements between

athletes and federations since these agreements usually are made in the same way. They once again show that the federations use their power to the maximum extent permitted by the law. Notwithstanding its legal assessment, the federations clearly pursue their own interests rather than trying to provide a fair and balanced system of arbitration. Therefore, the establishment of the International Council of Arbitration for Sport and the related reforms have not amounted to a real attempt to provide an independent and impartial dispute settlement body but a targeted measure to maintain the legal autonomy regarding sports law and its disputes without losing too much influence.

Even though the German courts obviously ruled on a German law basis, the applied principles such as the guarantee of a fair trial, the right of access to the court and the freedom of contract are all general principles of law. Moreover, since the goal of the Court of Arbitration for Sport is to achieve uniform standards for international legal sport disputes, the objectives which the Court of Arbitration for Sport is aiming for should include the fulfilment of the requirements for arbitration of all law systems.

The differing findings of the Higher Regional Court Munich and the Federal Supreme Court of Germany also highlight the fine line of the balancing of interests in this matter.

The considered special features of sports - such as its internationality, its need for uniformity and fast decisions as well as for specific expertise regarding the rules of several kinds of sports - in fact require a system of dispute settlement that satisfies these demands. The difficulty to bring these aspects in accordance with the guarantee of a fair trial has been the reason for the differing decisions of the two courts and finally also for the fate of Claudia Pechstein. Nevertheless, from this point of view, it would be too simple to just call for a general national jurisdiction for legal sport disputes. In fact, the concept of arbitration perfectly serves to fulfil the special demands of sports law. Admittedly, it can well be argued like Kaufmann does, 'that municipal judges possess the capabilities to handle disputes in the area of international sports law' as they 'constantly hear cases that cover an infinite spectrum of issues' and on which they are no experts and 'yet few would argue that a separate court system should exist for each and every legal topic'<sup>137</sup>. But nonetheless, the need for international uniformity and fast decisions still constitutes special demands that can best be dealt with by arbitration.

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<sup>137</sup> Stephen A Kaufmann op cit note 54, 549.

After all, however, such arbitration system at the same time needs to guarantee a fair trial and in particular the independence and impartiality of the court of arbitration. As presented above, the Court of Arbitration for Sport does not yet ensure such a fair trial. For this reason, as long as the structure and the composition of the Court of Arbitration for Sport is unreformed, national courts can consider the mandatory pre-dispute arbitration agreements to be invalid and hence assume their own jurisdiction for the dispute as happened in the Pechstein case at the Higher Regional Court Munich. How exactly these needs for a reformation of the Court of Arbitration for Sport could be met in order to bring the different demands in accordance will be examined in chapter E.

#### **D. Comparison: Assessment of the findings from a South African perspective**

Under South African law according to section 34 of the Bill of Rights in Chapter 2 of the South African Constitution 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'<sup>138</sup>

The above considered general principle of the guarantee of a fair trial and the right of access to the court which in the Pechstein case was deduced from article 6(1) of the European Convention on Human Rights and article 101(1)(2) of the German Constitution is hence given the same high importance under South African law. The provision mainly serves as a protection against the ousting of the jurisdiction of national courts due to ouster clauses in legislation which was a practice in the times of the law system of the apartheid.<sup>139</sup> However, the possibility of alternative dispute settlement such as mediation or arbitration is not affected by this guarantee.<sup>140</sup> Therefore, sport federations can only invoke these alternative ways and in particular arbitration if they want to avoid the national courts of South Africa to decide on their disputes.<sup>141</sup>

For these reasons, the above discussed questions about the validity of mandatory pre-dispute arbitration clauses and the independence of the Court of Arbitration for Sport are also rising from a South African view. As section 34 of the Bill of Rights guarantees the right of access to the court in order to prevent the ousting of the jurisdiction

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<sup>138</sup> The Constitution of the Republic of South Africa (1996) Chapter 2 s 34.

<sup>139</sup> Currie & de Waal *Bill of Rights Handbook* (2013) 6 ed, 708.

<sup>140</sup> Andre M. Louw *Sports Law in South Africa* (2010) 191.

<sup>141</sup> *Ibid.*

of national courts, arbitration agreements and their provided system of arbitration need to fulfil the requirements of such a fair trial in the same way as they need to fulfil them under article 6(1) of the European Convention on Human Rights and article 101(1)(2) of the German Constitution. The balancing of this fundamental right on the one hand and the special features of sports and their juridical needs (which apparently are the same in every country) on the other hand hence require a consistent assessment of this question. Therefore, the above concluded findings apply from a South African perspective to the Court of Arbitration for Sport as well.

#### **E. The future of arbitration in international sports**

The latest judgement of the Federal Supreme Court of Germany in the examined case of *Claudia Pechstein against the International Skating Union* clearly constitutes an important decision for the future of sports disputes and arbitration in sports in particular. The recognition of the Court of Arbitration for Sport as a sufficiently independent and impartial dispute settlement body which considers the interests of the federations as well as these of the athletes confirms the previous findings of the Swiss Federal Tribunal and strengthens the currently provided system of arbitration of the Court of Arbitration for Sport. The scope of this assessment reaches far beyond national or continental borders and rather has global effect on international sports law and its arbitration system as it contributes to the worldwide acceptance of the Court of Arbitration for Sport as an independent and impartial court of arbitration. These far-reaching implications indicate how ground-breaking a contrary decision against the validity of the mandatory pre-dispute arbitration clauses based on the lack of independence of the Court of Arbitration for Sport could have been. Therefore, the dispute between Claudia Pechstein and the International Skating Union has been an extraordinary opportunity for the German national Courts as well as for the whole sport community to urge the Court of Arbitration for Sport for another reformation of its structure for the benefit of a balanced arbitration system which considers the interests of the athletes in the same way as those of the federations and hence is truly independent.

The consequence of such a contrary decision would have been a breach of the uniformity of sports law. Within the scope of the jurisdiction of German courts, athletes could bring their legal disputes to the national courts of Germany and therefore possibly obtain different judgments than athletes in other countries which still would

have to bring their disputes to the Court of Arbitration for Sport. However, it is not very unlikely that national courts of other countries would have followed the way of such a decision of the Federal Supreme Court of Germany up to a point where the Court of Arbitration for Sport had to reform its structure in order to regain uniformity and control over the legal disputes in international sports.

Although the decision of the Constitutional Court of Germany remains to be seen, the present prospect for arbitration in international sports in the aftermath of the Pechstein decision by the Federal Supreme Court of Germany is clear.

### **I. Prospect for arbitration in international sports**

In reality, arbitration in international sports is more dominant and powerful than ever. The efforts to establish a separate and uniform dispute settlement body for sports recognized by the legal community seem to be ultimately achieved. The Court of Arbitration for Sport as well as the sport federations and organisations feel vindicated by the judgement of the Federal Supreme Court of Germany in the Pechstein case. Their strict methods to pursue their goal of an exclusive arbitration system for international sport by enforcing mandatory pre-dispute arbitration agreements seem to be justified as they apparently even have the blessing of the national courts of Germany which they thereby successfully exclude from the jurisdiction in order to avoid the state control by such traditional courts.

In the face of these developments and the general history of the Court of Arbitration for Sport it seems to be highly unlikely that a new reform of the court will be striven for. In fact, if there should have been thoughts to improve the structure of the Court of Arbitration for Sport in order to ensure its true independence, these reform efforts have been given up as a result of the Pechstein decision. Instead, the Court of Arbitration for Sport finds itself in a safe position of self-control instead of state control so that the court can further on act in a carefree way and without consideration of the interests of the athletes. Hence, the representation of these interests will most probably not improve any time soon. Mandatory pre-dispute arbitration clauses will continually be used without hesitation and an athlete who thus becomes a party of a legal dispute at the Court of Arbitration for Sport can still only choose one arbitrator out of the prescribed list of arbitrators created by the federation dominated International Council of Arbitration for Sport.

Therefore, the strengthening of the provided system and its recognition only exists from the perspective of the legal community. The scepticism and concerns of the athletes do not end as they still feel uncomfortable and inconvenient with bringing a legal dispute to the Court of Arbitration for Sport. Their subordination towards the powerful federations and organisations of sports is further on reflected by its system of arbitration and ignored by the ordinary courts. In contrast to this, the superior alliance of interests comprising the global sport federations and organisations enjoys a great level of autonomy<sup>142</sup> and hence is free to pursue their interests by any means possible.

Accordingly, the establishment of the International Council of Arbitration for Sport and the related reforms regarding the reputed improvements of independence of the Court of Arbitration for Sport from the International Olympic Committee and other federations achieved its true purpose, as presented above. The strategy of the International Olympic Committee to rather drop its direct and obvious influence - at least to some degree - by pretending to aim for a completely independent and 'athlete-friendly' court of arbitration in order to prevent the denial of the independent status of the Court of Arbitration for Sport by the international legal community and hence the total loss of influence on the legal sport-proceedings, worked out well.

Consequently, arbitration remains the prevalent way of dispute settlement in sports. This trend of exclusive jurisdiction of arbitration and its recognition by the legal community might serve the interests of international sports and its special features as it supports its uniformity and its entertainment value which are no longer at stake and threatened by inconsistent and slow-moving national jurisdictions. These benefits however, come at high costs and at the expense of the athletes which are deprived of their (constitutional) right of access to the court and the guarantee of a fair trial.

In this context one has to bear in mind that the pursued goals and benefits could easily be achieved in another way without paying such a high price. The special needs of the dispute settlement in international sports law - which are after all best fulfilled by way of dispute settlement through arbitration - could be ensured to the same extent if the arbitration system was reformed in order to safeguard its independence and impartiality. An idea how such a reform and its particularly included changes could

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<sup>142</sup> Andre M. Louw 'An 'anomaly tolerated by the law': Examining the nature and legal significance of the International Sports Governing Body' (2007) 22 *SAPR/PL* 210, 227.

look like is given in the following chapter which makes suggestions for improvements of the current arbitration system in international sports.

## **II. Suggestions for improvements of the international sport arbitration system**

'It appears the [International Olympic Committee] has convinced most legal experts that the Court of Arbitration for Sport will make unprejudiced decisions in the cases it hears. Perhaps then the new challenge that lies ahead for the [International Olympic Committee], is convincing athletes to take advantage of this dispute resolution system that was established primarily for their benefit'.<sup>143</sup> This statement by Stephen A. Kaufmann comes straight to the point. The provided system of international sports arbitration still struggles for the appreciation of the athletes which comprehensibly do not feel represented and fairly treated by the court.

For the purpose of maintaining an effective way of dispute settlement in sports and at the same time improving acceptance by the athletes as well as consistency with the fundamental right of a fair trial and access to the court, the only possible way for the Court of Arbitration for Sport is a reformation of its structure.

As discussed above, there is more than one good reason for legal disputes in sports to be settled by way of arbitration. Nevertheless, the provided system of arbitration for international sports fails to fulfil the requirement of independence and thus of the fundamental right for a fair trial. Therefore, it could only claim legal validity if it was reformed. Such reformation would not only help the Court of Arbitration for Sport to gain acceptance by the athletes but also to 'reinforce its legitimacy and protect its own institutional autonomy and independence', as Foster noted<sup>144</sup>. Furthermore, in consequence of such a reform and the related warranty of independence mandatory pre-dispute arbitration agreements would no longer contravene the right of a fair trial as seen above. As a result of this, such arbitration agreements could legally constitute a mandatory condition for the participation in international sport competitions and therefore also ultimately ensure the uniformity of dispute resolution by way of arbitration in international sports.

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<sup>143</sup> Stephen A Kaufmann op cit note 54, 548.

<sup>144</sup> Ken Foster 'Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence' in Ian S Blackshaw, Robert C Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984-2004* (2006) 420, 40.

The following suggestions for improvements of the Court of Arbitration for Sport attempt to draw a system of arbitration for international sports which satisfies these different requirements in order to create an uncontroversial court of arbitration for sport.

### **1. The funding of the Court of Arbitration for Sport**

The first step to improve the independence of the Court of Arbitration for Sport is to assure its financial autonomy by adjusting its funding system. Although the establishment of the International Council of Arbitration for Sport officially served to guarantee the financial independence of the Court of Arbitration for Sport from the International Olympic Committee<sup>145</sup>, the Court of Arbitration for Sport still obtains his entire funding from the Olympic-governing bodies by receiving one-third from the International Olympic Committee, one-third from the International Federations, and one-third from the National Olympic Committees.<sup>146</sup> Therefore, a restructured funding system providing alternative funding methods would help to reduce the dependence of the Court of Arbitration for Sport from the Olympic Movement. One possibility for such a modification of the funding could be an increase of the fees of the Court of Arbitration for Sport as suggested by Downie.<sup>147</sup> However, such an increase would once again burden the athletes and perhaps even keep them from bringing their disputes to the Court of Arbitration for Sport.

Thus, to provide an alternative funding system for the Court of Arbitration for Sport seems to be rather difficult. What is more, a one-sided funding system as is currently provided does not necessarily contravene the independence of the Court of Arbitration for Sport if other links between the Court of Arbitration for Sport and the Olympic Movement and its governing bodies can be removed.

Alternatively, instead of obtaining the funding directly from the committees and federations, a special fee could be charged on the gains made at professional sport competitions. As these amounts can be traced back on the performance of the athletes as well as on the achievements of the governing bodies, the funding would be obtained by both rather than one-sided. In addition, the fee would not burden the athletes as

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<sup>145</sup> Darren Kane op cit note 14 at 618.

<sup>146</sup> Supra note 22.

<sup>147</sup> Rachell Downie 'Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport' (2011) *Melbourne Journal of International Law* Vol 12, 22.

the amount otherwise would only raise the earnings of the organizations and committees. In that respect, in the end there would not be a significant change of the ultimate source of the funding but at least the method could help to strengthen the trust of the athletes as they would contribute to the funding as well. Thus, the suspicion of the Court of Arbitration for Sport to be influenced or pressured by the Olympic Movement in the light of its one-sided funding system could possibly be reduced in this way.

## **2. The establishment of a 'Union of Athletes'**

Another suggested change in order to support the athletes' acceptance of the Court of Arbitration for Sport and at the same time reduce the extent of influence by the federations and organisations is to finally incorporate the representation of the interests of the athletes.

The most obvious reason for the unbalanced structure of the Court of Arbitration for Sport and thus for its lack of independence is the process of how the International Council of Arbitration for Sport and the Court of Arbitration for Sport are composed. As presented above, the election of the members of the International Council of Arbitration for Sport as well as the nomination of the list of arbitrators at the Court of Arbitration for Sport is mainly controlled by the federations and organisations. In particular, according to section 4 of the Code of the Court of Arbitration for Sport 60 per cent of members of the International Council of Arbitration for Sport are appointed by the committees of the Olympic Movement.<sup>148</sup>

As illustrated earlier, even though section 4 of the Code of the Court of Arbitration for Sport also contains a provision which implies the considerations of the interest of the athletes, there is still no guarantee of the representation of such interests as the provision only requires 'appropriate consultation with a view to safeguarding the interests of the athletes'<sup>149</sup>. In fact, all of the remaining eight International Council of Arbitration for Sport members are chosen by those already elected members and therefore indirectly by the Olympic governing bodies as well.

Furthermore, the members of the International Council of Arbitration for Sport elected in this way are subsequently responsible for the creation of the list of arbitrators

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<sup>148</sup> Ibid.

<sup>149</sup> Supra note 16, s 4(4).

for the Court of Arbitration for Sport with the result that the influence of such federations and organisations even continues to have an effect on the exclusive appointment of the arbitrators of the Court of Arbitration for Sport.

A reform of the election system of the members of the International Council of Arbitration for Sport members could therefore take effect up to the list of arbitrators as well. Such a reform would need to include the representation of the athletes' interests in order to balance the possible influence of the potential parties to a dispute at the Court of Arbitration for Sport.

However, since the athletes do not yet have a common voice to express and advocate their interests towards the federations and organisations it seems to be appropriate to establish a union of athletes<sup>150</sup>. The union's goal would be to safeguard the interests of the athletes directly and not only by way of consultations whose outcome is limited and uncertain. It should be incorporated as another committee which participates in the election of the members of the International Council of Arbitration for Sport and consequently also has indirect influence on the appointment of the arbitrators.

However, to determinate the exact and appropriate extent of its voting power in proportion to the currently already entitled nominating sources (the International Federations, the National Olympic Committees and the International Olympic Committee) proves to be difficult. Although these federations and committees are separate bodies with partly different fields of interests, the ties between the different federations and organisations nevertheless are too tight and their goals too consistent to consider them as totally different groups of interests. Therefore, they should not each have the same power of voting as the entire group of athletes which is also practicing different kinds of sports and participating in diverse competitions and tournaments and though is considered as one group of interests. In fact, both of these two groups of interests should have the same extent of impact on the composition of the International Council of Arbitration for Sport and hence also on the appointment of the arbitrators. What is more, the provision ruling that 20 per cent of members of the International Council of Arbitration for Sport must be 'chosen from among personalities independent of the bodies designating the other members of the ICAS'<sup>151</sup> could even be expanded as these are probably the most independent members of the International Council of Arbitration for Sport.

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<sup>150</sup> Michael Straubel op cit note 57 at 1234.

<sup>151</sup> Supra note 16, s 4(4).

A revised section 4 of the Code of the Court of Arbitration for Sport could be read as follows:

'ICAS is composed of twenty members, experienced jurists appointed in the following manner:

1. two members are appointed by the International Federations (IFs), viz. one by the Association of Summer Olympic IFs (ASOIF) and one by the Association of the Winter Olympic IFs;
2. two members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;
3. two members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;
4. six members are appointed by the Union of Athletes, chosen from within or outside its membership;
5. eight members are appointed by the twelve members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.'

In addition, the union of athletes should be included in the consultation process regarding the election of the president of the Court of Arbitration for Sport by the International Council of Arbitration for Sport prescribed by the Code of the Court of Arbitration for Sport<sup>152</sup>.

With this change, not only the interests of the athletes would be represented at the International Council of Arbitration for Sport to the same extent as those of the federations and organisations but also the general independence of the Court of Arbitration for Sport and hence its over-all acceptance and credibility would be greatly enhanced. These effects would even be reinforced by the fact that the now balanced International Council of Arbitration for Sport would than again - as it is provided anyway - appoint the arbitrators of the Court of Arbitration for Sport in an equally balanced way. Consequently, any concerns regarding the prescribed and exclusive list of arbitrators could be removed by this reform as well with the result that a better balance of the potential influences from the different groups of interests would be ultimately ensured.<sup>153</sup>

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<sup>152</sup> Supra note 16, s 6(2).

<sup>153</sup> Michael Straubel op cit note 57.

### 3. The appointment of the formations of the Court of Arbitration for Sport

Another discussed change regarding the composition of the Court of Arbitration for Sport concerns the appointment of its particular formations. As presented earlier, the present practice of two party-appointed arbitrators and a third mutually agreed arbitrator in the end often leads to an appointment of this third arbitrator and president of the panel by the president of the respective division of the Court of Arbitration for Sport who is appointed again by the International Council of Arbitration for Sport. The election of the panel's president on which the International Council of Arbitration for Sport has indirect influence thus turns out to be the most crucial factor in the composition of the panel and possibly even in the decision of the dispute.

What is more, the practice of party-appointed arbitrators enables the parties to choose biased arbitrators. However, the limitation of this choice to the prescribed list of arbitrators created by the International Council of Arbitration for Sport and the fact that single athletes might not have as good contacts to the listed arbitrators as the officials of the federations and organisations have, creates better chances for the latter to influence the bias of the panel.

To remove this extensive link between the International Council of Arbitration for Sport and the formations of the Court of Arbitration for Sport a lottery system for the appointment of arbitrators is discussed.<sup>154</sup> Such a system would resolve any concerns in terms of the partiality or the bias of the arbitrators. However, the current system provides party-appointed arbitrators because this way of appointment gives the security to the parties of having an advocate on the panel rather than risking to have no representative on it at all.<sup>155</sup> As the aim of the suggested reform is to improve the trust and acceptance of the athletes towards the Court of Arbitration for Sport, such security should not be withdrawn. Furthermore, the appointment of arbitrators by the parties is a traditional practice of arbitration that has prevailed for a long time and in several fields of arbitration such as commercial arbitration.<sup>156</sup>

For these reasons, Straubel suggests a combined system of arbitrator appointment which considers parties' need for the security of choosing one of the arbitrators each

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<sup>154</sup> Michael Straubel op cit note 57 at 1237.

<sup>155</sup> Michael Straubel op cit note 57 at 1238.

<sup>156</sup> Michael Straubel op cit note 57 at 1236; Scott Donahey 'The Independence and Neutrality of Arbitrators' (1992) 9(4) *Journal of International Arbitration* 31, 39–40.

but nevertheless at least increases the chance of having a neutral president as the third member of the panel.<sup>157</sup> These two requirements could be fulfilled if only such president of the formation of the Court of Arbitration for Sport was chosen by lot whilst the other two members are still appointed by the parties. Such a composition of the panel 'would retain the security of appointing a friendly arbitrator, while reducing the insecurity (particularly from the athlete's perspective) of the swing vote arbitrator being selected by an institution that the parties may not trust.'<sup>158</sup>

Although this approach seems to be reasonable, in the face of the above proposed reformations of the composition of the International Council of Arbitration for Sport, the trust in such institution should be improved anyway. The possibility of indirect influence of the federations and organisations through a biased International Council of Arbitration for Sport would no longer exist. Instead, because of the representation of the athletes through the union of athletes and their participation in the election of the International Council of Arbitration for Sport, the reform would constitute a balanced International Council of Arbitration for Sport which can be trusted by the athletes in the first place. Therefore, a change of the system of appointment of the arbitrators in the above suggested way could additionally add a certain degree of independence to the Court of Arbitration for Sport. However, such an adjustment would not necessarily be required as the above suggested change of the composition of the International Council of Arbitration for Sport already serves for the same purpose.

### **III. The realisation of the suggested improvements**

However, as illustrated earlier, in the face of the decision of the Federal Supreme Court of Germany in the Pechstein case and the increasing recognition of the Court of Arbitration for Sport by the legal community, the latest developments do not raise expectations that such a reformation of the Court of Arbitration for Sport seems to be realistic in the foreseeable future. The Court of Arbitration for Sport most certainly will not reform its structure by itself and with no need to do so. Neither will the International Olympic Committee nor any other organisation or federation promote a process which removes their opportunity to exercise influence over the composition of the Court of Arbitration for Sport and hence possibly even over its proceedings.

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<sup>157</sup> Michael Straubel op cit note 57 at 1238.

<sup>158</sup> Michael Straubel op cit note 57 at 1238.

As seen in the context of the Gundel decision, athlete-friendly improvements can apparently only be achieved if certain interests of the International Olympic Committee or other federations are at stake. In such situations of pressure the federations usually pretend to act for the benefit of the athletes but instead actually rather pursue their own interests. This practice can be observed within the jurisprudence of the Court of Arbitration for Sport as well. In the case of the South African Paralympic sprint star Oscar Pistorius<sup>159</sup> for instance the Court of Arbitration for Sport upheld the athlete's appeal against a ruling of the International Association of Athletics Federations which banned Pistorius from professionally competing against able-bodied athletes because of the use of a special prosthesis known as the 'Cheetah Flex-Foot'.<sup>160</sup> However, even in this remarkable and ostensibly athlete-friendly decision the panel explicitly stated that the ruling was limited to the eligibility of Pistorius only and had no general effect.<sup>161</sup> The limitation of the decision's effect raises the suspicion that the actual purpose of the decision was not to prevent discriminatory bans and create legal certainty about the use of the prosthesis but to keep Pistorius competing against able-bodied athletes as he was a spectacular and popular sport star. In this way, the IOC used its opportunity to publicly show its equal treatment of handicapped athletes without risking to set a precedent.

In the face of this strategy, an athlete-friendly structure of the Court of Arbitration can probably only be achieved by pressuring the International Olympic Committee to reform the structure of the Court of Arbitration for Sport once again in order to maintain its exclusive jurisdiction of sports-related legal disputes. Therefore, a judgment of a major court in an important sport nation would be required to set the ball rolling, questioning the recognition of the Court of Arbitration for Sport as a truly independent court of arbitration by the legal community. As the Federal Supreme Court of Germany missed the opportunity to do so, such a decision seems to be very unlikely. What is more, such a decision would bring the respective nation at risk to get left out from international sports because of its inconsistent legal position. Thus, according to the slogan 'the first follower makes the leader' it would not only need such a landmark decision but also subsequent decisions of further courts in other nations to secure that the pioneering state would not be isolated in international sports. Only then the Court of Arbitration for Sport would be forced to reform its structure in order to

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<sup>159</sup> *Pistorius v IAAF* (2008) CAS 2008/A/1480.

<sup>160</sup> Andre M. Louw op cit note 140 at 190.

<sup>161</sup> Andre M. Louw op cit note 140 at 194.

re-establish the required uniformity of dispute settlement in international sports. However, such a process is very hard to launch as its course is unpredictable. Although it is very unlikely that a reform like the suggested one will be realised, it would still constitute a huge advantage for international sports in general in the long run. As Michael Novak noted: 'Sports events do not really exist at all unless there is a certain order and fairness - justice in each event.'<sup>162</sup>

## F. Conclusion

The special features of sports - such as its fast-moving nature and its global competition - indeed require a dispute resolution system that delivers quick and internationally uniform decisions. These criteria are best met by a mandatory dispute resolution system of international arbitration. Therefore, the Court of Arbitration for Sport generally is the appropriate platform for the settlement of sports-related legal disputes. Its creation and development has been a remarkable process which has not come to an end yet.

However, it has been the argument of this dissertation that the mandatory nature of the pre-dispute arbitration agreements included in the licence contracts and athlete agreements contravenes the general principle of voluntariness of arbitration. Nevertheless, as illustrated by the case study of Claudia Pechstein against the International Skating Union (and as confirmed by the decisions of the Higher Regional Court of Munich as well as by the Federal Supreme Court of Germany) such mandatory and hence involuntary arbitration agreements could still be valid if the provided system of arbitration meets the requirements of the fundamental right of access to the court and a fair trial as required, among others, by the German Constitution<sup>163</sup>, the European Convention on Human Rights<sup>164</sup> as well as by the South African Bill of Rights.

However, the assessment of the Court of Arbitration for Sport prevailed that the existing system of arbitration for international sports currently does not meet these requirements in a sufficient manner. In fact, the ties between several sport federations and organisations and their common interests in their capacity as bases of the Olympic movement create a formidable power towards an athlete acting alone. It has been argued that the composition of the International Council of Arbitration for Sport fa-

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<sup>162</sup> Michael Novak *The Joy of Sports: End Zones, Bases, Baskets, Balls, and the Consecration of the American Spirit* (1993) 357.

<sup>163</sup> Supra note 127.

<sup>164</sup> Supra note 38.

vours the common interests of the superior federations and organisations by allowing them to effectively appoint all of the members of the International Council of Arbitration for Sport. In contrast to this, there is still no guarantee for the representation of the interests of the athletes. As a result of this unbalanced structure, the superior federations and organisations are in a position to indirectly influence the appointment of the arbitrators nominated in the exclusive list of arbitrators at the Court of Arbitration for Sport, the election of the presidents of the Ordinary Arbitration Division and of the Appeals Arbitration Division and thus last but not least in many cases also the appointment of the crucial president of the particular formation Court of Arbitration for Sport which finally decides the individual dispute.

For this reason, it has been noted in this dissertation that - against the findings of the Swiss Federal Tribunal and the Federal Supreme Court of Germany - the Court of Arbitration for Sport is not a truly independent court of arbitration and that its provided system of arbitration contravenes the fundamental rights of a fair trial and access to the courts. Under these conditions, the mandatory and thus involuntary arbitration clauses in athlete agreements and licence contracts cannot be considered as being valid so that the jurisdiction of national ordinary courts is not effectively excluded for disputes arising from sports.

In the face of this currently unbalanced structure of the Court of Arbitration for Sport and the resulting lack of independence and impartiality, the only possible way to fulfil the need for a fast-acting and internationally uniform dispute resolution system for international sports and at the same time to ensure the fundamental rights of a fair trial and access to the court, is to reform the current system of arbitration and its legal framework. Only in this way will the two different challenges for such a mandatory court of arbitration for sport-related legal disputes would be met at the same time. Such a reform should include the above suggested changes regarding the funding of the Court of Arbitration for Sport, the composition of the International Council of Arbitration for Sport as well as the composition of the particular panels. The consideration and representation of the athletes' interests in such a reformed structure of the Court of Arbitration for Sport would finally ensure a balanced, independent and impartial system of arbitration which would help the Court of Arbitration for Sport to gain the trust and acceptance of the athletes for whom it was created in the first place and hence to unlock its potential as an ideal alternative body of dispute settlement.

However, despite this assessment of the Court of Arbitration for Sport and the suggested reforms regarding its structure, in the light of the latest decision of the Federal Supreme Court of Germany and the settled case law of the Swiss Federal Tribunal such a reform seems to be very unlikely. In this context, the Gundel decision clearly demonstrated that the Court of Arbitration for Sport will not reform its structure by itself but that a landmark decision of a major court in an important sports nation is required to cause such a reformation. Unfortunately, the Federal Supreme Court of Germany in the Pechstein case missed its opportunity to set the ball rolling and pressure the Court of Arbitration for Sport towards such a reform. It can only be hoped that the upcoming decision of the Constitutional Court of Germany turns the current process upside down and radically changes the view of the legal community towards the Court of Arbitration for Sport and its provided system of arbitration for sports. Only then, one of the basic principles of sports can be ensured for its legal disputes as well: Fair play.

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## **Declaration**

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirements for the <qualification for which the student is registered> in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of <qualification for which the student is registered> dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.