

## **Longitudinal Profiling, Sports Arbitration and The Woman Who Had Nothing to Lose. Some Thoughts on *Pechstein v International Skating Union***

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### **Introduction**

The juridical field's (Bourdieu 1987) willingness to recognise that sports disputes are often best resolved by sporting organisations themselves rather than by the courts is perhaps the most important aspect of the relationship between sport and the law. Sports that have been willing to develop impartial and transparent disciplinary mechanisms, where both parties are given the opportunity to present their case before appropriately qualified decision-makers in proceedings not tainted by bias or impropriety, can ordinarily expect to carry out their functions without attracting judicial intervention. It does not, however, follow from this that there is no potential for judicial oversight, and sports-specific dispute resolution systems such as the Court of Arbitration for Sport (hereafter 'CAS') may thus be regarded as an aspect of the juridification (Cowan, 2004) of sports. Parties are obliged (or are at least afforded the opportunity) to seek resolution through a forum that may be cheaper, quicker and more responsive to the peculiarities of sport than are the 'ordinary courts', but those bodies still need to abide by legal principles and they are in no sense 'above the law'.

However, a common factor among arbitral bodies is that, historically, there has been no expectation that their decisions will be explicitly and consistently informed by the rulings of earlier arbitral bodies in a manner akin to judicial precedent. Moreover, this has been the case even when a dispute shares marked factual similarities with the subject-matter of an earlier arbitral award. There is no system of binding authority in arbitration and "each award stands on its own; it may well happen that an arbitral tribunal ... will arrive at a different conclusion from another tribunal faced with the same problem. The award of the first tribunal ... may be of persuasive effect, but no more" (Blackaby *et al.* 2009: para 1.1113). While this 'traditional' approach to arbitration can certainly be discerned in the many decisions of sports dispute resolution panels that defy both logic and legal norms, some of CAS' determinations have been explicitly informed by both its earlier rulings and by wider legal principles. This comparative legal sophistication, together with CAS' robust procedures (Mangan 2009), the ever-increasing scope and importance of its jurisdiction and its potential to safeguard competitors against the procedural ineptitude, mendacity or sheer incompetence on the part of decision-makers (McArdle 2009) have contributed to "the recognition and enforcement of CAS awards domestically and internationally. There is a growing body of private international sports law which some claim might soon be seen to override national law" (Anderson 2010: para 3.01).

This potential for sports law to override national law is susceptible to exaggeration, but it is certainly the case that this increased juridical sophistication on the part of CAS is to be welcomed. The application of a coherent corpus of arbitration principles to sports dispute resolution, if underpinned by appropriate reference to its own earlier determinations and wider legal authority, will help locate CAS in the same firmament as other prominent arbitral systems' which, for the most part, inspire confidence among those who either choose to, or are compelled to, submit to their jurisdiction. That in turn would represent a pivotal feature of what some will inevitably continue to describe as the *lex sportiva* – a dreadful cod-Latin phrase ("the law of little buckets") which, notwithstanding its lexical shortcomings, has come

to connote that body of statutory and judicial authority, secondary sources and procedural rules which comprise what others prefer to call simply ‘sports law’.

How striking, then, to note that in *Claudia Pechstein v International Skating Union* CAS 2009/A/1912, 1913 CAS was able to determine the matter without much consideration either of previous CAS judgments or of the wider legal principles that one would have expected to be raised, given that this is the first CAS judgment to deal with the problematic use of longitudinal profiling as a means of detecting doping violations. There is little discussion of *Meca-Medina and Majcen v FINA* CAS 99/A/234, the subsequent ruling of the European Court of Justice’s seminal ruling in *Meca-Medina v The Commission* [2006] E.C.R. I-6991 or indeed any other decisions of CAS or the courts. But longitudinal profiling is legally problematic and the doubts concerning its legality are not going to disappear simply because they were not advanced on this occasion. Detailed consideration of those issues must wait until another occasion, but this paper uses *Pechstein* as an opportunity to discuss the scope of CAS’ jurisdiction, to reflect on some the arguments that were raised (though which fell ultimately on stony ground), and briefly to highlight some of those legal issues that might arise in the future.

### **Party autonomy and Sports arbitration**

It would be wrong to suppose that arbitral bodies which may be called upon to resolve sports disputes are somehow immune from legal principle. The putative autonomy of the parties is vitiated by the arbitrators’ need to ensure compliance with the *lex loci arbitri* – the laws and rules that are applicable to arbitral proceedings under the law of whichever state the parties have decided (whether by choice or by default) is to govern the process. CAS is based in Switzerland and Swiss law provides less potential for intervention than is the case with other jurisdictions (see for example the attempted use of ‘long-arm’ statutes by the state of Ohio in *Reynolds v IAAF* [1992] US Dist LEXIS 8625 or the judgment of the English court in *Gasser v Stinson* (1988) unreported, 15 June (QBD)). Ergo, in the case of CAS, Switzerland’s Federal Code on Private International Law is the provision that deals with the relationship between it and the *lex loci arbitri*.<sup>2</sup> The Code gives the parties considerable freedom on such matters as choice of law, composition of the arbitral panel and so forth, and under Article 190 there are very limited grounds upon which the decision can be challenged,<sup>3</sup> but grounds do exist there is still a role for judicial oversight. Indeed, there have been occasions where the Swiss court has corrected a CAS determination on the ground that it conflicts with the Code. In *Gundel v FEI* CAS 1992/A/63, for example, the court stated that the relationship between CAS and the IOC was such that the former could not truly be regarded as independent of the latter. CAS thus had to be reconstituted as an independent entity in order to give validity to any decisions it reached in cases where the IOC was a party.

Furthermore, in *Meca-Medina v FINA* CAS noted that it was obliged additionally to consider European competition law if there was a close connection between the subject-matter of the dispute and the European Union (para 4.9, citing *AEK Athens and Slavia Prague v UEFA* CAS 98/200), and it would be open to the European courts to intervene if CAS fails to do so. *Meca-Medina* hailed from an EU member state (Spain) while *Majcen*, who was Slovenian, also had certain rights under EU law by virtue of that country’s then Association Agreement with the EU<sup>4</sup>. Accordingly, in that case the Panel proceeded “on the premise that the same protection (*Meca-Medina*) enjoys can be derived in respect of (*Majcen*)” (para 4.8). In the present case, *Pechstein*’s German nationality clearly gave rise to a sufficiently ‘close connection’ between the EU and the subject-matter of her dispute, and even the relatively hands-off approach of the Swiss courts in the exercising of their supervisory jurisdiction does

not defeat the relevance of European law. Pechstein's failure to make use of both European Union law and the European Convention on Human Rights seems remiss in retrospect, but time was of the essence and Pechstein played a tactical game in her search for a ruling that would allow her to compete at Vancouver. However, the complexities of longitudinal profiling demand a far more robust legal scrutiny than occurred here: Her arguments were weak and the ISU had little difficulty in rebutting them but when a similar case arises in the future (as it surely will) legal advisers may well decide that there is little merit in revisiting the *Pechstein* approach and will choose instead to advance the proper legal arguments, while preparing their client for a long haul through the domestic or European courts if their overtures are rejected by CAS.

### **Blood profiling**

Claudia Pechstein's case centred on blood profiling, which has been developed over the past decade in response to the use of a synthetic version of recombinant human erythropoietin (rHuEPO), which accelerates red blood cell production in bone marrow. This can be beneficial to athletes because rHuEPO can increase the number of red blood cells in circulation and "dramatically improve(s) the oxygen-carrying capacity of the blood and therefore endurance performance" (Parisotto *et al.* 2001: 128). Other studies have documented the benefits of moderate rHuEPO use on the quality of life among the wider populace, including life satisfaction and happiness in patients with chronic renal failure, heightened libido and improved sexual 'performance' (Ninot *et al.* 2006). From a sporting perspective, rHuEPO use is generally associated with endurance sports (hence the high-profile involvement of those disciplines' governing bodies in the development of blood profiling), but it has also been shown that "an enhanced oxygen carrying capacity can bestow a marked advantage in events lasting as little as 45 seconds, as well as recovery from intermittent efforts and general training drills. It is prudent to consider most sports (individual and team) at risk of blood doping" (Ashenden 2002: 225).

In the late 1990s, haematologists started to develop ever-more sophisticated procedures that could be used to detect the illicit use of rHuEPO. These procedures focussed on the role of reticulocytes (rather than on other haematological parameters such as haemoglobin) "because of their particular sensitivity in identifying bone marrow stimulation, especially when recombinant human erythropoietin is fraudulently used" (Banfi 2008: 188). In addition to helping identify illicit substance use, reticulocyte evaluation has a significant role in protecting the health of professional athletes (many of whom have an increased risk of anaemia (Banfi 2008: 189) but earlier research had revealed that the manner in which reticulocytes were counted, the time and manner in which blood samples were drawn and stored and the influence of training, competition, altitude and haematological or genetic abnormalities all presented considerable barriers to the development of an effective 'test' that could be used in anti-doping.

Athletes can experience a performance benefit for several weeks after ceasing to use rHuEPO, but upon cessation there will be a significant reduction in reticulocyte count because the body reduces both endogenous erythropoietin production and reticulocyte release until the red cell count returns to normal (Banfi 2008). In long-distance cycling and other endurance sports, athletes who return an abnormally high red cell mass in hematocrit testing can be prohibited for competing for more than two weeks on medical grounds (high hematocrit levels are particularly associated with an increased risk of deep vein thrombosis); but up to 5% of athletes may exceed the 'safe' threshold because of genetic factors so there is patently a risk that many athletes could be unfairly prevented from competing (Banfi 2008)

and, in turn, this means than any attempt to use hematocrit levels as an evidential basis for a doping offence is untenable. It had also been noted that testing athletes' urine samples for the presence of rHuEPO was of limited utility because "although a small amount is detectable unchanged in the urine for 24– 96 hours after each injection, once the red cell mass has been boosted, the athlete can substantially reduce their dosage of rHuEPO. During this maintenance phase, it is difficult to discern the hematologic profile of a maintenance user from that of a non-user" (Ashenden 2002: 225-6).

Establishing an effective test for rHuEPO was thus undermined by the concern that "altitude/training/genetic factors (which) may also be associated with a transient increase in erythropoiesis (albeit of a much smaller magnitude) might lead to mistakenly accusing an athlete when no drug was taken" (Ashenden 2002: 228). There was also a clear need to combine any effective in-competition test with reliable out-of-competition random testing, given the need for rHuEPO users to engage in the prohibited activity for several weeks prior to a competition. However, by 2002 the practicality of using a mobile blood testing facility that "could relocate to a remote competition site and would make place-getters subject to blood testing immediately after competition" (Ashenden 2002: 229) had been established: the technology to allow many samples to be taken and analysed quickly was in place and a similar facility could be used for random testing too. Moreover, the same machine could be used consistently across all sports to eliminate any technical variations that might skew the results.

Procedures that would allow an athlete's blood profile to be monitored over a period of time were also being developed around the same time, and the International Cycling Union (UCI) seems to have been the first international governing body to develop a procedure under which competitors were required to give blood samples as part of the regular medical examinations they were obliged to undergo as a condition of their participation in UCI events. Since 2008 this has been a central aspect of their 'biological passport', alongside the results of the urine and other tests.

The UCI website states that

Blood and urine samples may be collected during a race, during preparation/training periods or during the non-competitive season. Riders should expect to be required to provide a blood or urine sample at any time of the year and in any place. All samples will be collected by authorised UCI sample collection officers. Blood collectors will have appropriate qualifications approved by the UCI (UCI 2007)

The International Skating Union's (ISU) Communication No 1520, which makes provision for blood testing, is in broadly similar terms. It provides that:

The ISU will conduct Blood Testing at various ISU Championships, World Cup Events and other International Events as deemed necessary by the ISU. Blood screening or Testing is conducted by a specialist Anti-Doping Agency appointed by the ISU under the direction of the ISU Medical Advisors. Out-of-Competition Blood Tests may be carried out at any time by specialist Anti-Doping Agencies, appointed by the ISU or WADA (ISU 2008)

This Communication lays down the detail of the procedures that were at issue in *Pechstein and Deutsche Eisschnellauf Gemeinschaft (DEFG) v. International Skating Union CAS 2009/A/1912*, 1913.

### ***Pechstein v International Skating Union: The arguments***

Claudia Pechstein is one of speed skating's most successful exponents, having won five Olympic gold medals and two bronze medals between 1992 and 2006. Between 2000 and April 2009 she underwent many doping control tests both in- and out-of competition, and she gave over ninety blood samples under the International Skating Union's blood profiling programme. The last twelve of those were given between January and April 2009. The ISU asserted that "during the months of January and February 2009 the Athlete changed her whereabouts on numerous occasions rendering it especially difficult, if not impossible, to organise any out-of competition testing on her" (CAS judgment, para 68). The implication was that, during those months, Pechstein had changed her whereabouts in order to facilitate her use of rHuEPO and thus artificially stimulate "her body's capacity to produce red blood cells that carry oxygen to muscles and organs, with the evident purpose of reducing fatigue and attaining an unfair advantage over her competitors. In short, blood doping" (para 191). *Pechstein* is thus significant because it involved sanctioning an athlete who had never returned an adverse analytical finding but was condemned on the basis of her blood values and profile. "The Panel (was) thus mindful that this case involves issues that have not previously had to be decided by CAS Panels" (Para 78), although there were some parallels with the American Arbitration Association's ruling in *USADA v Michelle Collins*.

The ISU's regulations provide for a blood profile that monitors participants' hemoglobin, hematocrit and percentage of reticulocytes (hereafter '%retics'). The last of these was of particular relevance to this case because it serves as an indicator of potential blood doping (para 7), and while the upper-end of the 'normal' %retics level is deemed to be 2.4, many of Pechstein's readings had been considerably in excess of that level. In particular, on 6th February 2009 - the day before a 2009 World Championship event at Hamar, Norway commenced - all participants gave blood samples and Pechstein's %retics value was measured at 3.49. She was tested twice more on 7<sup>th</sup> February and her readings were 3.54 and 3.38 respectively. These findings were communicated to Pechstein's domestic governing body (the DEFG), which took the decision to withdraw her from the competition even though her hemoglobin and hematocrit levels were not so high as to provide a 'no-start' situation, where the ISU prohibits the athlete from competing for the next 18 days in order to safeguard their health status. (ISU 2008: para 4.2).

On 18<sup>th</sup> February 2009, another test showed that her %retics had declined to 1.37. Such high readings being followed by a much lower-level reading ten days later gives rise to a suspicion that the athlete had been engaging in some form of blood doping and, on 5<sup>th</sup> March 2009 the ISU's Disciplinary Commission duly held that Pechstein has violated its new anti-doping policy (which had come into force on 1<sup>st</sup> January 2009 and accorded with the terms of the new WADA Code) and imposed a two-year ban (CAS judgment: paras 12, 13).

In July 2009 the athlete and her governing body appealed to CAS (as they were entitled to do under the ISU's rules and Art R47 of the CAS Code). In the interim, she sought a stay of the Decision until CAS ruled on the matter or, failing that, the right to use appropriate skating facilities in order to assist her training for the 2010 Winter Olympics. Pechstein was duly granted leave to train, but not to compete, and, after much procedural wrangling (paras 16-

32), the hearing took place on 22-23 October 2009, the parties agreeing that Swiss law would apply to the proceedings (para 76).

Pechstein's defences were wide-ranging; but rather than include the legal arguments that one might have anticipated had time not been of the essence or if the case had been fully argued before the courts, they concentrated on sample collection and testing and the propriety of the ISU's regulations – arguments which are the staple fare of athletes' appeals but which are doomed to failure unless it can be shown that the agreed procedures had not been followed. She contended that because the ISU had only allowed blood profiles to be used as evidence of a doping violation since 1<sup>st</sup> January 2009 (when its new provisions came into effect), only blood samples collected after that date could be used in evidence against her (para 47). She also contended that ISU blood profiling rules provided that the blood samples had to be analysed in WADA-accredited laboratories and that WADA's standards governing collection and chain-of-custody applied (para 48); that the upper limit of 2.4 %retics was not generally accepted in sports medicine (para 49); and that, for several reasons, the blood screening data was unreliable and not appropriate for statistical analysis (para 50). Pechstein also challenged the accuracy of the machine used to analyse her samples (para 51), stressed that her hemoglobin and hematocrit levels had always been within ISU limits and asserted that her high %retics values were "likely" due to a hitherto-undiagnosed chronic blood disorder and/or a genetic abnormality (para 52). Finally, she argued that, with regard to the burden and standard of proof, the ISU "must convince the Panel to a level very close to 'beyond reasonable doubt' that all alternative causes for the increase in %retics can be excluded and that, additionally, the Athlete had an intention to use blood doping" (para 53). CAS summarily dealt with this matter by asserting that there was no need to show intent or fault because the strict liability principle applied in doping cases (para 120) and that the 'comfortable satisfaction' test, which applied under the ISU's rules, was well-known in CAS practice, had withstood the scrutiny of the Swiss federal tribunal in several previous cases (para 124), and would consequently be applied in this case (para 126).

Pechstein's domestic governing body, the DESG, "contends that it has a neutral role in the proceedings (but) essentially supports most of the arguments raised by the Athlete" (paras 55, 56). In addition, the DESG argued that any violation must have occurred before 30 January 2009 and, because the ISU made reference to the blood profiling results obtained prior to 6<sup>th</sup> February 2009 (rather than just relying on the Hamar figures), the ISU had breached its Rules of Procedure, Art 8.1 of which provides that complaints have to be lodged within thirty days of it learning about the alleged offence (the complaint was lodged with the ISU's Disciplinary Commission on 5<sup>th</sup> March). The DESG said that, in effect, the ISU had used the Hamar tests as an opportunity to 'buy time', and that its case had actually been built upon Pechstein's earlier test results.

In rebuttal of the athlete's arguments, the ISU stated that it had implemented its own procedures for blood profiling in July 2008 and was not obliged to wait for WADA to draft specific rules for blood doping (which it was in the throes of doing at that time) before it could develop such rules for its own sport; and it drew an important distinction between the blood profiling programme – which "focuses on measuring blood parameters rather than on detecting prohibited substances" – and on anti-doping controls, which have far more complex testing and analysis procedures and were accompanied by stringent rules and procedures that were unnecessary in the context of blood profiling. There was no evidence that any of the procedures regulating blood profiling had been departed from, and that "the use of a longitudinal (blood) profile as evidence of doping is legally admissible since it is an

evidential/procedural rule to which the prohibition against the retroactive application of the law does not apply” (para 65). The ISU also said that intent was relevant only in cases of ‘attempted use’ (rather than occasions where use had actually occurred); that it could not provide evidence relating to possible blood diseases because Pechstein had refused to cooperate in its enquiries into that possibility; but that in any event the significant fluctuations in her %retics could not be explained by any known blood disorder.

### *The CAS judgment*

CAS determined that, under the ISU Rules, the thirty-day period began to run only once the ISU “learned about” the alleged offence – a phrase which

Must be properly understood as the moment at which the ISU had reasonable suspicion of the alleged offence. Unlike allegations based on an adverse analytical finding, doping charges based on longitudinal (blood) profiling require a series of tests and evaluation of the results by the anti-doping organisations experts. For this reason, the ISU had not ‘learned’ about the offence and was not in a position to raise charges until its medical advisors had determined that Ms Pechstein’s blood profile constituted – in their opinion – sufficient proof of the use of a prohibited method (para 91).

CAS stated that the Hamar competition tests were “at the core” of the case and there was no evidence of the ISU using them in order to ‘gain time’ as the DESG had suggested (para 92). Further, Pechstein’s contention that she had never consented to the ISU using her blood profile as evidence of blood doping was summarily rejected on the ground that, under its Regulations, any person taking part in the ISU’s ‘international activities’ is bound to comply with all its provisions, and the anti-doping rules cited “conclusions drawn from the profile of the skater’s blood or urine samples” as a specific example of a reasonably reliable means by which an anti-doping rule violation could be established (para 101). “In willingly registering for international skating competitions sanctioned by the ISU, she obviously expressed her acceptance of ISU rules and regulations, including the (anti-doping rules)... When they accede to competition, athletes cannot pick and choose the rules they like” (paras 98, 99). This clearly gives rise to concerns about how much credence should be attached to the athletes’ putative acceptance of the rules, given that one either signs up to the anti-doping regime or one does not compete at the international level; but if athletes wish to voice their opposition to anti-doping regimes (and there is no evidence that Pechstein or the wider firmament of skaters had opposed them beforehand), this has to be done long before the disciplinary hearing or subsequent application to CAS. In any event, CAS noted that the ISU’s rules stated that profiling was just an “evidentiary means” by which a doping offence could be demonstrated, so “the only relevant issue is whether longitudinal blood profiling can be regarded as among the ‘reasonably reliable means’ to prove the use of a prohibited method ... its utilisation for anti-doping purposes does not constitute a retrospective application of a substantive anti-doping rule” (para 108).

CAS further asserted that “even in cases of adverse analytical findings, departures from WADA international standards do not invalidate *per se* the analytical results, as long as the anti-doping organisation establishes that such departure did not cause the adverse analytical finding” (para 117). It stated that the WADA draft Biological Passport Guidelines could not be regarded as setting down ‘minimum standards’ (as Pechstein contended), and even when they were finalised (which occurred on 1<sup>st</sup> December 2009), the Biological Passport Guidelines would not become mandatory. This stands in clear contradiction to WADA’s own

position: the introduction to the WADA Guidelines states that the Athlete Biological Passport “includes mandatory requirements for collection, transportation, analysis of blood samples and results management that anti-doping organisations wishing to adopt WADA’s model will have to following order to ensure consistency of application and to comply with the WADA Code and the International Standards. These mandatory technical documents will be incorporated into WADA’s International Standard for Testing and International Standard for Laboratories”. For the avoidance of doubt, it is now clear that governing bodies would be very well-advised to ensure their blood profiling provisions replicate those laid down by WADA. If they do not, the governing body must be able to advance very strong, clear arguments as to why they have departed from what WADA has laid down; and it ought not expect too sympathetic a hearing from CAS or the courts.

CAS reiterated that Pechstein had been accused of a doping offence in respect of the %retics findings at Hamar in early February 2009 and the sample taken on February 18<sup>th</sup>. Consideration of her earlier results “may help in understanding and interpreting the Athlete’s blood values as found on 6, 7 and 18 February 2009 but it is strictly a question of considering the evidence on record and its scientific reliability, not involving retrospective application of any new anti-doping rule to old facts” (para 107). It continues:

The panel would have no hesitation in holding that new scientifically sound evidentiary methods, even not specifically mentioned in anti-doping rules, can be used at any time to investigate and discover past anti-doping rule violations that went undetected, with the only constraint deriving from the eight-year time limitation and the timely initiation of disciplinary proceedings. As long as the substantive rule sanctioning a given conduct as doping is in force prior to the conduct, the resort to a new evidentiary method does not constitute a case of retrospective application of the law” (para 109).

With regard to the athlete’s allegations that the collection, administration and storage of her blood samples had not complied with the provisions of the WADA Code, CAS asserted that, because this was not a case of adverse analytical finding, the ISU was not obliged to follow WADA’s provisions on those matters. Instead, “in the panel’s opinion, any reasonably reliable practice of sample collection, post-test administration, transport of samples, analytical process and documentation would suffice” (para 116). With that in mind, CAS engaged in a long analysis of the collection, storage and sampling procedures that had been adopted by the ISU in July 2008 and utilised at the Hamar event. It found that Pechstein had never challenged the procedure or asserted her right to have the samples taken by her own doctor rather than an ISU official, and that she had never protested against any of the sampling procedures or been able to point out any of the material flaws in the process as applied to her (para 137). It highlighted the distinction between the procedures for blood testing for screening purposes and those for post-event anti-doping control (paras 133, 134) and stressed that:

The analytical process followed by the (testing) laboratories does not require any person from the laboratory personnel to open the (sample), since it is placed directly ... into the analysing machine... Unlike in anti-doping where the laboratory (by means of a complex and costly investigation) looks for prohibited substances yielding an adverse analytical finding, in blood screening the laboratory simply measures (by means of an automated machine) certain hematological parameters (para 146).

CAS had no reservations about the chain of custody (“the Panel has heard and examined evidence that does not leave any reasonable doubts as to the transportation conditions” (para 144)). Pechstein further contended that physical stress due to cold temperatures, altitude, intense exercise, pressure on the foot caused by her skates and blades, menstrual bleeding, infection or the fact that the tests were unequally distributed throughout the year could have caused her adverse profile. Nevertheless, the Panel was not swayed:

The panel has not found the above-mentioned justifications, nor the few others that the Appellants have thrown in during the course of the proceedings, to be convincing...The athlete’s multifarious explanations imply that all of a sudden a perfectly fit athlete incurred all sorts of unlikely situations and misfortunes that in some way affected her blood values; it appears to the Panel to be too astonishing a coincidence to be reasonably credible (para 197).

Medical tests carried out in advance of the hearing had returned no untoward results, and the Panel was comfortably satisfied that Pechstein’s abnormal %retics values “must derive from the athlete’s illicit manipulation of her own blood, which remains the only reasonable alternative source of such abnormal values” (para 210). It upheld the FIS’ original sanction of a two-year ban.

The initial CAS hearing did not herald the end of the affair. On 9<sup>th</sup> December 2009 the Swiss Federal Tribunal granted Pechstein an injunction which partially prevented the imposition of that two-year ban pending a full hearing of her application. The injunction was granted under the extraordinary ‘super provisional’ (*superprovisorisch*) power under Article 104 of the Federal Supreme Court law (*Bundesgerichts gesetz*), but it was partial to the extent that it only allowed her to train for and compete at one specific 3000m event (to held in Salt Lake City on 11<sup>th</sup> December) rather than allowing her to compete at other distances and in any forthcoming events through which she might secure qualification. Salt Lake City thus represented her last opportunity to qualify for the Winter Olympics, but she failed to achieve the top-eight finish that she needed (Krouse 2009). Undaunted, in the two weeks after Salt Lake City Pechstein made repeated efforts to obtain further injunctive relief that would allow her to participate in various 1500m competitions, in team events and in two upcoming World Championship races in Norway and Holland prior to the full hearing of her appeal<sup>5</sup>, but all to no avail. On 26<sup>th</sup> January 2010, the Tribunal refused to grant her the opportunity to try out again at events in the last weeks before Vancouver and on that occasion intimated that her appeal was unlikely to succeed when it was finally heard in full (Dunbar, 2010). Consequently, when the Federal Tribunal heard her appeal on February 10<sup>th</sup> 2010 it asserted that Article 190 provided no grounds for reviewing the factual determinations of CAS, and neither could it entertain new evidence.<sup>6</sup>

Less than a week later, the redoubtable Pechstein appealed to the CAS’s ad-hoc division at Vancouver, delivering herself of a wide-ranging application which, in effect, invited the *ad hoc* tribunal to overturn the CAS’s November ruling and force the IOC and the German Olympic Committee to allow her to compete (*Pechstein v Deutscher Olimpischer Sortbund and the IOC* CAS No OG 10/04). Her application was rejected on the ground that there had been no ‘decision’ at the winter Olympics (or in the ten days prior to the opening ceremony) which the *ad hoc* tribunal could entertain under the terms of the CAS Arbitration Rules for the Olympic Games, Article 1 and that, even if it did have jurisdiction to hear the case, the ad-hoc tribunal was not a competent tribunal for the purpose of challenging her ineligibility (para

4.13). Prior to that, the Swiss Tribunal's willingness to grant her injunction in December, albeit to a very limited extent, simply reinforced that CAS is indeed subject to its supervisory jurisdiction (as discussed above) while the February judgment provides some guidance on the limits of that jurisdiction and is consistent with the Tribunal's earlier caselaw on CAS appeals.

### **Future developments?**

At the time of writing, it is unclear if Pechstein will choose to pursue the matter through the courts, but if she does any arguments will have to be far more legally robust than what has been advanced hitherto. Conduct of the case thus far suggests that one can expect further arguments to the effect that the CAS Panel erred in either adopting a 'comfortable satisfaction' test or in its application of it, or that it had erred in departing from WADA Guidelines. In the alternative, maybe new scientific evidence will emerge that will indicate Pechstein's hitherto-undiagnosed medical condition does indeed exist, or she will be able to adduce new scientific evidence which casts doubts on the accuracy of longitudinal profiling in general or testing for synthetic rHuEPO in particular.

Aside from these last two areas it is difficult to discern anything which either CAS or the testing authorities may have done that could amount to so egregious an error that it can be regarded as fatal to the whole process and, as per *Meca-Medina*, there would still be the difficulty of showing that any alternative scientific explanations for her reticence undermined the strong evidence that she had engaged in blood doping. But perhaps there are more fundamental legal issues that will be argued, either as well as or instead of these. It is at least arguable that the sheer number of blood tests that are taken for the purposes of longitudinal profiling is excessive and contravenes Article 8 of the European Convention on Human Rights. Between 2000 and April 2009, Pechstein gave over ninety blood samples under the International Skating Union's (ISU) blood profiling programme, and to those of us who do not fully understand the scientific basis of blood profiling, that may seem a disproportionate interference with athletes' privacy rights and one that clearly requires justification. There is little in the case law that discusses the interference with Article 8(1) ECHR that a compulsory medical intervention undoubtedly entails (*Peters v The Netherlands* (1999) 77-A DR 75), but that infringement has to be balanced against Article 8(2) ECHR, which allows for such interference where it is necessary for *inter alia* the protection of health. Analogy with the Privy Council decision in *Whitefield v General Medical Council* [2003] HRLR 9 suggests that maybe the blood tests can be regarded as pursuing the legitimate aim of protecting the health of participants, for it is true that athletes are at a greater risk of anaemia than the general population (Banfi 2008: 189) and there is evidence that use of rHuEPO "may cause a dangerous hedonic effect linked to endurance training... (our) findings suggest a clinical increase in global self-esteem with rHuEPO, which can have a euphoric effect on global self-perception" (Nino et al, 2006: 390). Ergo, perhaps the Article 8(2) justification can indeed be made out – but even if blood testing is justifiable in principle the sheer number of tests to which athletes are subjected needs to be explained by reference to cogent medical grounds. The more nebulous arguments that concern 'fair play' and 'cheating' in sport have little relevance to Human Rights jurisprudence, although (in the wake of *Meca-Medina*) they might strike a chord if it is argued that longitudinal profiling contravenes European competition law. An alternative argument would be that Article 8 also states that there shall be no unwarranted interference by "a public authority," and perhaps one might argue that CAS itself is a court or tribunal that is a public authority and thus under an obligation to act consistently with ECHR rights; but it is hard to discern anything in CAS's disposal of this case which may amount to a breach of that obligation.

She is now 38 years of age, and one wonders whether Claudia Pechstein will really see any merit in dragging out this sorry saga still further. If she feels her future work aspirations (media commentator, high-profile governing body member, sporting ‘ambassador’) depend upon her being exonerated, then perhaps she will advance the EU law and European Convention on Human Rights provisions that have hitherto been untested. If she does throw in her hand, then it will simply fall to others to make those arguments, but either way WADA’s provisions on longitudinal profiling - and CAS’ support of it – do not sit easily with European law. Arguments that would be advanced might include the EU laws on working time, health and safety law and data protection in addition to the Article 8 Convention rights discussed above and while this author is not convinced that any of those arguments will be successful, one might also consider, in passing, the situation of the athlete who challenges longitudinal profiling on the ground that any blood test cannot be reconciled with their religious beliefs and thus contravenes their right to freedom of thought, conscience or religion as established under Article 9 ECHR (or the equivalent provisions that exist in other parts of the world). But those athletes need to be raising their voices now if they are to have any credibility. That aside, the lesson to learn from *Pechstein* is that the complex legal issues which undoubtedly arise here are far more relevant than the essentially procedural matters that arose in her case, and while that inevitably means the timeliness of the remedy will have to be sacrificed upon the altar of legal certainty, such an approach will be necessary if those applicants are going to achieve more success than Pechstein has hitherto.

The ECJ’s ruling in *Meca-Medina* clearly illustrates its willingness to accommodate the specialist knowledge of decision-makers such as CAS, sports scientists and sports governing bodies rather than substitute its own limited expertise – but it also demonstrates its obligation to oversee whether those bodies’ use of their powers is necessary and proportionate when they have a negative impact on citizens of the European Union. Notwithstanding the arms-length approach of the Swiss courts in their supervision of CAS and the balanced approach of the ECJ in *Meca-Medina*, the legal and scientific complexities of longitudinal profiling will doubtless ensure it represents a new dimension to the relationship between the sporting and juridical fields. Claudia Pechstein may go away, but the issues her case has raised will certainly not

## Notes

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<sup>1</sup> For example, those that deal with construction contracts or internet domain name disputes.

<sup>2</sup> See <http://www.tas-cas.org/en/arbitrage.asp/4-3-292-1023-4-1-1/5-0-1023-3-0-0/>

<sup>3</sup> The grounds for challenge are restricted to: (i) that the tribunal was not properly constituted; (ii) its jurisdiction was incorrectly drawn; (iii) its decision went beyond the claim submitted to it or did not deal with all parts of the stated claim; and (iv) breach of one of the parties’ rights to equal treatment and a fair hearing; incompatibility with public policy.

<sup>4</sup> That status became otiose when Slovenia fully joined the EU in 2004.

<sup>5</sup> See <http://jensweinreich.de/?p=6169>

<sup>6</sup> See [http://www.bger.ch/mm\\_4a\\_612\\_2009\\_d.pdf](http://www.bger.ch/mm_4a_612_2009_d.pdf)

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