Civil Procedure Review
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Die internationale Sportschiedsgerichtsbarkeit vor dem deutschen Bundesgerichtshof

(Sport International Arbitration before the German Superior Court of Justice)

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Abstract: The judgment of the Supreme Federal Court of Germany given in the "Pechstein-Case" upheld the jurisdiction of the Lausanne-based "Court of Arbitration for Sport", CAS – in French: Tribunal de l'arbitrage pour le sport, TAS - . For non-German observers this may not have been a great surprise because this monopolistic judicial body has since a considerable time world-wide been accepted and welcome as "the" International Sport Court, particularly in doping disputes. For Germany, however, it was really a surprise. The reason for this is that the contrary ruling of the Munich Court of Appeals (in German: Oberlandesgericht) had obtained much support in legal doctrine. This, in turn, corresponded to a prevailing rather ideological way of thinking in Germany's intellectual life and, above all, in the mass media, even those of pretended higher level. In that purview it is to be fought against all kind of powerful entities in society, including monopolistically organized sports organizations; the intellectual leaders are expected to do their utmost to restrict as far as possible the activities of those associations, activities which are in principle supposed to be oppressive against individuals. With regard to sports organizations this mentality had a double focus. First: the principle of voluntariness of any arbitration agreement is said not to be respected if sports organizations make participating in sporting contests dependent on signing the arbitration agreement in the competition

contract terms. Second: Within the meaning of Anti-Trust Laws the sports organizations are qualified as "undertakings of a dominant economic market position" which is held to be abused by requesting the submission under the CAS arbitration. The second aspect was the focus of the Court of Appeal's ruling. The closed list of accepted arbitrators (more than 150) was denounced to have been set up by the "dominant" international sports associations without any participation of the athletes. The paramount merit of the BGH's decision is precisely not to have given way to these kinds of widespread popular moral pressure which had already let traces in other countries and which hopefully will not rise again.

Keywords: Sport arbitration. Germany. Europe. Doping.

1. Das juristische Umfeld der Entscheidung

(1) Das im Anhang abgedruckte Urteil des deutschen Bundesgerichtshof (im Folgenden „BGH") ist ein vorläufiger[1] Endpunkt unter eine Diskussion über die Anerkennungsfähigkeit der Sportschiedsgerichtsbarkeit, vor allem in Doping Angelegenheiten. Der BGH arbeitet sehr klar heraus[2], dass für die Vertragsstaaten des Internationalen Übereinkommens gegen Doping im Sport vom 19. Oktober 2005[3] in der Kopenhagener Fassung den in Bezug genommenen WADC[4], welche die ausschließliche Zuständigkeit des CAS/TAS vorschreibt, in das innerstaatlich bindende Völkervertragsrecht inkorporiert worden ist. Die Entscheidung hat aber auch –

[1] Gegen das Urteil ist eine sogenannte Verfassungsbeschwerde eingelegt worden. Eine solche kann allein darauf gestützt werden, dass der Beschwerdeführerin (Claudia Pechstein) der verfassungsmäßig garantierte gesetzliche Richter (Art. 101 Absatz 1 Grundgesetz) deshalb entzogen worden sei, weil sie „gezwungen" worden sei, eine Schiedsvereinbarung abzuschließen, um ihren Beruf als Eisschnellläuferin ausüben zu können. In den Textziffern (im Folgenden „Tz") 52 ss hat der BGH jedoch diesen möglichen Einwand in ausführlicher und sehr überzeugender Begründung zurückgewiesen. Vor allem gilt dies auch wegen der sogleich zu erörternden staatsvertraglichen Lage.

[2] Tz 60 der Urteilsbegründung.

[3] Ratifikationsnachweis für Deutschland Bundesgesetzblatt Teil II 2007, 354.

[4] Angenommen in der jetzigen Fassung auf der Welt-Anti-Doping Konferenz in Johannesburg im November 2013, in Kraft getreten am 1. Januar 2015. Er verpflichtet die Sportverbände, die Regelungen in ihre nationalen Regelungswerke zu implementieren. Der Fall Pechstein ereignete sich zwar schon vor der Konferenz von Johannesburg. Jedoch war die ausschließliche Zuständigkeit des CAS/TAS schon in den früheren Fassungen festgelegt.

hoffentlich – einen Schlusspunkt unter die allgemeine Diskussion über die Legitimität der Sportschiedsgerichtsbarkeit gesetzt, die ja nicht nur in Doping-Angelegenheiten, sondern bei allen Rechtsstreitigkeiten über Sportangelegenheiten tätig ist, etwa auch bei Rechtsstreitigkeiten über die Zulassung zu sportlichen Wettbewerben, wenn sich behauptetermaßen die Verbände nicht an ihre eigen Richtlinien über eine solche Zulassung gehalten haben[5].

(2) In Deutschland – und nach den Beobachtungen des Verfassers nur in Deutschland – hat zu diesem Thema – leider! – eine sehr stark ideologisch geprägte Diskussion stattgefunden. Von dieser war auch – man kann es nicht anders sagen – das Urteil des OLG München geprägt, das der BGH aufgehoben hat[6]. Dieses Urteil hat in einem großen Teil der meist auf populistische Aufmerksamkeit erpichten Tagespresse großen Anklang gefunden als „Sieg" über die unakzeptable Macht der Verbände. Das OLG München hatte zwar grundsätzlich akzeptiert, dass internationale Sportverbände von den an ihren Veranstaltungen teilnehmenden (Berufs-) Sportlern den Abschluss einer Schiedsvereinbarung verlangen. Es meinte aber, „beim CAS/TAS" hätten die Sportverbände gegenüber den Sportlern einen überwiegenden Einfluss, ohne die Frage aufzuwerfen, wie das angebliche Übergewicht sich auf die Zusammensetzung der einzelnen für eine bestimmte Streitigkeit zu konstituierenden Schiedsgerichte auswirken soll. Damit waren die beiden Argumentationsfelder angesprochen, welche die deutsche Debatte beherrschten.

(3) Einmal ging es darum, ob eine Schiedsvereinbarung nur wirksam sein kann, wenn sie „freiwilllig" abgeschlossen wurde (2.). Zum anderen hatte man das Wettbewerbsrecht herangezogen und gemeint, die Sportverbände hätten - auch gegenüber den Sportlern – eine „marktbeherrschende" Position, die sie missbrauchten, wenn sie von den Teilnehmern an einer sportlichen Wettbewerbsveranstaltung den Abschluss einer Schiedsvereinbarung verlangten

[5] Auf der Website des CAS/TAS findet man viele Entscheidungen über alle möglichen sportrechtlichen Streitigkeiten.

[6] U 1110/14 v. 15.01.2015 – abgedruckt in Zeitschrift für Schiedsverfahren (künftig „SchiedsVZ") 2015, 40. Das OLG literarisch unterstützend *Heermann* SchiedsVZ 2015, 78; *ders.* Juristenzeitung 2015, 362. Das OLG in diesem Punkte kritisierend: *Schlosser* SchiedsVZ 2015, 857; *Paulsson* (in englischer Sprache) SchiedsVZ 2015, 69; *Haas* Zeitschrift für vergleichende Rechtswissenschaft 2015, 516; *Kocholl* CaS 2015, 311; *Duve/Rösch* SchiedsVZ 2015, 69.

(3.). In beiderlei Hinsicht hatte sich in Deutschland generell eine ideologisch geprägte Debatte gegen die „Übermacht" von Großunternehmen, Konzernen und Verbänden in ihrer „demokratisch nicht legitimierten Rolle" breit gemacht. Zum Schluss (4.) sei noch eine Anmerkung zum konkreten Fall gebracht.

2. Fehlende „Freiwilligkeit" der Unterwerfung der Sportler unter die Jurisdiktion des CAS/TAS?

(4) Der erstere Gesichtspunkt hatte sich schon um den bis 1998 geltenden Absatz 2 des § 1025 ZPO gerankt, der folgendermaßen lautete:

„Der Schiedsvertrag[7] ist unwirksam, wenn eine Partei ihre wirtschaftliche oder soziale Überlegenheit dazu ausgenutzt hat, den anderen Teil zum Abschluss…..zu nötigen…".

Die aggressive Diskussion hat sich aber nach Abschaffung dieser Vorschrift fortgesetzt und sogar noch verstärkt. Besonders engagiert argumentierende Interpreten dieser Vorschrift und ihr Nachtrauernde meinten und meinen, für die Unwirksamkeit einer Schiedsvereinbarung reiche es aus, wenn überhaupt wirtschaftliche Macht eingesetzt wird, um den anderen Teil zu ihrem Abschluss zu veranlassen[8], wobei man schon damals ausdrücklich die Sportverbände im Visier hatte[9]. Das deutsche Recht hat aber demgegenüber selbst eine Definition von „nötigen" gegeben, nämlich in §240 des Strafgesetzbuchs über Nötigung: Die bloße Androhung eines „Übels" für die Verweigerung einer Handlung muss „verwerflich" sein. Es wäre auch einigermaßen absurd, jedes für vertragswidriges Verhalten Androhen von etwas, das der andere Teil als Übel ansieht, als Hindernis für eine wirksame vertragliche Einigung zu betrachten. Jede Vertragsstrafe, die ein wirtschaftlich oder sozial mächtiger Vertragsteil durchsetzt, wäre dann unwirksam. Ohne auf den Straftatbestand der Nötigung einzugehen, hat

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[7] Dieser Begriff ist heute ersetzt durch „Schiedsvereinbarung".

[8] Etwa z.B. *Nicklisch* Betriebsberater 1972, 1285, 1288 ff: *Schwab-Walter* Schiedsgerichtsbarkeit, 5. Aufl. 1995, Kapitel 4 Rn 15.

[9] Etwa *Preis* Der Betrieb 1972, 1727; *Westermann* Die Verbandsstrafgewalt und das allgemeine Recht, 1972, 108 ff; *Vollkommer* Neue Juristische Wochenschrift (künftig: NJW) 1083, 726; *Landgericht Frankfurt* Zeitschrift für Insolvenzrechtspraxis (künftig ZIP) 1989, 599.

der BGH in dem besprochenen Urteil klargestellt, dass es nicht verwerflich ist, einem Berufssportler „anzudrohen“, dass er zum Wettbewerb nicht zugelassen wird, wenn er nicht die Wettkampfbedingungen einschließlich der Zuständigkeitsregelung zugunsten des CAS/TAS akzeptiert. Man kann den BGH nur noch textlich zu Wort kommen lassen[10]: „[Für das Zustandekommen eines Vertrags über die Wettkampfbeteiligung] ist es elementar, dass die Regelwerke gegenüber dem Sportler in ihrer Gesamtheit gelten und flächendeckend nach einheitlichen Maßstäben durchgesetzt werden.“

(5) Schon diese Aussage ist zwar nicht autoritätsmäßig, aber intellektuell international verallgemeinerungsfähig. Alle Rechtsordnungen kennen sicherlich Bestimmungen welche die Wirksamkeit einer Vertragsklausel oder gar des ganzen Vertrags leugnen, wenn der sich belastet fühlende Teil seiner im Rechtssinne „freiwilligen“ Entscheidung beraubt war. Das ist aber nicht allein deshalb der Fall, weil sich der belastet fühlende Teil auf den Vertragsschluss mit dem auf seinem Spezialgebiet monopolistischen Partner angewiesen war und nur widerwillig dessen Vertragsklauseln akzeptieren muss, die nicht gerade dem Verdikt der „Sittenwidrigkeit“ oder „Treuewidrigkeit“ „unfairness“ oder „Unangemessenheit“ unterfallen. Das aber ist bei dem Verlangen, eine Schiedsklausel zu akzeptieren, die ein unabhängiges und von einer unparteiischen Stelle organisiertes Schiedsgericht vorsehen, der Fall[11]. Nebenbei sei erwähnt, dass auch der österreichische OGH[12] die Schiedsklausel in den Vertragsbedingungen eines Sportverbandes für unwirksam erklärte, und zwar deshalb, weil sie „unklar“ sei. Dass dies eine an den Haaren herbeigezogene Argumentation war, hat *Kocholl*[13] aber überzeugend dargelegt.

Man muss dem BGH zugute halten, dass er sich durch die leidenschaftliche und einseitige Polemik, die in dieser Angelegenheit in Deutschland herrschte, nicht hat beeindrucken lassen.

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[10] Textziffer 59 des Urteils

[11] In der Richtlinie der Europäischen Union über missbräuchliche Klauseln in Verbraucherverträgen (93/13/EWG v. 05.05.1993, Amtsblatt EG Nr. L 95 v. 21.04.1993 S. 29 ff.) heißt es, missbräuchliche Klauseln (englisch: unfair terms) seien solche, die „entgegen Treu und Glauben zum Nachteil [des Verbrauchers] ein erhebliches und ungerechtfertigtes Missverhältnis der vertraglichen Rechte und Pflichten der Vertragspartner verursachen“.

[12] 3 Ob 157/14f CaS 2015, 305.

[13] CaS 2015, 311.

3. Sportschiedsgerichtsbarkeit und Kartellrecht

(6) Auch der zweite Gesichtspunkt ist verallgemeinerungsfähig, diesmal allerdings nur für das internationale Sportwesen, nicht auch für das Verhältnis von Monopolen zu ihren Vertragspartnern im allgemeinen. Ganz klar hat der BGH – ganz im Gegensatz zu den recht unüberlegten Thesen des Berufungsgerichts – gesagt, das Verlangen von Sportverbänden, die an einem Wettbewerb teilnehmenden Sportler müssten die Schiedsklausel zum CAS/TAS akzeptieren, kein Missbrauch einer marktbeherrschenden Stellung ist. Wahrscheinlich kennen alle Rechtsordnungen, die ein Kartellrecht entwickelt haben, das Verbot des Missbrauchs einer marktbeherrschenden Position[14]. Zwar ist auffällig[15], das der BGH, ebenso wie das OLG München, nicht das Kartellrecht der Europäischen Union[16] angewendet haben. Ursprünglich waren der deutsche Nationalverband und der internationale Verband in München verklagt worden. Wegen der gerichtlichen Zuständigkeit gegenüber dem ersteren bestand die Zuständigkeit auch gegenüber dem zweiten – Zuständigkeit wegen Streitgenossenschaft[17]. Nach dem Ausscheiden des deutschen Verbandes blieb die Zuständigkeit gegenüber dem internationalen Verband gemäß dem Prinzip der perpetuatio fori bestehen. Es kam aber in der Sache selbst grundsätzlich nicht deutsches Recht, sondern schweizerisches Recht zur Anwendung. Das Kartellrecht – ob deutsches oder solches der Europäischen Union – war aber als sogenannte „Eingriffsnorm“ beachtlich – nach dem allgemeinen Grundsatz des Kollisionsrechts, dass staatslenkende Normen unter Umständen auch dann angewendet werden müssen, wenn eigentlich ausländisches Recht zur Anwendung kommt. Jedoch war nicht nur der deutsche „Markt“ betroffen, weshalb das Kartellrecht der Europäischen Union hätte angewendet werden müssen. Der BGH fürchtete offenbar den Zeitverlust, der eintreten würde, wenn dem Gerichtshof der Europäischen Union nach Art. 267 § 3 AEUV die entscheidende

[14] Z.B. USA Sherman Act von 1890 sect. 2 (wörtlich wendet er sich nur gegen Monopole. Aber gerade darum geht es auch bei den Sportverbänden); Brasilien Gesetz Nr. 8884 Art. 20, 21; Schweden Competition Law chapter 2 Art. 7).

[15] Selbst dem das OLG München verteidigenden *Heermann* ist dies unerklärlich, Juristenzeitung 2015, 362, 363.

[16] Art. 101 ff, im Besonderen Art. 102 des Vertrags über die Arbeitsweise der Europäischen Union (abgekürzt AEUV; englisch: Treaty on the Functioning of the European Union – TFEU).

[17] Damals Art. 6 Nr. 1 der EU-Verordnung 44/2001 über die Zuständigkeit und die Anerkennung und Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen. Heute mit identischem Text Art. 8 Verordnung [EU] 1215/2012 vom 12. Dezember 2012, in Kraft seit 10. Januar 2015.

Rechtsfrage hätte vorgelegt werden müssen. Für die Bewertung der Bedeutung der Entscheidung des BGH ist jedoch ausschlaggebend, dass das europäische Kartellrecht in Sachen „Missbrauch einer marktbeherrschenden Position“ bezüglich der Vertragsbedingungen nahezu wörtlich identisch mit dem deutschen Kartellrecht ist[18]. Die Entscheidung des BGH kann daher in Sachen Kartellrecht als Präjudiz („persuasive authority“) auch für das Europarecht eingestuft werden. Da die ganze Auseinandersetzung um die angeblich durch die Sportverbände geübte „Zwangsschiedsgerichtsbarkeit“ auf Deutschland beschränkt geblieben ist, wird aber vermutlich auch ein Gericht eines anderen Mitgliedstaats der Europäischen Union die Frage nicht dem Gerichtshof der Europäischen Union vorlegen[19].

4. Ergänzung des konkreten Sachverhalts

(7) Das Urteil des OLG München und das ihm vorausgehende des LG München haben wegen eines besonderen Gerechtigkeitsaspekts sehr viel Aufsehen und eine von Mitleid erfüllte positive Reaktion ausgelöst. Dabei ist aber übersehen worden, dass gerade wegen dieses Aspekts das Schweizerische Bundesgericht sich zweimal ausführlich mit der Sache befasst hat. Claudia Pechstein hatte geltend gemacht, der „falsche“ Eindruck, dass sie gedopt habe, sei durch folgenden Umstand zustande gekommen: Ihre Blutwerte hätten nur deshalb eine Schlussfolgerung zu ihren Lasten heraufbeschworen, weil sie von Natur aus die fraglichen Werte in ihrem Blut produziere, was sie ererbt habe; die Möglichkeit einer solchen Vererbung habe erst nach dem Abschluss des ganzen Verfahrens mit wissenschaftlichen Methoden festgestellt werden können. Diesen Einwand hatte sie aber bereits in einem „Wiederaufnahmeverfahren“[20] vor dem Schweizerischen Bundesgericht vorgebracht. In Wirklichkeit hat sich das Schweizerische Bundesgericht[21] sehr ausführlich mit der Frage befasst,

[18] S. Art. 103 AEUV einerseits und § 19 deutsches Gesetz gegen Wettbewerbsbeschränkungen andererseits.
[19] Nach Art. 267 AEUV könnte auch ein anderes deutsches Gericht, vor allem wenn es dem BGH nicht folgen will, vorlegen.
[20] Im Englischen „resumtion of proceedings“, in der brasilianischen ZPO von 2015 Acåo rescisória, Art. 966. In der Schweiz heißt der Fachausdruck „Revision“. Diesen scheint der BGH missverstanden und gemeint zu haben, er sei mit der deutschen „Revision“ als einem letztinstanzlichen Rechtsmittel identisch.
[21] Vom 28. September 2010 A_144/200 – aufzurufen unter www.bundesgericht.ch.

ob wirklich ein neues, früher nicht verfügbares Beweismittel vorgebracht wird. Man muss zum Verständnis dieser Entscheidung wissen, dass nach einer prätorianisch zu nennenden Rechtsprechung das Schweizerische Bundesgericht ein Wiederaufnahmeverfahren gegen einen Schiedsspruch zugelassen hat[22], wofür es in kaum einer anderen Rechtsordnung ein Gegenstück gibt[23]. In einem solchen Verfahren hat das Schweizerische Bundesgericht festgestellt, dass in früheren Jahren, auch bis kurz vor den entscheidenden Proben, bei Claudia Pechstein 90 Blutproben entnommen und auf Doping-Nachweise untersucht worden seien. Sie alle hatten die angeblich erblichen Blutmerkmale nicht. Da das Schweizerische Bundesgericht das Wiederaufnahmeverfahren wegen der fehlenden Neuheit des Beweismittels für unzulässig hielt, hat es dem Leser überlassen, die Schlussfolgerungen aus dieser Geschichte zu ziehen.

[22] Grundlegend BGE/ATF 118 II 200. Besonders eindrucksvoll 4_A596/2108 = XXXV Yearbook Commercial Arbitration (2009) Fall „Fregatten von Taiwan".

[23] Ausnahme: Frankreich, Cour de cassation Revue de l'Arbitrage 1993, 91 f = XIX Yearbook Commercial Arbitration (1994) 205. Für Deutschland vom Verfasser zur Übernahme empfohlen in *Stein/Jonas/Schlosser* Kommentar zur ZPO, 23. Aufl. (2014), § 1058 Rn. 4.

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English translation (Original judgment in German)

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGEMENT

KZR 6/15

Handed down on:
7 June 2016
Bürk
Clerk of the court
acting as authentication officer

In the legal matter of

1. Deutsche Eisschnelllauf-Gemeinschaft e.V. (DESG), represented by the president, Menzinger Straße 68, Munich,

Defendant,

2. International Skating Union (ISU), represented by the president, Chemin de Primerose 2, Lausanne (Switzerland),

Defendant, Appellee and Complainant

- Attorneys of record: Jordan and Dr Hall, attorneys at law –

versus

Claudia Pechstein, Wendenschloßstraße 298, Berlin,

Plaintiff, Appellant and Respondent

- Attorney of record: Dr Hammer, attorney at law –

Having held a hearing on 8 March 2016, the anti-trust division (*Kartellsenat*) of the Federal Court of Justice, presided by the president of the Federal Court of Justice, Limperg, and attended by presiding

judges Prof. Dr. Meier-Beck and Dr. Raum and attended by associate judges Prof. Dr. Strohn and Dr. Deichfuß, has passed the following

Decision:

In reply to the Second Defendant's writ of certiorari (*Revision*), the partial final and the partial interim judgement of the anti-trust division of the Higher Regional Court of Munich of 15 January 2015 is hereby set aside insofar as the Court of Appeal has found against the Second Defendant in the said judgement.

The Plaintiff's appeal against the judgement of the Regional Court of Munich I of 26 February 2014 is dismissed in its entirety.

The costs of the appeal proceedings shall be borne by the Plaintiff.

<u>The facts of the case:</u>

1 The Plaintiff is an internationally successful speed skater. The First Defendant – which is not involved in the appeal proceedings – is the German National Association for speed skating, which has its registered offices in Munich. The Second Defendant is the International Skating Union (hereinafter referred to as ISU); the ISU has its registered offices in Switzerland. Both federations are organised in accordance with the "one place principle", i.e., there is only one German and one international federation that organise speed skating competitions on the national and international level.

2 On 2 January 2009, during the period before the speed skating world championships in Hamar (Norway) on 7 and 8 February 2009, the Plaintiff signed a registration form provided by the Second Defendant. If the Plaintiff had not signed this registration form, she would not have been permitted to compete. By signing the form, the Plaintiff undertook, inter alia, to comply with the Second Defendant's anti-doping regulations. Furthermore, she also signed an arbitration agreement that provided that any disputes should be brought before the Court of Arbitration for Sport (hereinafter referred to as CAS) in Lausanne and that the jurisdiction of the ordinary courts of law should be excluded.

3 During the World Championships in Hamar, blood samples were taken from the Plaintiff; these samples showed elevated reticulocyte counts. The Second Defendant considered this to be

evidence of doping. Its disciplinary commission decided on 1 July 2009 to ban the Plaintiff from competition with retroactive effect as of 7 February 2009 for two years on the ground of illegal blood doping, to annul the results obtained by the Plaintiff during the competitions on 7 February 2009 and to strip her of the points, awards and medals that she had won. In a letter dated 19 July 2009, the First Defendant informed the Plaintiff that she was also excluded from training as a result of this ban and that her status as a member of the team for the Olympic Winter Games 2010 had been suspended.

4 The Plaintiff and the First Defendant appealed to the CAS against the decision of the disciplinary commission. On 29 September 2009, the CAS submitted its Rules of Procedure for these proceedings, in which, inter alia, it determined its own jurisdiction. These Rules of Procedure were signed by the parties. In an award dated 25 November 2009, the CAS dismissed the appeals almost without exception; only the date of commencement of the ban was altered to 8 February 2009.

5 The Plaintiff appealed against this award to the Swiss Federal Tribunal; this appeal was dismissed by a judgment dated 10 February 2010. A further appeal (Revision [i.e.*: based on alleged new facts*]) filed by the Plaintiff with the Swiss Federal Tribunal was dismissed by a judgment dated 28 September 2010.

6 By the present action, the Plaintiff requests a declaratory judgement stating that her ban due to doping was unlawful, and a decision ordering the Defendants to pay compensation for the material damage suffered by her, as well as compensation for her pain and suffering. The Regional Court (*Landgericht*) dismissed the complaint (Regional Court of Munich I, SchiedsVZ 2014, 100). The Plaintiff accepts the dismissal of the complaint against the First Defendant; however, she has filed an appeal against the dismissal of the complaints against the Second Defendant. The Court of Appeal handed down a partial final and partial interim decision (Higher Regional Court of Munich, WuW/E DE-R 4543) dismissing the Plaintiff’s appeal to the extent of dismissing the first point of the complaint filed against the Second Defendant – i.e., the request for a declaratory judgement stating that the doping ban imposed on the Plaintiff was illegal. Concerning the further relief sought in the complaints – damages, including damages for pain and suffering –, the Court of Appeal has found that the action filed against the Second Defendant is admissible. The Second Defendant then appealed against this decision by an appeal on points of law only, which was allowed by the Court of Appeal and is now being contested by the Plaintiff.

Statement of reasons:

7 A. The Court of Appeal based its decision essentially on the following reasons:

8 The German courts have international jurisdiction over the complaint against the Second Defendant. This jurisdiction is based on Art. 6 no. 1 of the *Convention on jurisdiction* and the recognition and *enforcement of judgments in civil and commercial matters of 30 October 2007 (Lugano Convention 2007).* The close link required as a prerequisite for recourse to these courts, together with another legal entity, at the place where the other legal entity has its registered offices, is provided by the fact that the complaints against the First Defendant and the Second Defendant are based on one and the same factual and legal situation. There are no indications of any abusive behaviour on the Plaintiff's part, e.g. by filing a suit against the First Defendant with the sole aim of establishing the jurisdiction of the German courts over the Second Defendant. The German courts continue to hold jurisdiction with regard to the complaint filed against the Second Defendant even after the dismissal of the complaint against the First Defendant has become res iudicata.

9 The arbitration agreement concluded between the Plaintiff and the Second Defendant does not hinder access to the regular courts. The arbitration agreement is invalid because it infringes mandatory law. Pursuant to Art. 34 of the Introductory Law to the German Civil Code (EGBGB), the effectiveness of the arbitration agreement must be evaluated in accordance with German anti-trust law. Such an evaluation shows that the arbitration agreement is invalid according to sec. 19 para. 1, para. 4 no. 2 of the German Act against Restraints on Competition (*GWB*), old version. The Second Defendant holds a monopoly position in the relevant market of admission to speed skating world championships and is therefore an addressee of the norm. The organisation of sporting events constitutes a commercial activity. By submitting a registration form providing for the jurisdiction of a court of arbitration and excluding the jurisdiction of the courts of law, the Second Defendant imposed general terms and conditions of business. This assessment is not contradicted by the International Convention against Doping in Sports of 19 October 2005, which refers to the principles of the World Anti-Doping Code (hereinafter referred to as WADC) that include mandatory jurisdiction of the CAS. There is no indication either that the Convention considers this specific detail to be part of the principles that the signatory states – including Switzerland – undertook to adhere to, or that Switzerland had created a statutory obligation according to which the Second Defendant would have had to draw up an arbitration agreement involving the CAS. The question whether the Second Defendant felt itself obliged to demand an arbitration agreement involving the CAS for other than statutory reasons, particularly because it wanted to maintain its recognition by the

International Olympic Committee, is irrelevant to the assessment from the point of view of anti-trust law.

10 A request for an arbitration agreement on the part of the organiser of an international sporting competition is not, in itself, an abuse of a dominant market position. In particular, guaranteeing uniform jurisdiction and rules of procedure in proceedings based on similar sets of facts prevents contradictory decisions and provides an objective reason for submitting disputes between athletes and federations in connection with international competitions to a uniform court of arbitration for sports. In the present case, however, the request to sign the arbitration agreement does constitute an abuse of market position, since the federations have a significant influence on the selection of the persons eligible for appointment as arbitrators in proceedings before the CAS. There is no objective justification for this excess of power in the hands of the federation. The only reason for an athlete to sign the arbitration agreement despite this imbalance is the monopoly position of the federation. Since the arbitration agreement blocked the Plaintiff's access to the courts of law and to a judge provided by law, the level of materiality required for an assumption of abuse of market position may be considered to have been exceeded.

11 An assumption of abuse under anti-trust law is not contradicted by the deletion of sec. 1025 para. 2 of the Code of Civil Procedure (*ZPO*), old version, which provided for the invalidity of an arbitration agreement in cases where one party abused its economic or social dominance to force the other party to sign it. To justify the deletion of this provision, the legislative authorities argued that the invalidity of the arbitration agreement would constitute an excessive legal consequence in view of the fact that arbitration offered legal protection that is, generally speaking, equivalent to that of the courts of law, and that the rule of sec. 1034 para. 2 of the Code of Civil Procedure guarantees a balanced composition of the court of arbitration. However, these legislative considerations are irrelevant to the evaluation under anti-trust law, since it is a typical feature of anti-trust abuse control that market-dominating enterprises are prohibited from certain behaviours that are freely permitted to other market participants.

12 The Plaintiff is not prevented from bringing her case before a court of law because of contradictory behaviour. It is true that she filed an objection against the doping ban with the CAS. However even if this had entailed an acknowledgement of the latter's jurisdiction, such jurisdiction cannot be extended to other disputes, particularly to the dispute concerning the claims for damages in question here. Furthermore, it is unclear why the Second Defendant should have been expected to assume that the Plaintiff would have recourse to the CAS for other disputes than those concerning the validity of the doping ban. After all, the signing of the

Rules of procedure of the CAS could only have established its jurisdiction over the pending dispute concerning the doping ban, but not over other proceedings.

13 The first claim (declaratory judgement establishing the illegality of the doping ban) is inadmissible since it was not aimed at a declaratory judgement concerning a legal relationship. However, the other claims (material damages and compensation for pain and suffering) are admissible. To the extent that it is admissible, the complaint is not ready for decision; in particular, it is not unfounded due to any res iudicata effects of the arbitral award of the CAS. The recognition of the CAS award constitutes a violation of ordre public due to the fact that the arbitration agreement violated anti-trust law.

14 B. The Second Defendant's appeal on a point of law is successful and restores the judgement of the regional court which had dismissed the complaint. The complaint, to the extent that it has not yet been dealt with, is inadmissible.

15 I. However, the German courts have international jurisdiction over the complaint pursuant to Art. 6 no. 1 in conjunction with Art. 60 of the Lugano Convention 2007.

16 Pursuant to Art. 6 no. 1 of the Lugano Convention 2007, the courts of a state bound by this convention also have jurisdiction over actions filed against a defendant which has its registered offices in another signatory state if it is being sued together with a defendant having its registered offices in the state in which the court is located, and if the connection between the complaints is so close that joint proceedings and a joint decision appear to be necessary in order to prevent contradictory decisions being passed in separate proceedings. In the present case these requirements have been met with regards to the action filed jointly against the First and Second Defendant.

17 1. According to the case law of the Federal Court of Justice, the interpretation of Art. 6 no. 1 of the Lugano Convention 2007 must take into account the parallel provision of Art. 8 no. 1 of the Brussels I Regulation as well the relevant case law of the Court of Justice of the European Union (decision of 30 November 2009 – II ZR 55/09, WM 2010, 378). According to this, the necessary link between the complaints may be assumed to exist if the legal and factual situation is identical in both cases and there is a risk of contradictory decisions (ECJ, judgement of 11 April 2013 – C-645/11, NJW 2013, 1661, margin no. 43 – Sapir; judgement of 11 October 2007 – C-98/06, Slg. 2007, I-8340, margin no. 40 – Freeport; Federal Court of Justice, decision of 30 November 2009 – II ZR 55/09, WM 2010, 378; Geimer inGeimer/Schütze, Europäisches Zivilverfahrensrecht, 3rd ed., Art. 6 of the Brussels I Regulation, margin no. 19;

Thomas/Putzo/Hüßtege, ZPO, 36th ed., Art. 8 of the Brussels I Regulation, margin no. 4). As far as the claims for damages still pending before the Court of Appeal are concerned, the complaint against the Second Defendant is based on the Plaintiff's allegation that the doping ban imposed upon her was unlawful. The First Defendant was accused of having concretized the doping ban imposed by the Second Defendant by way of a letter dated 19 July 2009, and having subsequently implemented it. This means that the claims filed against the First Defendant were also based on the allegation of unlawfulness of the imposed doping ban. This means that both complaints are based on the same factual and legal situation, particularly in view of the fact that the Plaintiff has also cited both Defendants as joint and several debtors (see Bergermann, Doping und Zivilrecht, 2002, p. 256; Grothe in Festschrift für Hoffmann, 2011, p. 601, 614 et seq.; Classen, Rechtsschutz gegen Verbandsmaßnahmen im Profisport, 2014, p. 38; Adolphsen in Adolphsen/Nolte/Lehner/Gerlinger, Sportrecht in der Praxis, 2012, margin no. 1253; concerning the question of connectedness (*Konnexität*) in case of joint and several liability, see Stadler in Musielak/Voit, ZPO, 13th ed., Art. 8 of the Brussels I Regulation, margin no. 3).

18 2. The Court of Appeal has correctly rejected the suggestion of an attempt at forum shopping, i.e., the suggestion that the First Defendant had only been sued in order to keep the Second Defendant away from the Swiss courts that would actually have had jurisdiction over it. In particular, an alleged inconclusiveness of the complaint against the First Defendant does not constitute sufficient evidence of an abuse of Art. 6 of the Lugano Convention 2007.

19 According to the case law of the Court of Justice of the European Union, the jurisdiction clause of Art. 8 no. 1 of the Brussels I Regulation cannot be interpreted to mean that a plaintiff is entitled to bring an action against a plurality of defendants with the sole purpose of removing one of them from its proper court (EUGH, judgement of 13 July 2006 – C-103/05, Slg. 2006, I-6840, margin no. 32 – Reisch Montage; judgement of 27 September 1988 – 189/87, Slg. 1988, 5579, margin no. 9 – Kalfelis). However, the lack of attempts at forum shopping is not a prerequisite of jurisdiction requiring separate examination, but needs only to be taken into account in connection with the considerations as to whether a joint hearing and decision appears necessary (ECJ, judgement of 11 October 2007 – C-98/06, Slg. 2007, I-8340, margin no. 54 – Freeport; Geimer in Geimer/Schütze, Europäisches Zivilverfahrensrecht, 3rd ed., Art. 6 of the Brussels I Regulation, margin no. 23; MünchKommZPO-Gottwald, 4th ed., Art. 6 of the Brussels I Regulation, margin no. 14; concerning the consideration as an independent item for examination, see Stadler in Musielak/Voit, ZPO, 13th ed., Art. 8 of the Brussels I Regulation, margin no. 3).

20 Any act of forum shopping – which would have to be taken into account - will however not be assumed to have been proved just because the complaint against the First Defendant was already inadmissible under national law at the time it was filed, or was found to be inadmissible subsequently (see ECJ, judgement of 30 July 2006 – C-103/05, Slg. 2006, I-6840, margin no. 31, 33 – Reisch Montage; for an opinion affirming jurisdiction pursuant to Art. 6 no. 1 of the Brussels I Regulation independently of the admissibility or merits of the "original action", see also Kropholler / von Hein, Europäisches Zivilprozessrecht, 9th ed., Art. 6 of the Brussels I Regulation, margin no. 8, 16; Geimer in Geimer/Schütze, Europäisches Zivilverfahrensrecht, 3rd ed., Art. 6 of the Brussels I Regulation, margin no. 25; MünchKommZPO-Gottwald, 4th ed., Art. 6 of the Brussels I Regulation, margin no. 6; Thomas/Putzo/Hüßtege, ZPO, 36th ed., Art. 8 of the Brussels I Regulation, margin no. 5; for a different opinion, see Wagner, in Stein/Jonas, ZPO, 23rd ed., Art. 6 of the Brussels I Regulation, margin no. 44 et seq.; for a different opinion, see Stadler in Musielak/Voit, ZPO. 13th ed., Art. 8 of the Brussels I Regulation, margin no. 5). This point of view is supported, in particular, by the fact that the practical effectiveness of the jurisdiction provision of Art. 6 no. 1 of the Lugano Convention 2007 would no longer be guaranteed if difficult questions of jurisdiction or the question of the merits of the "original action" had to be dealt with already at the stage at which the jurisdiction of the court is being examined (see Kropholler/von Hein, Europäisches Zivilprozessrecht, 9th ed., Art. 6 of the Brussels I Regulation, margin no. 16). In this way, the legal certainty aimed at by this provision would also be impaired (see ECJ, judgement of 13 July 2006 – C-103/05, Slg. 2006, I-6840, margin no. 25 – Reisch Montage). Conclusions may be different in cases where the inconclusiveness of the "original action" is obvious. However, this is not the case here. The contrary opinion set forth in the appeal on a point of law relied mainly on the consideration that the First Defendant was not involved in the doping ban on which all the Plaintiff's claims for damages are based and that, therefore, it had not committed any act that could have given rise to liability. On the other hand, the Plaintiff considered the First Defendant to be liable because it had implemented the doping ban imposed by the Second Defendant although it could have ignored the ban quite easily, and it would have been possible and reasonable for it to do so. This is not an obviously ineligible starting point for joint action including the First Defendant.

21 3. According to the principle of *perpetuatio fori*, the international jurisdiction of German courts over the action against the Second Defendant, once established, will not cease as a result of the dismissal of the action against the First Defendant having become res iudicata in the meantime (ECJ, judgement of 5 February 2004 – C-18/02, Slg. 2004, I-1441, margin no. 36 et seq. – DFDS Torline; Kropholler/von Hein, Europäisches Zivilprozessrecht, 9th edition, Art. 6 of the Brussels I Regulation, margin no. 14; Adolphsen in Adolphsen/Nolte/Lehner/Gerlinger,

Sportrecht in der Praxis, 2012, margin no. 1254; Schlosser in Schlosser/Hess, EU-Zivilprozessrecht, 4th edition, Art. 8 of the Brussels I Regulation, margin no. 3).

22 II. However, the complaint is inadmissible due to the Second Defendant pleading the arbitration agreement (sec. 1032 para. 1 in conjunction with sec. 1025 para. 2 of the Code of Civil Procedure).

23 1. By signing the registration for the competition at the Second Defendant's request, the Plaintiff and the Defendants entered into an arbitration agreement pursuant to sections 1025 et seq. of the Code of Civil Procedure. The CAS is a "true" court of arbitration within the meaning of the Code of Civil Procedure and not merely an association tribunal (*Verbandsgericht*) (for more details concerning this distinction, see FCJ, judgement of 28 November 1994 – II ZR 1 1/94, BGHZ 128, 93, 108 et seq.; Schlosser in Stein/Jonas, ZPO, 22nd ed., ahead of sec. 1025, margin no. 11) or any other dispute resolution body.

24 a) The general outlines of the position of the judiciary power within the governmental structure and its relationship with the citizens have been established as fundamental principles of the German legal system (cf. BVerfGE 2, 307, 320). A judge must observe a proper distance and neutrality (cf. BVerfGE 21, 139, 145 et seq.; 42, 64, 78); the nature of a judge's work excludes any possibility that it could be done by uninvolved third parties (for the relevant case law, see, inter alia, BVerfGE 3, 377, 381). As regards arbitration, the function and effect of which constitutes substantive jurisprudence, no exception to this principle is made. Consequently, a "true" court of arbitration by which access to the court of law can be effectively excluded can only exist in cases where the arbitration court called upon to decide the particular case represents an independent and neutral instance (FCJ, judgement of 15 May 1986 – III ZR 192/84, BGHZ 98, 70, 72; decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 211 et seq.; Schlosser in Stein/Jonas, ZPO, 22nd ed., ahead of sec. 1025, margin no. 11).

25 b) The CAS represents such an independent and neutral instance. Unlike a federation or association tribunal (concerning this point, see FCJ, decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 210 et seq.), it is not incorporated into any particular federation or association. As an institution, it is independent of the sports federations and Olympic Committees that support it (see Federal Tribunal of Switzerland, judgment of 27 May 2003 – 4P.267-270/2002, SchiedsVZ 2004, 208, 209 et seq. – Danilova and Lazutina); it is intended to ensure uniform jurisdiction across all federations.

26 c) The procedure of drawing up the list of arbitrators of the CAS indicates no structural imbalance impairing the independence and neutrality of the CAS to such an extent that its position as a "true" court of arbitration could be called into question (this is also the conclusion of Görtz, Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht, 2012, p. 219; Schlosser in Stein/Jonas, ZPO, 22nd ed., sec. 1034, margin no. 13; for a different opinion, see Classen, Rechtsschutz gegen Verbandsmaßnahmen im Profisport, 2014, p. 69 et seq.; Orth, SpuRt 2015, 230, 232; Heermann, SchiedsVZ 2015, 78, 79, who has some doubts; Holla, Der Einsatz von Schiedsgerichten im organisierten Sport, 2006, p. 204).

27 aa) According to the findings of the Court of Appeal, the 2004 rules governing the procedure that were applicable on the date on which the arbitration agreement was signed (Statutes of the Bodies Working for the Settlement of Sports-related Disputes, hereinafter referred to as Statutes, and the Procedural Rules, hereinafter referred to as the Procedural Rules), the parties appealing to the CAS are only entitled to select the arbitrators from a closed list of arbitrators drawn up by the International Council of Arbitration for Sport (hereinafter referred to as ICAS). The ICAS consists of 20 members. The International Sports Federations (of which the Second Defendant is one), the National Olympic Committees and the International Olympic Committee are each entitled to appoint four of these members. These 12 members then appoint four members "with a view to safeguarding the interests of the athletes". These 16 members finally appoint four further members who are independent of the organisations that have nominated all the other members. The members of the ICAS pass their decisions with a simple majority of all votes. When selecting arbitrators for the CAS, the ICAS is obliged to guarantee a distribution that corresponds to its own composition: one fifth of the arbitrators must be chosen from those appointed by the International Sports Federations, one fifth from those appointed by the International Olympic Committee and one fifth from those appointed by the National Olympic Committees; a further fifth should be selected to safeguard the interests of the athletes and the remaining fifth should consist of persons who are independent of the persons responsible for proposing the other arbitrators. During appeal proceedings before the CAS, the president of the appeal division who has been elected by a simple majority in the ICAS is entitled to appoint a chairman for the panel seized of the dispute in question if the parties to the dispute failed to come to an agreement concerning this point.

28 The Court of Appeal concludes from this that due to the majority principle applying to the ICAS, the federations are overrepresented by the 12 members appointed by them, which allegedly enables them to influence the composition of the list of arbitrators, particularly in view of the fact that the independence in relation to the federations of the further eight members cannot be guaranteed since they are elected by the 12 members linked to the federations. This

ascendancy represents a risk in that the persons included in the list of arbitrators are likely, for the most part or even entirely, to be closer to the federations than to the athletes. There is no objective justification for this preponderance of the federations. In disputes between the federations and the athletes, the interests of the parties are not identical, but rather directly opposed to each other.

29 bb) This conclusion is without merit.

30 The independence required for a qualification as a "true" court of arbitration will be found to be lacking in cases where the members of the arbitral tribunal are determined solely or predominantly by one party, or where the parties to the dispute do not have equal influence on the composition of the tribunal (FCJ, decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 213 et seq.; Haas, ZVglRWiss 2015, 516, 517 et seq.; Classen, Rechtsschutz gegen Verbandsmaßnahmen im Profisport, 2014, p. 62 et seq.). However, in case of an actual dispute the parties have equal influence on the composition of the arbitral tribunal of the CAS. Both parties are entitled to choose an arbitrator from the (closed) list of arbitrators. A list of arbitrators as such is unobjectionable as long as it is not used to institutionalise the predominant influence of one party (see Zöller/Geimer, ZPO, 31st edition, sec. 1034, margin no. 11) or the body exercising a decisive influence on the drawing up of the list of arbitrators is closer to one party than to the other, i.e., belonging to a specific "camp" (Schlosser in Stein/Jonas, ZPO, 22nd ed., sec. 1025, margin no. 10). There is no such predominant influence in the present case.

31 The list of arbitrators reflects no institutionalisation of a predominant influence on the part of any specific sports federation involved in actual proceedings (in this case, the Second Defendant) in the sense that it could have directly influenced the list. The Second Defendant only has an indirect influence over the composition of the list of arbitrators, since, according to the findings of the Court of Appeal, it is one of the international sport federations entitled to appoint four members of the ICAS. Furthermore, one fifth of the arbitrators should be appointed from among the persons named by the international sport federations. This means that an international sports federation such as the Second Defendant does have a certain influence on the composition of the list of arbitrators. However, its scope is not sufficient to permit the Second Defendant to exercise a decisive influence on the composition of the list of arbitrators. No indications have been found, and no evidence has been provided to suggest that the list of arbitrators, which must include a minimum of 150 persons – in fact, it includes far more than 200 (see Haas, ZVglRWiss 2015, 516, 528) – does not contain a sufficient number of neutral persons independent of the Second Defendant (see FCJ, judgement of 7 January 1971 – VII ZR 160/69, BGHZ 55, 162, 175 et seq.; Pfeiffer, SchiedsVZ 2014, 161, 164; Öschütz, Anmerkung zur

Entscheidung des schweizerischen Bundesgerichts im Fall Danilova und Lazutina, SchiedsVZ 2004, 211, 212).

32 A dominant influence of the federation involved in the proceedings in the present case cannot be deduced from the fact that the sports federations and the Olympic Committees globally have an important influence with respect to the composition of the list of arbitrators. A predominant position of the federation involved in the present proceedings vis-à-vis the athlete when determining the arbitrators could only be deduced from this if "federations" and "athletes" were seen as two "camps" confronting each other and motivated by opposing interests, as may be the case in other areas, e.g. in disputes involving employers and employees. However, "federations" and "athletes" do not represent such opposing camps. It is true that, in the present case, a federation – the Second Defendant – and an athlete – the Plaintiff – were facing each other before the CAS as opposing parties; yet this does not mean that it is possible to place all the other sports federations automatically in the same camp as the Second Defendant. Generally speaking, the sports federations and the Olympic Committees are competing units with very different individual interests (see Haas, ZVglRWiss 2015, 516, 528 et seq.). As far as the obligation of implementing the WADC is concerned, they may very well represent parallel interests in doping cases. However, these interests are usually identical with the interests of the athletes in ensuring that sport remains free from doping. Furthermore, beyond the common goal of ensuring doping-free sports competitions, there will frequently be quite different individual interests on the part of the various federations and the athletes. Like the First Defendant, a federation may support its athlete in doping -related proceedings because it is convinced of the athlete's innocence. Another federation – as, in the present case, the Second Defendant – may defend the doping ban imposed by its disciplinary commission. As far as the athletes are concerned, an athlete found guilty of doping will fight for the mildest possible sanctions, while other athletes, whose interests may have been prejudiced by their doping competitor, may possibly be in favour of much stricter sanctions.

33 The panel has not lost sight of the fact that possibly the interest of the "federation's side" in ensuring effective implementation of the rules and the public perception of such implementation may be in conflict with the interests of the athlete in question in ensuring a high standard of evidence. However, in view of the main goal of a doping-free sport pursued by all federations and athletes – despite very different individual interests in individual cases – this does not justify an assumption of homogenous "camps", consisting of "the federations" and "the athletes", which would permit individual sports federations such as the Second Defendant to be automatically lumped with all the other federations so as to construe a predominance of an individual party to the proceedings with respect to the composition of the arbitral tribunal.

34 d) In other respects, the Statutes and the Procedural Rules of the CAS provide sufficient individual independence and neutrality on the part of the arbitrators. After the appointment, the arbitrators must sign a declaration to the effect that they undertake to exercise their function in an objective and independent manner. They cannot be members of the ICAS and they are obliged to disclose to the parties any circumstances that may impair their impartiality. Furthermore, the parties are given the opportunity to challenge an arbitrator who appears to them to be not impartial. The Plaintiff's objection that this right of challenge is only of limited value since the arbitrators are not obliged to disclose whether and how many times in the past they have already been appointed by a party can all the less hinder the classification of the CAS as a "true" Court of Arbitration, just like the right of suggestion (*Hinweisrecht*) of the Secretary General of the CAS – before being signed, an arbitral award must be submitted to the Secretary General, who may correct formal errors and draw the attention of the arbitral tribunal to "fundamental issues of principle" (compare the doubts resulting from this as to the factual independence of the arbitral tribunal with the similar provision of Art. 33 [corresponding to Art. 27 of the old version] of the ICC Rules of arbitration, see Reiner/Jahnel in Schütze, Institutionelle Schiedsgerichtsbarkeit, 2nd ed., Art. 27 ICC, margin no. 8 et seq.; Schlosser in Stein/Jonas, ZPO, 22nd ed., sec. 1036, margin no. 60 et seq.).

35 aa) The provision of sec. 1034 para. 2 of the Code of Civil Procedure, which provides a special procedure, subject to a time limit, before domestic courts of arbitration in cases of structural predominance of one party in the composition of the arbitral panel, indicates that not all impairments of the independence and neutrality of the arbitral panel will exclude the applicability of sections 1025 et seq. of the Code of Civil Procedure. Rather, the application of sections 1025 et seq. will only be waived if the court of arbitration is no longer organised as an independent and impartial body according to its own statutes or if the "arbitral proceedings" boil down to no more than a decision on the part of the association or federation itself to safeguard its own interests, i.e. if a mere representation of the interests of the association or federation in question is to be expected (FCJ, decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 212 et seq.).

36 This is in accordance with the case law of the Federal Court of Justice concerning foreign arbitral awards, the recognition of which is only refused if the violations of the requirement of neutrality are absolutely irreconcilable with the principles governing the exercise of judicial power, e.g. because, from the point of view of a neutral observer, they justify the assumption that the arbitrators are no more than agents implementing the intentions of one party, or because the arbitrators unilaterally promote the interests of one party over those of the other for reasons

unrelated to the case in question. This means that recognition of a foreign arbitral award can only be refused if the violation of the rule of impartial administration of justice has had actual, palpable consequences to the arbitral proceedings (FCJ, judgement of 15 May 1986 – III ZR 192/84, BGHZ 98, 70, 74 et seq.).

37 bb) However, as already explained above, this is definitely not the case here.

38 The fact that a federation has, as a rule, more often the opportunity to nominate an arbitrator than an individual athlete is in the nature of things; it does not mean that the arbitrator nominated by the federation can be considered as its agent.

39 The right of the Secretary General of the CAS to point out fundamental issues of principle does not, basically, constitute a restriction to the independence of the arbitral tribunal, either. Rather, this right of suggestion serves to guarantee a uniform jurisdiction.

40 2. The arbitration agreement between the parties of 2 January 2009 covers the claims for damages raised by the Plaintiff.

41 When the Plaintiff signed the registration form of 2 January 2009, she submitted to the articles of association of the Second Defendant. The registration form expressly refers to art. 26 of the articles of association, as well as to the right of decision of the CAS with regard to final and absolute arbitral awards binding upon the Second Defendant, its members and all participants in events organised by the Second Defendant, to the total exclusion of the jurisdiction of all ordinary courts. Art. 26 of the Second Defendant's articles of association in force at the time set out the responsibilities of the CAS. According to this, claims for damages and other claims against the Second Defendant, which could otherwise have been brought before a civil court, were to be subject to the exclusive jurisdiction of the CAS.

42 3. The arbitration agreement between the parties is valid.

43 a) The agreement must be evaluated in accordance with the standards established by sec. 19 of the Act against Restraints of Competition, old version.

44 In case of a conflict of laws, the question of a valid conclusion and the effectiveness of an arbitration agreement must be evaluated in accordance with the rules of German International Private Law (FCJ, judgement of 3 May 2011 – XI ZR 373/08, NJW-RR 2011, 1350, margin no. 38). According to Art 27 et seq. of the Introductory Law to the German Civil Code, valid until 17

December 2009 and thus applicable to the arbitration agreement of 2 January 2009 (cf. FCJ, loc. cit.), the effectiveness of the arbitration agreement must be determined in accordance with German anti-trust law, the law applicable to the contract notwithstanding. According to Art. 34 of the Introductory Law to the German Civil Code, old version, the applicable provisions are those provisions of German law that cannot be contractually modified and that are mandatorily applicable internationally to the facts in question, without regard to the law governing the contract itself. These include the provisions of anti-trust law (MünchKommBGB-Martiny, 4th ed., Art. 34 EGBGB, margin no. 94; Palandt/Thorn, BGB, 68th ed., Art. 34 EGBGB, margin no. 3). Concerning this point, the conflict of laws clause of private competition law in sec. 130 para. 2 of the Act against Restraints of Competition (cf. Rehbinder in Immenga/Mestmäcker, Wettbewerbsrecht, 5th ed., § 130 GWB, margin no. 291) states that the provisions of the Act against Restraints of Competition are applicable to all restraints of competition which – as in the present case concerning an abuse of a dominant market position vis-à-vis a person resident in Germany – have an impact within the scope of applicability of this law, even if they have been initiated outside the scope of applicability of this law (cf. Tyrolt, Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht, 2007, p. 44; for a different opinion, see Duve/Rösch, SchiedsVZ 2015, 69, 74).

45 b) The Second Defendant is the addressee of the norm of sec. 19 of the Act against Restraints of Competition, old version. The Court of Appeal has correctly found that the organisation of sporting events constitutes a commercial activity and that, in view of the one place principle, the Second Defendant occupies a monopoly position in the relevant market of the organisation of speed skating world championships.

46 c) The arbitration agreement entered into by the parties is valid. It does not infringe the prohibition of abuse under anti-trust law pursuant to section 19 of the Act against Restraints of Competition in the version applicable to this dispute, in force until 29 June 2013 (hereinafter referred to as the “old version”), which would render it invalid pursuant to sec. 134 of the German Civil Code.

47 The question whether the applicability of the prohibition of abuse under antitrust law is excluded because the Second Defendant was not acting as an entrepreneur when entering into the arbitration agreement, but rather in accordance with its obligation to provide exclusive jurisdiction of CAS for legal remedies against decisions in anti-doping proceedings resulting from the participation in an international sporting event, or in cases involving international top athletes (Art. 13.2.1 in conjunction with Art. 23.2.2 WADC), may be left unanswered. In any case, the behavior of the Second Respondent – following a comprehensive evaluation of the interests

of both parties, taking into account the aim of the Act against Restraints of Competition of safeguarding the freedom of competition - does not constitute any abuse of its dominant position in the market.

48 It is also irrelevant whether the Second Defendant's request that the Plaintiff sign the arbitration agreement should be evaluated in accordance with sec. 19 para. 4 no. 2 of the Act in Restraint of Competition, old version (abuse of conditions) or in accordance with the general clause of sec. 19 para. 1 of the Act against Restraints of Competition, old version (concerning this point, BGH, judgement of 6 November 2013 – KZR 58/11, BGHZ 199, 1, margin no. 65 – VBL-Gegenwert; Fuchs/Möschel in Immenga/Mestmäcker, Wettbewerbsrecht, 5th edition, § 19 GWB, margin no. 254, 256; the question is left open by FCJ, decision of 6 November 1984 – KVR 13/83, WuW/E BGH 2103, 2107 – Favorit; Nothdurft in Langen/Bunte, Kartellrecht, 12th ed., § 19 GWB, margin no. 144). The balancing of interest required both under sec. 19 para. 4 no. 2 and under sec. 19 para. 1 of the Act against Restraints of Competition, old version, shows that the Second Defendant has not committed any abuse. The request for an arbitration agreement designating the CAS as the Court of arbitration is definitely justified from an objective point of view and does not contradict the general values enshrined in the law. In particular, this request is in no way contrary to the Plaintiff's right of access to the courts, her rights of professional freedom (Art. 12 of the German Constitution) and her rights under Art. 6 ECHR. This also means that the arbitration agreement cannot be considered invalid pursuant to sec. 138 of the German Civil Code.

49 aa) As far as the balancing of interests is concerned, the Plaintiff is mainly interested in obtaining a decision by an independent court (of arbitration) in fair proceedings, while the Second Defendant is mainly interested in safeguarding the interests of sporting federations in achieving functioning global sports arbitration. However, neither aspect is limited to the interests of one party only. Only an independent and fair sports arbitration can expect to be recognised and respected worldwide, and every athlete wishing to participate in fair competition must be interested in having alleged violations of anti-doping rules cleared up and sanctioned on an international level in accordance with uniform standards, and in ensuring equal treatment for all the athletes from different countries against whom such violations may have been alleged.

50 The fact that the fight against doping is of paramount importance worldwide has never been denied by either party and is undisputed. Against this background, a uniform system of arbitration is intended to implement the anti-doping rules of the WADC in an effective manner and in accordance with uniform case law. If this task were left to the courts in the individual

states, the goal of international sporting arbitration would be jeopardised. No one has succeeded as yet in drawing up a system of rules capable of maintaining international sports arbitration, while, at the same time, completely avoiding the deficiencies in connection with the appointment of independent arbitrators and the proceedings in general that results from the significant influence exercised by the international sports federations and the Olympic Committees. The CAS procedure has been criticised in the past – inter alia due to the case law of the Swiss Federal Tribunal –, which has already led to modifications of these procedural rules (Öschütz, SchiedsVZ 2004, 211 et seq.). The statutes of the CAS, as they currently stand, contain procedural rules for the appointment of arbitrators which can be considered as acceptable.

51 bb) The request of the Second Defendant that an arbitration agreement be signed does not violate the fundamental rights of the Plaintiff. It is true that it affects the fundamental rights. However, this fact, by itself, does not mean that the interests of the Plaintiff must always be given precedence when balancing the interests of the parties pursuant to sec. 19 of the Act against Restraints of Competition, old version, (cf. concerning the fundamental right to private property, BGH, decision of 4 March 2008 – KVR 21/07, BGHZ 176, 1, margin no. 38 et seq. – Soda-Club II), particularly in view of the fact that the case involves fundamental rights on the part of the Second Defendant, as well.

52 The right of access to justice, which is derived from the rule-of–law principle in conjunction with the fundamental rights, particularly with Art. 2 para. 1 of the German Constitution, guarantees access to courts governed by the state and staffed with independent judges (cf. BVerfGE 107, 395, 406 et seq.; 117, 71, 121 et seq.; 122, 248, 270 et seq.; Uhle in Merten/Papier, Handbuch der Grundrechte, Band V, 2013, § 129, margin no. 29; Papier in Isensee/Kirchhof, Handbuch des Staatsrechts, 3rd ed., vol. VIII, § 176, margin no. 12). However, it is possible to waive this right to access to the state courts and to agree on arbitration instead, as long as the parties have submitted voluntarily to the arbitration agreement and the resulting waiver of a decision by state judicial authority (BGH, judgement of 3 April 2000 – II ZR 373/98, BGHZ 144, 146, 148 et seq.; – Körbuch; Zöller/Geimer, ZPO, 31st ed., ahead of § 1025, margin no. 4; Schütze, Schiedsgericht und Schiedsverfahren, 5th ed., Introduction, margin no. 10; Uhle in Merten/Papier, loc. cit., § 129, margin no. 4; Papier in Isensee/Kirchhof, loc. cit., § 176, margin no. 13; Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd ed., margin no. 240).

53 (1) The Plaintiff submitted to the arbitration agreement voluntarily and, consequently, effectively (similarly with respect to the conclusions: Adolphsen in Adolphsen/Nolte/Lehner/Gerlinger, Sportrecht in der Praxis, 2012, margin no. 1151 et seq.; Görtz, Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht, 2012, p. 241 et

seq.; Duve/Rösch, SchiedsVZ 2015, 216, 222 et seq.; for a differing opinion, see Orth, SpuRT 2015, 230, 231; Monheim, SpuRT 2014, 90, 91; Classen, Rechtschutz gegen Verbandsmaßnahmen im Profisport, 2014, p. 87 et seq.; Heermann, SchiedsVZ 2015, 78, 80; Bleistein-Degenhart, NJW 2015, 1353, 1355; Bergermann, Doping und Zivilrecht, 2002, p. 141 et seq., 281; see also Maihold, SpuRt 2013, 95, 96, who has some doubts).

54 An involuntary waiver of reliance on fundamental rights may have been obtained in cases where physical or psychological coercion have been used, e.g. by threatening considerable disadvantages (cf. BVerfG NJW 1982, 375, regarding lie detectors), where the party waving its rights has been misled, where he or she is not aware of the significance and scope of his/her declaration (Merten in Merten/Papier, Handbuch der Grundrechte, Band III, 2009, § 73 129, margin no. 38, 21; Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol. III/2, 1994, p. 914; Lachmann, Handbuch für die Schiedsgerichtspraxis, loc. cit., margin no. 241) or where no respective declaration of intent has been made, at least consciously (concerning this point, see FCJ, judgement of 3 April 2000 – II ZR 373/98, BGHZ 144, 146 – Körbuch). If the waiver of fundamental rights is part of a contractual agreement, this agreement must be considered as the decisive legal instrument for the realisation of free and independent actions in relation to others. The contractual parties themselves thereby determine how their individual interests are adequately balanced within their internal relationship. In this way, the exercise of freedom and the undertaking of mutual obligations are concretised. For this reason, the corresponding intentions of the contractual parties are therefore, as a general rule, considered proof of an adequate balancing of interests, enshrined in the contract, which in principle the state must respect (cf. BVerfGE 103, 89, 100; BVerfG, NJW 2011, 1339, margin no. 34). In case of a contractual agreement, this means that it will be generally assumed that the parties entered into the contract voluntarily.

55 The present case is no exception. In order to be able to participate in the speed skating world championships in Hamar (Norway) in pursuit of her profession, the Plaintiff signed the registration form provided by the Second Defendant on 2 January 2009. It has been neither established nor alleged that she was forced to do so by any unlawful threat or misrepresentation or by physical coercion. The fact as alleged by her, i.e., that she did not want the arbitration clause – that is to say, one of the terms and conditions of the contract – contained in the registration form is no proof that she did not sign the contract of her own free will. In fact, a contractual agreement presupposes a willingness on the part of the parties – in particular in cases where they represent opposing interests – to give up some of their own positions and to accept conditions that are not in accordance with their own intentions but with those of the other party. There is nothing to be said against this, as long as the contract in

question provides an objective balancing of interests. However, in cases where one of the parties is in a position of such power that it is able to determine the terms of the contract more or less unilaterally, the other party may be said to have been coerced into agreeing to such terms. If, in such a situation, fundamental rights are affected, the rules and regulations of the respective state have to come into action in a balancing manner in order to protect these fundamental rights (BVerfGE 81, 242, 255; 89, 214, 232; 103, 89, 100 et seq.).

56 In the present case however, the Plaintiff's decision was imposed on her. The Second Defendant holds a monopoly on the organisation of speed skating world championships. The Plaintiff's pursuing of her profession depended on her participation in such world championships. Consequently, the Second Defendant was actually in a position to impose the terms and conditions of participation in the championships on the Plaintiff. Furthermore, in light of the obligation on the part of the Second Defendant pursuant to Art. 13.2.1 in conjunction with Art. 23.2.2 WADC of foreseeing the CAS as the court of arbitration, it may be assumed that the Plaintiff would not have been admitted for participation in the competition if she had refused to also sign the arbitration agreement.

57 In such cases of “heteronomy”, the provisions to be applied in order to safeguard the fundamental rights include, in particular, the general clauses of civil law (sections 138, 242, 307, 315 of the German Civil Code), which also include sec. 19 of the Act against Restraints of Competition (cf. Nothdurft in Langen/Bunte loc. cit., § 19 GWB, margin no. 2). Fundamental rights must be taken into account when concretising and implementing these (BVerfGE 81, 242, 255 et seq.; 89, 214, 232 et seq.; 115, 51, 66 et seq.) and the reciprocal action of colliding fundamental rights must be taken into account and limited in such a way as to ensure that they are as effective as possible for all parties concerned (BVerfGE 89, 214, 232).

58 In balancing the interests of the parties pursuant to sec. 19 of the Act against Restraints of Competition, old version, particularly the fundamental rights involved, with regard to the Plaintiff it must be taken into account that, in addition to her claim to access to the courts, her fundamental right of exercising her profession freely (Art. 12 para. 1 of the German Constitution) is affected. The fundamental right to a free exercise of one's profession includes not only the right to choose and take up one's profession freely, but also the right to exercise that profession as one sees fit (cf. the fundamental considerations in BVerfGE 7, 377 et seq.). The requirement imposed by the Second Defendant, i.e., its rule that participation in competitions – which is absolutely necessary for professional athletes when exercising their profession – will not be permitted unless a registration form containing, inter alia, an arbitration clause has been signed, constitutes a restriction on the freedom to exercise one's profession. If

the Plaintiff were to refuse to comply with this requirement, e.g. because she did not want to agree to arbitration, she would be practically prevented from exercising her profession.

59 (2) On the other hand, the imposition of arbitration proceedings constitutes a procedural safeguard of the Second Defendant's autonomy as an association, which is equally guaranteed as a fundamental right (Art. 9 para. 1 of the German Constitution). Sports federations such as the Second Defendant promote sports in general and particularly their own sport by creating the prerequisites for organised sport. To achieve the relevant goals, it is of fundamental importance to ensure that the rules apply to all athletes and are implemented everywhere in accordance with uniform standards (Görtz, Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht, 2012, p. 243). It is therefore generally recognised, particularly in the area of international sport, that arbitration agreements determining the jurisdiction of a particular court of arbitration are required to ensure a uniform procedure with regard to the implementation of the rules of sports law. Particularly in the area of doping, uniform application of the anti-doping rules of the federations and of the WADC is indispensable to ensure fair international sporting competitions for all athletes. Furthermore, a uniform court of arbitration for sport can contribute to the development of international sports law. Further advantages of an international sports arbitration, as compared to state courts, include the specialist knowledge of the arbitrators, the speed of the decision-making process, which is of paramount importance for the athlete involved in such proceedings, and the international recognition and execution of arbitral awards (cf. BT-Drucks. 18/4898, p. 38; Adolphsen in Adolphsen/Nolte/Lehner/Gerlinger, Sportrecht in der Praxis, 2012, margin no. 1030 et seq.; Holla, Der Einsatz von Schiedsgerichten im organisierten Sport, 2006, p. 30 et seq.; Heermann, SchiedsVZ 2014, 66, 75; Duve/Rösch, SchiedsVZ 2014, 216, 223 et seq. and SchiedsVZ 2015, 69, 77; Orth, SpuRT 2015, 230).

60 Concerning the Second Defendant, it must further be remembered that it is, in turn, obliged by Art. 13.2.1 in conjunction with Art. 23.2.2 WADC to insist on arbitration agreements designating the CAS as the court of arbitration. Due to the ratification of the International Convention against Doping in Sport of 19 October 2005 (BGBl. II 2007, p. 354) by the Federal Republic of Germany, the principles of the WADC represent contractual law which is binding under international law (cf. Görtz, Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht, 2012, p. 85). Furthermore, the International Olympic Committee, in compliance with its obligation under Art. 20.1.2 WADC, makes its recognition of international sport federations dependent on their compliance with the rules laid down in the WADC.

61 (3) The result of the balancing of these rights and interests leads to the conclusion that the Second Defendant, with its requirement that the arbitration agreement proposed by it, be

signed, has not abused its dominant market position in the meaning of sec. 19 of the Act against Restraints of Competition, old version

62 This result is due, on the one hand, to the fact that not only the federations but also, and more particularly, the athletes benefit from the aforementioned advantages of sports arbitration, since these depend on fair conditions during competition to be able to exercise their sport (professionally, if applicable). This includes, but is not limited to, uniform application of the anti-doping rules, which, at present, can only be guaranteed by the CAS as a globally recognised court of sports arbitration. However, to ensure, on the other hand, that the Plaintiff's fundamental rights to access to justice and free exercise of her profession are protected to the greatest possible extent, the standards applied to the independence and neutrality of the CAS must not be too low. As already stated above, the list of CAS arbitrators basically contains a sufficient number of independent and neutral persons; furthermore, in particular the Second Defendant, as the opposing party in these proceedings, does not have institutional supremacy in connection with the drawing up of the list of arbitrators and the composition of the court of arbitration. Moreover, the Plaintiff was not without legal remedies if she had factual misgivings concerning the impartiality and neutrality of the arbitral tribunal. Rather, the statutes and the Procedural Rules of the CAS contain suitable regulations in case of conflict of interest. Moreover there is also the option – exercised by the Plaintiff – of having the arbitral awards of the CAS reviewed by the federal courts of Switzerland to a certain extent. According to the case law of the Swiss Federal Tribunal, this legal remedy, which resembles the German proceedings pursuant to sec. 1059 of the Code of Civil Procedure regarding reversal of an arbitral award (cf. Tyrolt, Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht, 2007, p. 104), cannot be excluded in the arbitration agreement (Swiss Federal Tribunal, judgement of 22 March 2007 – 4P.172/2006, SchiedsVZ 2007, 330, 332 et seq. - Cañas). There is no further reaching right for a decision particularly by a German state court. Rather, the German legal system recognises both foreign judgements and foreign arbitral awards if the relevant requirements have been fulfilled (sec. 328 of the Code of Civil Procedure and/or Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention)).

63 Furthermore the legislative intent of facilitating the valid conclusion of an arbitration agreement in cases like the present must be taken into account. Sec. 1025 para. 2 of the Code of Civil Procedure, in its version applicable up to 31 December 1997, provided that an arbitration agreement will be invalid if either party has used its commercially or socially dominant position to coerce the other party into signing the agreement or into accepting terms and conditions that generally grant it a predominant position vis-a-vis the other party during the proceedings and particularly with regard to the appointment or rejection of arbitrators. The legislative authorities

deleted this provision, since they considered that the legal consequence of an invalidity of the arbitration agreement in case of exploitation of the commercial or social dominance of a party was too far-reaching in view of the equivalence of legal protection in arbitration proceedings (BT-Drucks. 13/5274, p. 34). This assessment is confirmed in sec. 11 of the Law Against Doping in Sports enacted on 10 December 2015 (BGBl. I 2015, p. 2210), which also provides the possibility of an arbitration agreement in cases like the present. In the explanatory memorandum of this law (BT-Drucks. 18/4898, p. 38 et seq.), it is made clear that arbitration agreements pre-formulated by the sports federations are not, in the opinion of the legislative authorities, invalid because they have been signed involuntarily.

Furthermore, Germany has ratified the International Convention against Doping in Sport of 19 October 2005 (BGBl. II 2007, p. 354), which in its Art. 4 para. 1 refers to the rules of the WADC and imposes an obligation on the signatory states to comply with these rules. And, as already stated above, Art. 13.2.1 in conjunction with Art. 23.2.2 WADC provide for arbitration clauses that designate the CAS as the relevant court of arbitration.

64 cc) An arbitration agreement naming the CAS as the relevant court of arbitration does not violate the rights of the Plaintiff in the light of Art. 6 ECHR, either.

65 Art. 6 para. 1 ECHR provides that, with respect to civil law claims, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. However, like the claim of access to the courts established by the German Constitution, this right of access to ordinary courts may also be waived. In particular, the jurisdiction of ordinary courts may be excluded in arbitration agreements if the arbitration agreement has been entered into voluntarily, is lawful and clearly worded, if further the arbitration procedure has been designed in accordance with the guarantees given in Art. 6 ECHR and if the arbitral awards can be set aside by a court of law in case of procedural errors (European Court of Human Rights (ECHR), judgement of 28 October 2010 – 1643/06, margin no. 48 – Suda ./, République Tchèque; Meyer in Karpenstein/Mayer, EMRK, 2nd ed., Art. 6, margin no. 59). According to the statements set out above under bb), these requirements have been fulfilled. According to the case law of the European Court of Human Rights, the fact that the Plaintiff is obliged, to be able to exercise her profession, to sign the registration form imposed by the Second Defendant does not mean that the arbitration agreement has not been voluntarily signed and therefore infringes the Convention (cf. EKMR, Judgement of 5 March 1962 – 1197/61, X ./. Federal Republic of Germany; Matscher in Festschrift Nagel, 1987, p. 227, 238; for a similar conclusion, see Pfeiffer, SchiedsVZ 2014, 161, 165; for a different opinion, see Heermann, SchiedsVZ 2015, 78, 80 et seq.; undecided: Niedermair, SchiedsVZ 2014, 280, 283).

66 dd) The prohibition of abuse under anti-trust law pursuant to Art. 102 TFEU offers no basis for the assumption that the arbitration agreement between the parties is invalid, either. As in the case of sec. 19 of the Act against Restraints of Competition, a balancing of interests shows that the Second Defendant has not abusively exploited its dominant position in the market.

67 ee) Finally, an invalidity of the arbitration agreement cannot be based on Swiss law, either.

68 (1) With the exception of several provisions that cannot be waived by contractual agreement within the meaning of Art. 34 of the Introductory Law to the German Civil Code, old version, such as, for instance, provisions of anti-trust law, the validity of the arbitration agreement must be assessed in accordance with Swiss substantive law. As already stated above, the substantive law applicable to the arbitration agreement must be determined in accordance with Art. 27 et seq. of the Introductory Law to the German Civil Code, old version. Since the parties failed to include an express choice of law clause, the agreement is subject, pursuant to Art. 28 para. 1 sentence 1 of the Introductory Law to the German Civil Code, old version, to the law of the state to which it is most closely linked. According to Art. 28 para. 2 sentence 1 of the Introductory Law to the German Civil Code, old version, it must be assumed that the agreement is most closely linked with the state in which the party expected to provide the characteristic performance has its official residence or, in the case of a company, an association or a legal entity, its head offices, on the date on which the agreement was signed. In the case of arbitration agreements, the place of arbitration is seen as a major connecting link for determining the state with which the agreement has the closest connection (MünchKomm-ZPO-Münch, 4th ed., § 1029, margin no. 37; Tyrolt, Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht, 2007, p. 43, fn. 90; for a similar conclusion, see Heermann, SchiedsVZ 2015, 78, 83; Pfeiffer, SchiedsVZ 2014, and hundred 61, 163; for different opinion concerning the connecting link, but similar conclusion, see Zöller/Geimer, ZPO, 31st ed., § 1029, margin no. 15, 107 et seq.; Tyrolt, loc. cit., p. 43; Bergermann, Doping und Zivilrecht, 2002, p. 272; Voit in Musielak/Voit, ZPO, 13th ed., Art. 1029, margin no. 28; Schlosser in Stein/Jonas, ZPO, 22nd ed., sec. 1025, margin no. 9 and § 1029, margin no. 108).

69 (2) Contrary to the assumption of the Regional Court [*Landgericht*], the arbitration agreement is not invalid under Swiss law because the Plaintiff was practically obliged into signing it since she would otherwise have been unable to exercise her profession.

70 Foreign law must be applied by German courts in the same way as the courts of the foreign country in question interpret and apply it (FCJ, judgement of 14 January 2014 – II ZR 192/13, NJW 2014, 1244, margin no. 15). The case law of the Swiss Federal Tribunal on the question of "involuntary signing" of arbitration agreements in favour of the CAS which are imposed on

professional athletes by the sports federations shows that although a professional athlete will only sign the arbitration agreement under duress because he knows that he will not be able to exercise his profession otherwise, the arbitration agreement will still be valid (Swiss Federal Tribunal, judgement of 22 March 2007 – 4P.172/2006, SchiedsVZ 2007, 330, 332 et seq. - Cañas). Concerning this point, the Swiss Federal Tribunal states that a waiver of legal remedies in relation to arbitral awards declared in advance is invalid, because it is not to be expected, in view of the structural imbalance, that the athlete would have voluntarily waived any legal remedies at his disposal. Insofar there was is a contradiction between the treatment of the arbitration agreement and of the waiver of legal remedies, at least in theory. However, this is justified in view of the speedy resolution of disputes by specialised arbitration panels hedged about with sufficient guarantees of independence and impartiality. The “favourable” treatment of the question of voluntary conclusion of the arbitration agreement is balanced by the fact that legal remedies will not be considered to have been waived. Consequently, the present arbitration agreement between the parties, which does not exclude the right to appeal to the Swiss courts of law, is also valid under Swiss law.

71 III. The decision as to costs is based on sec. 97 para. 1 of the Code of Civil Procedure.

Limperg Meier-Beck Raum

Strohn Deichfuß

Lower courts:
Regional Court of Munich I, decision of 26 February 2014 – 37 O 28331/12 –
Higher Regional Court of Munich, decision of 15 January 2015 – U 1110/14 Kart –