IS FINAL AND BINDING ARBITRATION REALLY “FINAL” AND “BINDING?”: THE CURIOUS CASES OF CLAUDIA PECHSTEIN AND LANCE ARMSTRONG

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Synopsis:
This paper examines whether, and in what circumstances, courts in Germany and the US will reject "final and binding" arbitration awards.

Abstract:
Two of the most successful athletes in the history of their sports have asked courts on both sides of the Atlantic to determine when arbitration awards become final and binding. The results of these cases have the potential to completely change the structure of sport-related arbitration by authorizing courts to disregard the parties’ agreements to enter into final and binding arbitration.

AIM OF ABSTRACT/PAPER
In both cases, the athletes contractually agreed to submit disputes to binding arbitration, but being dissatisfied with the results, have asked courts to overturn the arbitral awards. Although both cases are still pending, it appears the two courts are taking completely different approaches to the arbitration awards. The results of these cases have the potential to completely change the structure of sport-related arbitration. This presentation will examine the legal grounds the courts cited in both cases and discuss whether courts will allow final and binding arbitration to be final and binding, or declare that such awards are subject to courts’ intervention.

LEGAL THEORY
For at least the past 30 years, in order to quickly resolve disputes, athletes involved in sporting activities have entered into agreements that disputes would be resolved through binding arbitration rather than through the court system. Consequently, athletes sign binding arbitration agreements which allow the disputes to be settled by an arbitrator rather than a judge. These agreements have now come under scrutiny by courts in Germany and the US, with athletes

asking courts to reject the arbitrator's decision.

ANALYSIS

Germany's Claudia Pechstein is the most successful speed skater ever, having won nine Olympic medals, five of which are gold. She had expected to add to her medal count in the 2010 Olympics, but was not allowed to compete after being banned by the International Skating Union (ISU) for two years for blood doping. Although she submitted to over 90 blood tests, she never tested positive. Her ban was based on circumstantial evidence that her blood had abnormal levels of immature red blood cells which can be a sign of doping. She argued that it was a genetic abnormality she inherited from her father. She had signed the ISU's required arbitration agreement establishing that a Court of Arbitration for Sport (CAS) award would be the final judgment. When the ISU issued the ban, she appealed the case to the CAS which upheld the ban, as did the Swiss Federal Tribunal. (Keidel, 2015).

Not deterred by her lack of success, Pechstein sued the ISU for 4.4 million Euros in the Regional Court in Munich. Although the court was sympathetic to her argument, it ruled that the case was final according to Article V of the New York Convention (1958) under the doctrine of res judicata. Pechstein appealed to the Higher Regional Court in Munich, alleging that the arbitration agreement she signed with the ISU violated German public policy. In a landmark ruling, this court agreed with Pechstein and refused to recognize the CAS award because Article V, para. 22(b) of the New York Convention exempts arbitration awards that are "contrary to the public policy of that country." The ISU has appealed the case to the German Federal Court of Justice.

Lance Armstrong's arbitration case may best be described as bizarre. When Armstrong finally acknowledged he was doping when he won his seven Tour de France titles, he was hit with a barrage of lawsuits seeking to recover money paid to him. One of the Plaintiffs was SCA Promotions, an insurance underwriter that pays prizes based on athletes' performances. Armstrong claimed he was owed $7.5 million incentive compensation based on his victories in the Tour de France in 2002-4. SCA denied liability asserting that Armstrong won using prohibited means. The claim was submitted to binding arbitration according to the insurance contract.

Prior to an arbitration award being entered, in 2006 the parties privately resolved their dispute and entered into a Compromise Settlement Agreement (CSA) resulting in a payment of $7.5 million to Armstrong. The unique aspect of this case is that the 2006 CSA anticipated additional disputes, and specifically granted the Tribunal exclusive jurisdiction to resolve any future disputes. After Armstrong's confession to doping, SCA moved to reconvene the original arbitration proceeding and requested sanctions against Armstrong. In response, Armstrong asked a Texas District Court to halt arbitration proceedings. In Armstrong v. SCA Promotions (1972), both the District Court and the 5th Court of Appeals of Texas denied his request.

The Tribunal heard the dispute and entered an award of $10 million against Armstrong. The resulting award states "perjury must never be profitable." This case "presents an unparalleled pageant of international perjury, fraud and conspiracy. It is almost certainly the most devious sustained deception ever perpetrated in world sporting history." The Tribunal found that it had jurisdiction over the dispute based on the 2006 CSA. The dissenting arbitrator disagreed, stating that under the Texas Arbitration Act (1997) any motion to vacate must

be filed within 90 days of the original award. Without question, this case will spend years working its way through the courts.

IMPLICATIONS/CONCLUSION

In the event that either Pechstein or Armstrong are successful in having their arbitration decisions vacated, the idea of using final and binding arbitration will be undermined. In that case, expect any disgruntled athlete who feels that he/she was treated unfairly to seek recourse through the courts. This will severely damage the ability of CAS and sport federations to resolve disputes independent of courts, and will extend final resolution of sport disputes.

This presentation will examine the legal grounds the courts cited in both cases and discuss whether courts will allow final and binding arbitration to be final and binding, or declare that such awards are subject to courts' intervention.

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