CLOSED LIST ARBITRATOR APPOINTMENTS:

A CASE STUDY

Wilmer Cutler Pickering Hale and Dorr counsel **Olga Braeuer** reviews a sports arbitration case which scrutinised a closed list appointment system, and draws parallels to the selection process in commercial and investment arbitrations

THE SELECTION of international arbitrators is one of the most important aspects of the arbitral process. Established methods span from the selection of arbitrators by agreement between the parties to the selection by non-judicial appointing authorities and by national courts.

Although party autonomy in the selection of arbitrators is one of the main reasons why parties opt for international arbitration in the first place, there are some limitations to the principle. There have been suggestions to systematically move away from the established practice of party-appointed arbitrators by requiring that appointments be made entirely by institutions and a number of newer arbitral institutions rely on closed lists when they are appointing arbitrators.

In a recent high-profile case, the use by the **Court of Arbitration for Sport** (CAS) of a closed list appointment system has come under scrutiny. As discussed below, while the closed list system may have its place in a specialised area like sports arbitration, the case identifies some of the wider concerns that can arise when parties' freedom to choose arbitrators is limited in the commercial world.

Background

The *Pechstein* case began in 2009, when highly decorated German Olympic speed skater Claudia Pechstein took legal action against a two-year doping ban issued by the International Skating Union (ISU). Pechstein and the ISU had signed an arbitration agreement when she registered for the Speed Skating World Championships in Norway. During these championships, Pechstein tested positive for blood doping and was subsequently banned.

Pechstein commenced a CAS arbitration in Switzerland to challenge the doping ban in accordance with the arbitration agreement, but could not convince the tribunal to overturn it. Pechstein then lost the two subsequent proceedings before the Swiss Federal Tribunal in which she sought to challenge the CAS Award. The case caused controversy because, after having exhausted her legal remedies within the designated system for resolving sports disputes in Switzerland, Pechstein turned to the state courts in Germany in an attempt to reopen her case.

This was aggravated by the fact that Pechstein had not objected to the validity of the arbitration agreement before CAS, nor before the Swiss Federal Tribunal. Rather, she challenged CAS' jurisdiction for the first time before the German courts in 2013, nearly four years after she had commenced the arbitration.

Pechstein argued, *inter alia*, that there is no fair balance in the selection of CAS arbitrators as sports bodies would decisively influence the closed list of arbitrators *vis-à-vis* athletes. According to the CAS Rules applicable at the time (Article S14), one-fifth of the arbitrators on the CAS list were selected upon proposal by the International Olympic Committee (IOC), one-fifth upon proposal by the International Sports Federations (IFs), one-fifth upon proposal by the National Olympic Committees (NOCs), one-fifth with a view to safeguarding the interests of the athletes, and one-fifth from among persons independent of the above bodies. These quotas were abolished in 2012, granting the appointing organ (ICAS) more discretion in drawing up the closed list.

Despite the fact that Pechstein failed to contest the validity of the underlying arbitration agreement in the CAS proceedings, the Higher Regional Court of Munich ruled in her favour in January 2015. It found the CAS closed list system a violation of German public policy and the arbitration agreement was invalid, thereby paving the way for a review of the doping ban before German courts.

Specifically, the German court reasoned that the appointment of arbitrators from a closed list created a structural imbalance in favour of sports bodies, i.e. athletes would not have a fair choice in the nomination of the panel. This ruling posed a significant threat to the recognition of CAS awards in Germany – until it was overturned by the German Federal Supreme Court on 7 June 2016.

The decision of the German Federal Supreme Court

The German Federal Supreme Court found Pechstein's claim inadmissible. Among other reasons, it considered CAS a "genuine arbitral tribunal" (as opposed to internal dispute resolution bodies of sports federations) under German law, thus overriding any concerns regarding the independence and impartiality of CAS tribunals.

In the Court's view, this finding is not countered by the fact that CAS maintains a closed list of arbitrators. The Federal Supreme Court concluded that there is no structural imbalance in favour of the ISU that would call into question the independence or impartiality of CAS. The court reasoned, *inter alia*, that (i) the ISU would merely have an indirect influence on the list of CAS arbitrators; (ii) the number of independent and neutral persons would be sufficient because there are more than 200 eligible CAS arbitrators

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(today: more than 350); (iii) sports federations and athletes would not necessarily have opposing interests, in particular in the fight against doping; and (iv) both athletes and federations would benefit from having a uniform system for (swiftly) resolving sports disputes. Any remaining imbalance in favour of sports bodies would be offset by the underlying procedural framework, which would guarantee the arbitrators' individual independence and impartiality.

While the Federal Supreme Court's reasoning is more persuasive in some parts than in others, its conclusion that the appointment process for the CAS closed list of arbitrators provides a sufficient degree of independence is consistent with the jurisprudence of the Swiss Federal Tribunal.

However, this is not yet the end; Pechstein took further legal action before the German Constitutional Court, and the case is still pending before the European Court of Human Rights in Strasbourg.

List systems in commercial and investment arbitration

While most international arbitration institutions do not use a closed list system, some institutions do, particularly those focused on a specific commodity or industry (e.g., Grain Trade Australia's **Dispute Resolution Service**). Moreover, the arbitration procedure included in the recently concluded Canada-European Union Free Trade Agreement (CETA) uses a closed list system. CETA's **Permanent Investment Tribunal** will be composed of 15 members nominated by the EU and Canada: five Canadian judges, five European judges and five judges from other countries. The tribunal will hear cases in divisions of three members appointed at random and each arbitrator will serve five-to-10-year terms.

At least with regard to specialist areas such as sports arbitration, the argument for a closed system is that the cases often require arbitrators with specialised expertise – for example, arbitrators who are familiar with the intricacies of anti-doping rules and the rigorous standard of proof associated with these rules.

By using arbitrators who have been vetted for their expertise, the closed list may also increase the odds of fast resolution of disputes, which may be essential for certain types of cases (for example, determining whether someone can participate in a competition like the Olympics). The use of a closed list arguably also increases the likelihood of consistent rulings on complex issues (for example, in the sports arbitration context, issues relating to eligibility and doping). It also may reduce the incentive for arbitrator bias because an arbitrator may not feel beholden to rule in favour of the party that unilaterally appointed him or her.

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Nonetheless, a closed list system limits party autonomy and may, depending on the circumstances, affect the procedural equality of the parties, or even impede on the impartiality and independence of arbitrators. It is therefore essential to address these issues by ensuring and procedurally safeguarding the quality of the closed list. One way that CAS does this is to require its arbitrators to abstain from acting as counsel in other CAS proceedings (Article S18 of the CAS Rules) in order to avoid an appearance of bias.

It may make sense for closed list systems to go even further with regard to transparency, including by borrowing measures that are being implemented in other institutions. For example, in January 2016, the **ICC International Court of Arbitration** announced that it will publish the names of all arbitrators sitting in ICC cases, their nationality, their status as tribunal chairperson and whether they were appointed by the ICC Court or the parties (however, parties are allowed to opt out of this new rule). In a similar vein, the **Permanent Court of Arbitration** maintains a list of arbitrators (Members of the Court), which not only indicates the qualifications and expertise of each member, but also identifies the States that have nominated the individual person.

Using these approaches in closed list systems could help reinforce the procedural equality of the parties. For example, CAS could move towards greater transparency by disclosing who proposed a given name on its list: the ICO, an IF, a NOC or an athletes' commission. This would allow CAS users to appoint their arbitrator with a better understanding of the relevant facts and

potential biases – a process that would reinforce the legitimacy of CAS as the leading institution for sports disputes.

Finally, some institutions use hybrid systems where parties select co-arbitrators from outside the list, while maintaining the closed list for the selection of presiding or sole arbitrators. If institutions that use fully closed systems were to adopt such a system, it would address many of the concerns about party autonomy in the appointment of arbitrators, while helping to ensure that the tribunal still includes specialist arbitrators who are familiar with the relevant issues.

Under the **International Centre for Settlement of Investment Disputes** (ICSID) Rules, for instance, the parties are free to appoint arbitrators from outside the ICSID Panel of Arbitrators if they possess the qualities required under the ICSID Convention. Absent an agreement between the parties, the Chairman of the ICSID Administrative Council appoints the presiding arbitrator from that panel. In commercial arbitration, the **London Court of International Arbitration** (LCIA), for example, maintains a database of arbitrators that is not publicly available. This list is only used by the LCIA Court when it is requested to appoint arbitrators, or when parties are unable to reach agreement on an arbitrator.

Under this approach, which is used by the **German Court of Arbitration for Sport** (*DIS-Sportschiedsgericht*) in anti-doping disputes, the parties can select their party-appointed arbitrators from outside the list, but, if the parties cannot agree on a presiding arbitrator, this arbitrator would be selected by the two members of the tribunal from a closed list. As a result, instead of having to find three suitable arbitrators from a closed list, there would only be a need for the selection of one presiding arbitrator. Parties would still be able to challenge individual arbitrators in the case of bias.

Conclusion

Although closed list appointment systems lead to a limitation on party autonomy, they are still (commonly) used in specialised commercial settings as they provide users with a maximum degree of relevant expertise, speed, efficiency, procedural predictability and uniform decision-making. However, these systems could look to recent transparency changes adopted by some arbitration institutions that may help parties to identify potential biases. Even one step further, moving to hybrid list systems would help balance the desire for specialised expertise with party autonomy.

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