FEDERAL CONSTITUTIONAL COURT

- 1 BvR 2103/16 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Ms (…),

– authorised representative: (…) –

against a) the Order of the Federal Court of Justice (*Bundesgerichtshof*)

of 12 July 2016 - KZR 6/15 -,

b) the Judgment of the Federal Court of Justice

of 7 June 2016 - KZR 6/15 -

the Second Chamber of the First Senate of the Federal Constitutional Court, with the participation of Justices

Paulus,

Christ

and Härtel,

unanimously held on 3 June 2022, on the basis of § 93b in conjunction with § 93a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*), […]:

1. **The Judgment of the Federal Court of Justice of 7 June 2016 - KZR 6/15 - violates the complainant's right of access to justice following from Article 2(1) in conjunction with Article 20(3) of the Basic Law (*Grundgesetz*). The Judgment is reversed. The matter is remanded to the Higher Regional Court (*Oberlandesgericht*) for a continuation of the proceedings.**

2. **[…]**

3. **[…]**

R e a s o n s :

I.

The complainant is a German professional athlete. With her constitutional complaint, she challenged the rejection of her action [concerning a doping ban] before the German civil courts. The courts had rejected her action because the complainant had agreed to an arbitration clause mandating dispute resolution before the Court of Arbitration for Sport (CAS) located in Lausanne, Switzerland. In the initial proceedings before the civil courts, the complainant sought damages and compensation for pain and suffering against two sports associations that had imposed and enforced the doping ban. 1

1. The Court of Arbitration for Sport has jurisdiction for international sports arbitration. It was created in 1984 and is based in Lausanne, Switzerland. By ensuring uniform interpretation and application of sports law, consisting of the statutes of sports associations and federations, the court is to guarantee equal opportunities in international elite sports to the greatest possible extent ([…]). The Court of Arbitration for Sport belongs to the International Council of Arbitration for Sport (ICAS), which also selects the arbitrators of the court. According to their joint statutes (Statutes of the Bodies Working for the Settlement of Sports-related Disputes – CAS Statutes), both bodies were created to resolve sports-related disputes through arbitration and mediation. The procedure before the CAS, including the formation of the panel deciding a given arbitration procedure, is governed by the Procedural Rules of the Court of Arbitration for Sport. 2

a) At the time the constitutional complaint was lodged, twelve of the twenty members of ICAS were appointed by the international sports federations and Olympic committees. These twelve members appointed four additional members with a view to safeguarding the interests of the athletes. These sixteen members then appointed another four members that had to be independent of the bodies designating the other members of ICAS. Upon their appointment for a term of four years, the members of ICAS signed a declaration undertaking to exercise their function personally, in conformity with the statutes, with total objectivity and independence. Members of ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS. ICAS elects from among its members the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division of the CAS. Moreover, ICAS determines the – closed – list of at least 150 CAS arbitrators and mediators from which the arbitrators and mediators serving in a given case are to be chosen. In July 2016, when the Federal Court of Justice rendered the challenged decision, the list contained more than 300 persons ([…]). 3

b) A decision of a sports federation, association or sports-related body may be appealed before the CAS if the statutes of said body so provide or if the parties have concluded a specific arbitration agreement and if the appellant has exhausted all legal remedies available prior to the appeal. The appeal is submitted to a panel of three 4

arbitrators, unless the parties have agreed to the appointment of a sole arbitrator. If a case is decided by a panel consisting of three arbitrators, each party chooses one arbitrator. The president of the division then appoints the president of the panel after having consulted the two chosen arbitrators. The arbitration award must be rendered by majority decision. The version of the statutes applicable to the case at hand did not provide for a right of the parties to a public hearing.

2. The sports federations are organised according to the so-called one-place principle. The worldwide monopolistic organisation of each sport and the binding definition of the rules by the world governing body ensure that uniform rules apply to each sport globally and that these rules are followed in competition in a given sport ([…]). Professional athletes who want to compete in their sport must be members of their respective national association and recognise its regulations. When registering for elite competitions, athletes are typically required to sign an arbitration agreement mandating dispute resolution before the CAS ([…]). Thus, agreeing to arbitration by the CAS is de facto compulsory for professional athletes who want to compete in their sport ([…]). 5

3. On 2 January 2009, the complainant signed a standardised registration form for the World Allround (...) Championships. She took part in the championships held on 7 and 8 February 2009 hosted by [the international federation for her sport] in (...). The international federation in question is an association under Swiss law based in Lausanne, which is recognised as the international federation for the sports (...) and (...) and is the only body authorised to organise international competitions in these sports. As part of the competition registration form, the complainant committed to complying with the anti-doping rules [of the international sports federation] and recognised the jurisdiction of the CAS, thereby excluding recourse to the ordinary courts. 6

4. Due to elevated levels [of certain blood components] in the samples taken from the complainant at the competitions held in (...) in February 2009, [the international federation] filed a complaint with its disciplinary commission. By decision of 1 July 2009, the disciplinary commission banned the complainant from competing for two years, starting on 7 February 2009, for illegal blood doping. It disqualified the complainant's results obtained in the competitions of 7 February 2009 and withdrew her points, prizes and medals. Further, on 19 July 2009, the [German sports association] also excluded the complainant from organised training and from participating in the Winter Olympics in Vancouver, Canada, held from 12 to 28 February 2010. 7

The complainant appealed the decision of the disciplinary commission to the CAS. The CAS did not grant the complainant's request for a public hearing and did not conduct the proceedings in public. In an arbitration decision of 25 November 2009 ((…), - CAS 2009/A/1912 -), the CAS dismissed the complainant's appeal against the decision of the disciplinary commission. The CAS held that to establish a violation of anti-doping rules, it was not necessary to demonstrate intent or fault on the athlete's part. Rather, it was sufficient that the sports federation that filed the complaint could 8

demonstrate that an anti-doping rule violation had been committed. The CAS found that the abnormal levels [of certain blood components] in the samples taken from the complainant were sufficient to demonstrate an anti-doping rule violation since the only reasonable explanation for these elevated levels was blood manipulation. By Judgment of 10 February 2019 ((…), - 4A_612/2009 -), the Swiss Federal Supreme Court (*Schweizer Bundesgericht*) – First Civil Law Division – rejected the complainant's appeal of the arbitration decision.

5. After the CAS arbitration decision had been published, the complainant underwent a novel specialised diagnostic procedure, which led to the finding that she suffered from a (...) (hereditary) blood anomaly, which in turn was deemed the cause of the abnormal blood values. This result was communicated to the complainant on 7 December 2009. 9

Thereupon, the complainant filed an appeal on points of law (*Revision*) with the Swiss Federal Supreme Court against the arbitration decision. The court dismissed this appeal by Judgment of 28 September 2010 ((…), - 4A_144/2010 -). […] 10

6. In the subsequent proceedings before the German civil courts, which ultimately led to the present constitutional complaint, the complainant then brought an action against the [German national association] and the [international federation] seeking a declaration that the doping ban was unlawful and claiming damages and compensation for pain and suffering on antitrust, tortious and contractual grounds. 11

The Regional Court (*Landgericht*) dismissed the claim; this judgment is not challenged in the present proceedings. The Higher Regional Court (*Oberlandesgericht*) dismissed the complainant's appeal against the rejection of the action against the [international federation] with regard to the complainant's application seeking a declaration that the doping ban was unlawful; this judgment, partially interim and partially final, is also not challenged here. For the rest, the Higher Regional Court found that the action was admissible. It determined that the arbitration agreement reached between the parties did not preclude recourse to the ordinary courts. It declared the arbitration agreement void pursuant to Art. 34 of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche* – EGBGB), § 134 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) and § 19(1), (4) no. 2 of the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB). The Higher Regional Court found that there was a structural power imbalance with the sports associations and federations holding too much power. In its reasoning, the court pointed to, among other things, the fact that in appeal proceedings before the CAS, the president of the arbitration panel is appointed by the President of the Appeals Arbitration Division of the CAS. 12

7. In response to an appeal on points of law by the [international federation], the Federal Court of Justice (*Bundesgerichtshof*) reversed the interim judgment of the Higher Regional Court by Judgment of 7 June 2016 insofar as the latter had ruled against the [federation], and rejected the complainant's appeal against the judgment 13

of the Regional Court in its entirety.

The Federal Court of Justice held that the lawsuit was inadmissible because it was precluded by the arbitration agreement pursuant to § 1032(1) in conjunction with § 1025(2) of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO). The Federal Court of Justice found that the CAS was a "genuine" arbitral tribunal within the meaning of these provisions and that the arbitration agreement was valid. According to that judgment, it did not constitute an abuse of market power for a sports federation to make an athlete's participation in a competition contingent upon the signing of an arbitration agreement that, under the anti-doping rules, provides for the CAS as the arbitral tribunal. It was further held that the Procedural Rules of the CAS contained sufficient guarantees protecting the rights of athletes. Under these circumstances, the Federal Court of Justice found the arbitration agreement to be compatible with the right of access to justice under Art. 2(1) of the Basic Law (*Grundgesetz* – GG), the right to occupational freedom under Art. 12(1) GG and the right to a fair trial under Art. 6(1) of the European Convention on Human Rights. 14

The Federal Court of Justice held that, while the requirements regarding the independence and neutrality of the CAS should not be too lenient, there was no institutionalised power imbalance in favour of the [international federation], neither with regard to the list of arbitrators nor with regard to determining arbitration panels in the individual case. 15

The Federal Court of Justice found that the conclusion of an arbitration agreement mandating dispute resolution before the CAS did not run counter to the rights of the plaintiff under Art. 6 of the European Convention on Human Rights. According to the European Court of Human Rights, the right to have recourse to state courts can be waived, just like the right of access to justice under the Basic Law, if the arbitration agreement is voluntary, permissible and unequivocal; if the arbitration procedure is in accordance with the guarantees of Art. 6(1) of the Convention; and if the arbitration decision can be reversed by state courts in case of procedural errors. 16

8. In the civil court proceedings, the complainant lodged a complaint seeking remedy for a violation of the right to be heard (*Anhörungsrüge*) against the challenged judgment, which was rejected as unfounded by the Federal Court of Justice by Order of 12 July 2016; this order is also challenged in the present proceedings. 17

9. Prior to bringing an action before the German courts, the complainant had filed an individual application with the European Court of Human Rights against the decision of the Swiss Federal Supreme Court. 18

By Judgment of 2 October 2018 (ECtHR, (…), Judgment of 2 October 2018, nos. 40575/10 and 67474/10), the Third Section of the European Court of Human Rights decided, with 5:2 votes, that the Swiss Federal Supreme Court had not violated Art. 6(1) of the Convention insofar as the complainant challenged the independence and impartiality of the CAS. The court held that a waiver of one's right to have re- 19

course to the ordinary courts is not incompatible with Art. 6(1) of the Convention provided that the waiver is established in a free, lawful and unequivocal manner. However, if arbitration is compulsory – as in the present case – the arbitral tribunal must afford the safeguards secured by Art. 6(1) of the Convention. These require that courts and tribunals be independent from the executive and from the parties. According to the established case-law of the European Court of Human Rights, the existence of impartiality must be determined according to a subjective and an objective test, with the objective test determining whether the court offered, in particular through its composition, guarantees sufficient to exclude any legitimate doubt about its impartiality. Based thereon, the European Court of Human Rights concluded that the complainant had not provided factual evidence capable of casting doubt on the independence or impartiality of the CAS arbitrators.

At the same time, the European Court of Human Rights held that the principles enshrined in Art. 6(1) of the Convention concerning public hearings in civil cases also apply to professional bodies ruling on disciplinary matters. It concluded that Art. 6(1) of the Convention had been violated in the complainant's case on account of the fact that the proceedings before the CAS were not held in public. The court did state that neither the letter nor the spirit of Art. 6(1) of the Convention prevented an individual from waiving, of their own free will, the entitlement to have their case heard in public. However, in the case at hand, the recourse to arbitration was compulsory. Moreover, the complainant's request of a public hearing had been denied. The court therefore concluded that the questions arising in the challenged proceedings, the hearing of experts and the consequences for the complainant rendered a hearing under public scrutiny necessary. 20

Since the Third Section of the European Court of Human Rights had rejected the complainant's additional challenge of a lack of independence and impartiality of the CAS, the complainant requested referral of the case to the Grand Chamber of the Court and applied for a deferral of the decision on the constitutional complaint pending before the Federal Constitutional Court. The panel of the Grand Chamber rejected the request on 4 February 2019. 21

10. The files of the initial civil court proceedings were available to the Federal Constitutional Court. The Federal Ministry of Justice and the defendants in the initial proceedings were notified of the constitutional complaint proceedings in accordance with § 23(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), and given the opportunity to submit statements. Thereupon, the defendants submitted statements. The [German national association] supports the complainant's applications in the present proceedings. 22

II.

With her constitutional complaint, the complainant asserts a violation of Art. 2(1) in conjunction with Art. 20(3), Art. 12(1), Art. 101(1) second sentence and Art. 103(1) GG. She also asserts a violation of her rights under Art. 6(1) of the Con- 23

vention.

1. […] 24-26

2. The [international sports federation] essentially claims that the constitutional complaint is inadmissible as it does not satisfy the substantiation requirements and the principle of subsidiarity; on the merits, it claims that the constitutional complaint is in any case unfounded. […] 27

III.

The Second Chamber of the First Senate of the Federal Constitutional Court admits the constitutional complaint for decision. On the merits, the Chamber grants the relief sought by the complainant as this is appropriate to enforce the right of access to justice guaranteed by Art. 2(1) in conjunction with Art. 20(3) GG (§ 93a(2)(b) and § 93b first sentence BVerfGG). 28

1. There was no need to further extend the time limit for submitting a statement for the [international federation], one of the parties entitled to submit a statement pursuant to § 94(3) BVerfGG. The time limit set, for which a brief extension had already been granted, was appropriate (cf. Federal Constitutional Court, Order of 27 April 1992 - 1 BvR 507/92 -, juris, para. 12), as is already evident from the substantiated and comprehensive statements submitted by the two defendants in the initial proceedings. The principle of equality of arms does not require that the complainant and the parties entitled to submit a statement are completely equal in terms of the time granted to them to prepare a statement. Even in criminal proceedings, this principle allows for the consideration of the different procedural positions of the parties, and of the requirement of speedy justice, when interpreting procedural rules, as long as that this does not result in substantial disadvantages for one party (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 63, 45 <67>; 122, 248 <272 f.>; ECtHR, Wynen and Centre Hospitalier Interrégional Edith-Cavell v. Belgium, Judgment of 5 November 2002, no. 32576/96, § 32). In civil proceedings, the requirements regarding equality of arms are more lenient than in criminal proceedings (cf. BVerfGE 52, 131 <156 f.>; ECtHR, Dombo Beheer B.V. v. the Netherlands, Judgment of 27 October 1993, no. 14448/88, § 32). 29

2. The constitutional complaint satisfies the requirements set out in § 93c(1) first sentence BVerfGG, allowing the Chamber to grant the complaint. The issues of constitutional law raised by the complaint, regarding the violation of the right of access to justice and regarding the direction and guidance provided by the European Convention on Human Rights for constitutional interpretation, have already been settled in the case-law of the Federal Constitutional Court. 30

3. The constitutional complaint is admissible. In particular, the complainant had requested a public hearing in the proceedings before the CAS, which was denied. The Swiss Federal Supreme Court rejected her appeal. Therefore, the complaint satisfies the requirements derived from the principle of subsidiarity, regardless of whether 31

these requirements are applicable in the present arbitration case.

4. The constitutional complaint is well-founded. The challenged judgment of the Federal Court of Justice violates the complainant's right of access to justice guaranteed by Art. 2(1) in conjunction with Art. 20(3) GG in that the judgment fails to recognise the constitutional significance of the right to have proceedings held in public. 32

a) The interpretation and application of ordinary law by the ordinary courts is subject to only limited review by the Federal Constitutional Court. As decisions on values enshrined in the Constitution, fundamental rights have a bearing on private law disputes, permeating the applicable provisions of private law; most notably, fundamental rights guide the interpretation of general and blanket clauses under private law (cf. BVerfGE 7, 198 <205f.>; 42, 143 <148>). It is incumbent upon the state to protect the fundamental rights of the individual and to ensure that others do not violate these rights, including in private law relations. In this respect, it falls to the courts to give effect to fundamental rights protection by interpreting and applying the law and, where necessary, by giving specific shape to this protection in the individual case. Apart from cases where decisions by the ordinary courts violate the prohibition of arbitrariness, a legal error in a court decision does not necessarily amount to a violation of constitutional law. A specific violation of constitutional law, which the Federal Constitutional Court must rectify, only arises if it is discernible that the civil courts erred in their interpretation of private law provisions and that this error is based on a fundamentally incorrect understanding of the significance of affected fundamental rights, in particular their scope of protection; such errors must have a material impact on the case at issue (cf. BVerfGE 18, 85 <93>; 42, 143 <149>; established case-law), for instance by adversely affecting the balancing of the conflicting legal interests under the applicable private law provisions. Yet it is not for the Federal Constitutional Court to direct the civil courts as regards the outcome of their decisions in the legal dispute before them (cf. BVerfGE 129, 78 <101 f.> – Le Corbusier furniture; 142, 74 <101 para. 82> – Sampling; established case-law). 33

b) Based on these standards, the Federal Court of Justice's balancing of the right of access to justice, on the one hand, and the freedom of contract and the autonomy of private association, on the other hand (cf. in this regard Federal Constitutional Court, Order of the Second Chamber of the First Senate of 15 September 2016 - 1 BvQ 38/16 -, para. 9), did not conform with constitutional requirements. 34

aa) When examining whether the arbitration agreement is invalid pursuant to § 19 GWB, the Federal Court of Justice did comprehensively consider the complainant's right of access to justice guaranteed by Art. 2(1) in conjunction with Art. 20(3) GG. The Federal Court of Justice also found that the arbitration procedure, which removes the matter from the jurisdiction of state courts, must comply with the guarantees of Art. 6 of the Convention. However, it did not take into account that the CAS Statutes– as was expressly asserted by the complainant in the court and appeal proceedings – did not provide for the right to a public hearing, which the complainant had unsuc- 35

cessfully requested. In the proceedings before the European Court of Human Rights, in which the complainant challenged the arbitration decision and the decisions of the Swiss Federal Supreme Court (ECtHR, Third Section, (…), Judgment of 2 October 2018, nos. 40575/10 and 67474/10, §§ 182 ff.), the European Court of Human Rights found that the CAS had violated Art. 6(1) of the Convention insofar as the procedure before the CAS was not held in public.

In its decision, the Federal Court of Justice thus failed to sufficiently take into account the specific guarantees of the general right of access to justice following from Art. 2(1) in conjunction with Art. 20(3) GG, according to which the arbitration procedure must guarantee effective legal protection and meet minimum standards of the rule of law (see (1) below). The constitutional requirements regarding the legal design of the arbitration procedure are by no means more lenient than those following from Art. 6(1) of the Convention, which, according to the case-law of the European Court of Human Rights, are not satisfied by the CAS Statutes (see (2) below). 36

(1) When interpreting § 19 GWB, in the version applicable to the present dispute, the specific requirements following from the general right of access to justice must be taken into account, according to which the arbitration procedure must guarantee effective legal protection and meet minimum standards of the rule of law. 37

(a) The guarantee of effective legal protection is an integral part of the rule of law (cf. BVerfGE 88, 118 <123>; 96, 27 <39 f.>; 107, 395 <401>). Under the Basic Law, recourse to the courts is not only guaranteed within the scope of Art. 19(4) GG but also forms part of the general right of access to justice (cf. BVerfGE 107, 395 <401>). This right derives from the principle of the rule of law in conjunction with fundamental rights, in particular with Art. 2(1) GG (cf. BVerfGE 93, 99 <107>; 107, 395 <401>). According to the Federal Constitutional Court's established case-law, the general right of access to justice encompasses the right to have recourse to state courts, which must entail a generally comprehensive review of the facts and law relating to the matter in dispute and a binding decision by a state court (cf. BVerfGE 54, 277 <291>; 84, 366 <369>; 85, 337 <345>; 107, 395 <401>). In addition, the right of access to justice also guarantees the effectiveness of legal protection (cf. BVerfGE 88, 118 <124>; 117, 71 <122>; 122, 248 <271>). 38

(b) However, neither the general right of access to justice nor the constitutional clause in Art. 92 GG [on the judiciary] prohibit private arbitration. Private arbitration is anchored in the freedom of contract following from Art. 2(1) GG and Art. 12(1) GG (cf. in this regard BVerfGE 134, 204 <222 f. para. 66 f.>; 142, 268 <285 f. para. 63 f.>; 149, 126 <142 f. para. 42> […]). 39

Nevertheless, the ability to waive one's access to state courts by means of an arbitration agreement in the field of sport is subject to some limitations. Arbitration is a necessary means to ensure internationally uniform sports jurisdiction and to combat doping in international sports competitions; as such, it is not objectionable under constitutional law, including in light of the international obligations arising from Art. 13.2.1 40

of the World Anti-Doping Code (WADC). However, both the general right of access to justice itself and the protection of private autonomy guaranteed by Art. 2(1) GG set limits as to the permissible scope and contents of an arbitration agreement. With the legal recognition of private arbitration, the state opens up an alternative, non-state tribunal for binding dispute resolution for citizens seeking justice (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 13/5274, p. 34). In order for the state to recognise arbitration decisions, and enforce them in the exercise of its public authority, it must ensure that the arbitration procedure guarantees effective legal protection and meets the minimum standards of the rule of law. When interpreting and applying the statutory provisions on the recognition and enforcement of arbitration procedures and the validity of arbitration agreements, the specific guarantees of the general right of access to justice under Art. 2(1) in conjunction with Art. 20(3) GG must be taken into account.

Moreover, it is not possible to determine the minimum requirements that an arbitration procedure envisaged by a particular arbitration agreement must satisfy, in accordance with the aforementioned constitutional guarantees, without considering the actual freedom of choice afforded the party that accepted the arbitration clause, which the Federal Court of Justice also had to take into account in the context of § 19 GWB (old version). If one of the two contracting parties has so much bargaining power that it can in fact unilaterally dictate the terms of the contract, the law must seek to safeguard the fundamental rights interests of both contracting parties in order to prevent the effective elimination of self-determination for one party to the contract (cf. BVerfGE 81, 242 <255>; 89, 214 <232>; 103, 89 <100 f.>; 114, 1 <34>). In this respect, conflicting fundamental rights interests must be considered in terms of how they interact and must be balanced in accordance with the principle of achieving maximum equilibrium between conflicting fundamental rights of equal weight (*Grundsatz der praktischen Konkordanz*), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent (cf. BVerfGE 134, 204 <223 para. 68> – Remuneration for translators; 148, 267 <280 para. 32> – Stadium ban; established case-law). 41

(2) Even though the complainant expressly challenged, in all stages of the court proceedings, the fact that the CAS Statutes did not provide for a right to a public hearing, and even though she had already unsuccessfully requested a public hearing in the prior arbitration procedure, the Federal Court of Justice did not take any of this into consideration. It thereby failed to recognise the requirements arising from Art. 6(1) of the Convention as specified in the case-law of the European Court of Human Rights. It also failed to take into account the full extent of the complainant's right of access to justice in its balancing of interests. 42

(a) It is true that in its challenged decision, the Federal Court of Justice took into account that the complainant had no choice but to sign the competition registration form if she wanted to compete professionally. The court also recognised, with reference to a decision of the European Court of Human Rights (ECtHR, Judgment of 43

28 October 2010 – Suda c. République Tchèque, no. 1643/06 , § 48), that the arbitration procedure had to be conducted in accordance with the guarantees of Art. 6(1) of the Convention. However, the Federal Court of Justice ultimately concluded that the arbitration procedure at issue had met these requirements. By contrast, the European Court of Human Rights, upon deciding on the complainant's application challenging the arbitration decision and the decisions of the Swiss Federal Supreme Court (ECtHR, Third Section, (…), Judgment of 2 October 2018, nos. 40575/10 and 67474/10, §§ 113 ff.), found that the procedure before the CAS had in fact violated the complainant's rights under Art. 6(1) of the Convention because of the lack of a public hearing.

(b) The public nature of oral hearings is an essential part of the principle of the rule of law and its importance goes far beyond individual procedural rules. It is also linked to the general principle of the public nature of democracy. The guarantee of public proceedings serves to protect those involved in a hearing against a secret judiciary that is not subject to public scrutiny. Given that the legal design of an arbitration procedure must ensure equally effective legal protection that satisfies minimum standards of the rule of law, it must then be recognised that the rule of law includes the principle of public proceedings, as specified under Art. 6(1) of the Convention (cf. BVerfGE 103, 44 <63 f.>). The rule-of-law dimension of public proceedings aims to ensure adherence to formal and substantive law. It is intended to strengthen procedural fairness in the sense of a procedural safeguard for the parties involved (BVerfGE 103, 44 <63 f.>). Nevertheless, the public can be partially or completely excluded from proceedings for compelling reasons of the common good even in cases where public proceedings are in principle required by the Constitution. In particular, the principle of public proceedings says nothing about the modalities under which the public is permitted to have access to court proceedings (BVerfGE 103, 44 <63> with further references). 44

(c) This also corresponds to the guarantees under Art. 6(1) of the Convention. In the German legal system, the European Convention on Human Rights has the status of a federal law (cf. BVerfGE 151, 1 <26 para. 61> with further references, established case-law). When relying on the European Convention on Human Rights as a guideline for interpretation, the Federal Constitutional Court takes into account decisions of the European Court of Human Rights, including decisions that concern a different subject matter than the pending case. This follows from the direction and guidance provided by the case-law of the European Court of Human Rights – at least de facto – when it comes to interpreting the Convention, including beyond the individual case at issue (cf. BVerfGE 111, 307 <320>; 128, 326 <368>; 148, 296 <129>). Therefore, the domestic relevance of decisions of the European Court of Human Rights is not limited to the obligation of courts to take this case-law into account in decisions concerning the same matters (cf. BVerfGE 111, 307 <328>; 112, 1 <25 f.>; 148, 296 <351 f. para. 129>). Drawing on the case-law of the European Court of Human Rights as a guideline for constitutional interpretation beyond the individual case serves to 45

give effect to the guarantees of the Convention in Germany to the greatest extent possible and may also help avoid violations of the Convention by the Federal Republic of Germany (cf. BVerfGE 128, 326 <369>; 148, 296 <352 f. para. 130>).

With regard to [the guarantee of legal recourse against acts of public authority in] Art. 19(4) GG, the Federal Constitutional Court has already decided that the constitutional standard derived from this right is congruent with the requirements arising from Art. 6(1) of the Convention and the case-law of the European Court of Human Rights (cf. BVerfGE 149, 346 <364 para. 38 ff.> – European schools). The general right of access to justice, and the guarantee of recourse to the courts in Art. 19(4) GG as a special manifestation of this general right, share the same core relating to the rule of law. They only differ with regard to their respective scope of application (cf. BVerfGE 107, 395 <403> (Plenary); 116, 135 <150>). The general right of access to justice in conjunction with the fundamental rights forms part of the principle of the rule of law (cf. BVerfGE 85, 337 <345>; 93, 99 <107>; 97, 169 <185>; 107, 395 <401>). 46

(d) In its case-law, the European Court of Human Rights recognises that Art. 6(1) of the Convention does not require a public hearing in all cases (cf. ECtHR, Third Section, (…), Judgment of 2 October 2018, nos. 40575/10 and 67474/10, §§ 176 ff. with further references) and that an individual may waive the right to have their case heard in public (ECtHR, loc. cit., § 180 with further references). Therefore, voluntary arbitration proceedings can in principle also provide for proceedings closed to the public (cf. ECtHR, loc. cit., § 95 with further references). 47

However, according to the cited decision of the European Court of Human Rights, the conditions under which a public hearing can be dispensed with were not met in the complainant's case. As regards the facts of the case, the Federal Court of Justice stated that the complainant had no choice but to sign the required competition registration form in order to pursue her career as an athlete; based thereon, that court also concluded that the legal design of the arbitration procedure had to adhere to the guarantees of Art. 6 of the Convention. These findings correspond to the above-mentioned minimum requirements under constitutional law set by the right of access to justice for the legal design of arbitration proceedings. 48

(e) The violation of the principle of public proceedings, derived from the rule of law, is not a mere procedural error. Therefore, it is irrelevant whether a public hearing would indeed have been required in the specific arbitration procedure involving the complainant or whether such a hearing could be dispensed with in accordance with the case-law of the European Court of Human Rights. The decisive factor is that the statutes of the CAS, applicable by virtue of the arbitration agreement, as such did not provide for a right to a public hearing, even in cases in which a public hearing is mandatory in accordance with Art. 6(1) of the Convention. The legal design of the arbitration procedure, which is decisive for the validity of the arbitration agreement at issue here, is therefore incompatible with the guarantees of Art. 6(1) of the Convention and the corresponding requirements of the right of access to justice. 49

(f) No different conclusion is merited with regard to Art. 13.2.1 WADC, according to which disputes involving international-level athletes are to be decided exclusively by the CAS. In this context, too, the validity and enforceability of the arbitration award requires that the arbitration procedure be designed in a way that satisfies the guarantees of Art. 6 of the European Convention on Human Rights. 50

bb) The Federal Court of Justice itself, concurring with the Higher Regional Court, pointed out that any arbitration agreement that violates the prohibition of abuse of a dominant position enshrined in § 19 GWB would be void pursuant to § 134 BGB (Federal Court of Justice, Judgment of 7 June 2016 - KZR 6/15 -, para. 46). This applies all the more to violations of minimum requirements regarding procedural safeguards, such as the guarantee of public proceedings, if holding proceedings in public is not precluded by a compelling reason of the common good. Such a reason has not been demonstrated in the present case, nor is it otherwise ascertainable. The complainant's lawsuit could thus not be dismissed on grounds of the arbitration clause pursuant to § 1025(2) of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO). There is no need to decide here whether the current, amended procedural rules sufficiently guarantee adherence to the principle of public proceedings. 51

5. The challenged appellate decision of the Federal Court of Justice is based on an error that amounts to a breach of constitutional law as set out above. It is therefore reversed, pursuant to § 93c(2) in conjunction with § 95(2) BVerfGG, and the matter is remanded to the Higher Regional Court for a continuation of the proceedings. In assessing the complainant's action [for damages], the court will have to resolve, inter alia, the issues regarding causality raised by the international federation in the present case. The Federal Court of Justice's decision rejecting the complaint seeking remedy for a violation of the right to be heard becomes inapplicable. 52

6. Given that the arbitration agreement is invalid, it is irrelevant in this case whether a structural imbalance in favour of the sports associations and federations, in particular with regard to appointing a "neutral" third arbitrator, likewise violates the right of access to justice under Art. 2(1) in conjunction with Art. 20(3) GG, which in this respect may go beyond the guarantees of Art. 6(1) of the Convention as interpreted by the European Court of Human Rights (Art. 53 ECHR; cf. in this regard BVerfGE 128, 326 <371> – Preventive detention II; 148, 296 <355 para. 134> – Ban on strike action for civil servants). That being said, it is the essential nature of judicial review that it is carried out by a third party that has no relation to the case; this requires neutrality as well as independence from all parties to the dispute. Art. 101(1) second sentence GG guarantees individuals a right to have their case heard by a judge who satisfies these requirements (cf. BVerfGE 3, 377 <381>; 4, 331 <346>; 14, 56 <69>; 21, 139 <145 f.>; 82, 286 <298>; 89, 28 <36>; 148, 69 <96 para. 69>). These principles must also be guaranteed in national or international arbitration procedures. In order to be able to exclude or limit recourse to the state courts, such procedures must meet the minimum rule of law requirements. 53

This decision cannot be appealed. 54

Paulus Christ Härtel

Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 3. Juni 2022 - 1 BvR 2103/16

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