CAS procedures compatible with right to a fair trial except for refusal of public hearing (European Court of Human Rights)

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In Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018)), the European Court of Human Rights has confirmed that the procedures of the Court of Arbitration for Sport are compatible with the right to a fair trial under Article 6(1) of the European Convention on Human Rights. However, in one of the claims, it did find a violation of the right to be heard with regard to a denial of public proceedings.

Speedread
The European Court of Human Rights (ECHR) has held, by a majority decision, that the right to a fair trial granted under Article 6(1) of the European Convention on Human Rights (Convention) had not been violated by an alleged lack of independence by the Court of Arbitration for Sport (CAS). In considering two independent applications by athletes Darian Mutu and Claudia Pechstein, the ECHR did not find any general structural absence of independence and impartiality in the CAS. It also denied the criticism regarding personal impartiality of certain arbitrators.

However, in the case of Pechstein, the ECHR recognised a violation of the right to a fair trial with regard to the denial of public proceedings before the CAS. It held that, in view of the compulsory nature of the arbitration in her case, the questions concerning the merits of the sanction imposed on Pechstein for doping, required a hearing before the CAS that was subject to public scrutiny.

The judgment brings, at least for the time being, two long standing sagas in sports arbitration to a close, which have kept the arbitration community in suspense for eight long years. It furthers legal certainty in that it reinforces the legitimacy of CAS tribunals and clarifies that states have a responsibility to ensure compliance with human rights, even in cases of private adjudication bodies. (Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018) (2 October 2018).)

Background
Article 6(1) of the European Convention on Human Rights (Convention) provides for the right to a fair trial:
"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...".

**Facts**

This decision concerned two independent claims by two athletes, the Romanian football player Darian Mutu (Mutu) and the German speed skater Claudia Pechstein (Pechstein).

**Mutu**

In 2003, Mutu was transferred for €26 million from AC Parma to Chelsea. In 2004, Mutu tested positive for cocaine, whereupon his new club, Chelsea, terminated the contract with him.

Mutu and Chelsea both submitted the matter to the Football Association Premier League Appeals Committee (FAPLAC), which, in April 2005, confirmed that Mutu had breached the contract. In December 2005, this decision was confirmed by the CAS. Thereafter, Chelsea sued Mutu for damages resulting from the now confirmed breach of contract before the Disputes Division of the International Federation of Association Football (FIFA). In 2008, FIFA's Disputes Division delivered its judgment ordering Mutu to pay over €17 million in damages. Mutu appealed this decision to the CAS but was unsuccessful. Finally, Mutu applied to the Swiss Supreme Court to set aside the CAS decision, arguing that the CAS panel who heard his case was not independent or impartial. Further, Mutu alleged that the law firm of the CAS panel's president, Professor Luigi Fumagalli, represented Chelsea's owner, Roman Abramovich. In addition, Mutu criticised the fact that arbitrator, Dirk-Reiner Martens, heard both his 2005 CAS appeal on the question of liability in principle and his 2008 CAS appeal on the amount of damages. In decision 4A_458/2009 of 10 June 2010, the Swiss Supreme Court dismissed Mutu's application for setting aside, holding that the CAS panel was independent and impartial (see Legal update, Swiss Federal Tribunal rejects arbitrator challenges).

**Pechstein**

In 2009, Claudia Pechstein was tested for doping at the world speed skating championships. The blood samples indicated reticulocyte levels above the permitted value, which led to a two-year suspension by the disciplinary board of the International Skating Union (ISU) against Pechstein. Pechstein appealed that decision to the CAS, which confirmed the two-year ban in November 2009. The hearings before the CAS panel were held in private sessions, despite Pechstein explicitly requesting a public procedure. In December 2009, Pechstein applied to the Swiss Supreme Court seeking to have the CAS decision set aside. Pechstein argued that:

- The CAS panel was not independent and impartial due to the method of appointment of the panel members.
- The panel's president had advocated a "hard line" against doping.
- The CAS' Secretary General modified the arbitral award after the panel had rendered it.
- She was denied a public hearing.
In decision 4A_612/2009 of 10 February 2010, the Swiss Supreme Court dismissed Pechstein’s application for setting aside (see Legal update, Swiss Federal Tribunal’s reasoning in the "Pechstein" case confirms its strict approach to petitions to set aside arbitral awards).

Subsequently, Pechstein applied to the German courts and obtained a judgment from the Higher Regional Court of Munich declaring the arbitration agreement invalid and, consequently, the 2009 CAS decision as inapplicable in Germany. The German court held that Pechstein was forced to sign the Athlete Agreement containing the arbitration agreement, as she otherwise would not have been in a position to compete (see Legal update, Higher Regional Court of Munich decides that arbitration agreements for athletes are invalid and CAS Arbitral Award is not enforceable). However, the German Supreme Court overturned this decision, holding that generally athletes were free to sign the Athlete Agreement (see Legal update, German Federal Court of Justice finds that CAS arbitration agreements are valid).

The European Court of Human Rights (ECHR) proceedings
In July and November 2010, respectively, Mutu and Pechstein applied to the ECHR both alleging violations of their right to a fair trial in Switzerland, relying on Article 6(1) of the Convention. In both cases, they argued that the CAS could not be regarded as an independent and impartial tribunal. In the case of Mutu, it was argued that one arbitrator lacked impartiality because of his prior involvement and, in the case of Pechstein, that she was denied a public hearing. Finally, relying on Article 4(1) (prohibition of slavery and forced labour) and Article 8 (right to respect for private and family life) of the Convention and Article 1 of Protocol No. 1 (protection of property), Mutu objected to the amount of damages that he had been ordered to pay. In December 2016, the ECHR joined the two cases.

Decision
The ECHR held that there had been no violation of Article 6(1) of the Convention with regard to a lack of independence and impartiality of the CAS. However, the ECHR did hold that the non-public nature of the proceedings before the CAS was, in fact, a violation of the right to a fair trial granted under Article 6(1) of the Convention (as argued by Pechstein). All other allegations were dismissed.

Competence of the ECHR
The ECHR analysed, amongst other things, whether it was competent to hear the applications brought before it, given that the CAS is neither a state court, nor another public Swiss state entity, but a privately-owned institution. The ECHR confirmed that a state may be liable under the Convention if the authorities of that state formally or tacitly approve acts of private individuals, which violate another individual’s rights guaranteed under the Convention. Moreover, in these particular cases, the Swiss Supreme Court was competent to hear challenges to the CAS decisions and in fact rejected both applications to set aside. By doing so, the Swiss Supreme Court gave res judicata effect to the CAS decisions within the Swiss legal system. Therefore, the ECHR held that it was competent to hear the applications against Switzerland.

Right to a fair trial (independent and impartial tribunal)
The ECHR examined the compatibility of arbitral tribunals with the "right to a court" under Article 6(1) of the Convention (of which the right to access a court only constitutes an aspect). It reiterated that the such a right can, under certain circumstances, be limited. In particular, Article 6 does not preclude the existence of arbitral
tribunals. According to the ECHR, such tribunals have undeniable advantages for the parties concerned and for the administration of justice so that contractual arbitration clauses do not, in principle, conflict with the Convention.

The ECHR then drew a distinction between compulsory and voluntary arbitration. In compulsory arbitration, that is, proceedings imposed by law which deprive parties of their right to submit their dispute to a state court, all guarantees provided for in Article 6(1) of the Convention must be safeguarded. In voluntary arbitration proceedings, in contrast, the parties may waive certain rights guaranteed by the Convention. However, in such situations, the submission to arbitration must be done freely, lawfully and in an unequivocal manner.

In the specific case of Pechstein, the ECHR found that her acceptance of the CAS's jurisdiction had not been freely given. The ECHR compared her situation to situations of parties in previous decisions of the ECHR, in particular with regard to the economic freedom to opt for other alternatives where the arbitration agreement is imposed by one party onto the other. The ECHR held that Pechstein's only option with respect to the Athlete Agreement was to either to accept the arbitration clause or to renounce her professional activities and, as a consequence, to earn her living by practising her sport.

As to Mutu, the ECHR held that he, in fact, had a choice to submit his dispute to the ordinary courts rather than an arbitral tribunal. However, given that he had challenged the arbitrator appointed by Chelsea, the ECHR considered that he had not waived (in a non-equivocal manner) the right to have his case heard by an independent and impartial tribunal. Nevertheless, the ECHR specifically pointed out that the fact that Mutu had freely chosen to submit his dispute to the jurisdiction of the CAS distinguished his case from Pechstein's case.

However, the ECHR found that CAS tribunals do fulfil the requirement of a "tribunal established by law" and did not accept the complaints regarding impartiality and independence made by both Pechstein and Mutu. It held that Pechstein failed to sufficiently substantiate her allegations against the CAS panel's president. Further, Pechstein failed to demonstrate that the mechanism for selecting arbitrators for the CAS arbitrators' list led (in general) to a lack of independence and impartiality of the arbitrators on the list. As to the criticism advanced that CAS lacked independence due to its funding by sporting federations, the ECHR noted that state courts are also funded by the states and yet are still considered to be independent and impartial when assessing disputes involving the state as a party. Finally, Pechstein's allegation that the Secretary General of the CAS illicitly changed the contested decision remains unproven.

As to Mutu's arguments, the ECHR found that although Dirk-Reiner Martens heard both his 2005 and 2008 CAS appeals, this was not in and of itself a reason for partiality, as the legal issues to be decided had been very different. The allegation regarding Professor Luigi Fumagalli, in turn, remained unsubstantiated and was therefore not considered by the ECHR.

The ECHR therefore denied a violation of Article 6(1) for a lack of independence and impartiality on the part of the CAS.

Right to a fair trial (public hearing)
Concerning Pechstein's complaint regarding the denial of a public hearing, the ECHR reiterated that the principles regarding the public nature of hearings were valid both for ordinary courts and professional disciplinary bodies.

The court held that while, in principle, nothing prevents a person from voluntarily waiving, expressly or tacitly, the exercise of the right to an ordinary court, this is not the case for compulsory arbitration. Against this background, the ECHR found that it was not justified to deny Pechstein's express request for a public hearing, as the prerequisites for a waiver of exercising the rights granted under Article 6(1) have not been met. In addition, the ECHR held that
as Pechstein’s case turned on questions of allegations of doping, a hearing that was subject to public scrutiny was required. It also recalled the Swiss Supreme Court’s judgment of 10 February 2010, which expressly acknowledged (obiter dictum) that a public hearing before the CAS would have been desirable.

Therefore, the ECHR determined that there had been a violation of Article 6(1) due to the CAS panel’s denial of a public hearing. As to the non-public proceedings before the Swiss Supreme Court, the ECHR held that no public hearing was necessary, as the dispute concerned merely legal questions.

Dissenting opinion
Interestingly, the Swiss and Cypriot judges (Helen Keller and Georgios Serghides) issued a strong dissenting opinion. The two judges were critical of the majority of the ECHR judges, which seemed to recognise the influence that the International Council of Arbitration for Sport (ICAS), the institution behind the CAS, exercises on the selection of arbitrators, but failed to properly consider that such influence could potentially affect the independence and impartiality of arbitrators. Keller and Serghides found the influence of the sport organisations which are "likely to oppose the athletes during any litigation before the CAS" on the ICAS and the CAS to be considerable and problematic. The two judges further criticised the closed list of arbitrators from which athletes must choose their arbitrator, as that list is administered by the ICAS. In particular, the two judges were not convinced by the Swiss Supreme Court’s arguments in defence of a closed list, namely that non-specialised arbitrators would act as lawyers for the parties rather than impartial adjudicators and stated that "in more technical areas - such as the pharmaceutical industry or aviation – the parties can choose their arbitrator freely without this problem."

Finally, the dissenting opinion did not follow the majority in its reasoning according to which the claims advanced by Mutu, regarding the CAS’ lack of impartiality, must be rejected on the ground that he voluntarily submitted to the jurisdiction of the CAS and not to that of an ordinary court. According to the dissenting judges, the fact that Mutu had not unequivocally waived his rights under Article 6(1) of the Convention rendered the consideration of his voluntary renunciation when analysing his claims contradictory. The dissenting opinion went on to state that more generally, where a procedure does not offer the minimum guarantees of impartiality and independence, the ECHR should more strictly analyse whether the applicant’s waiver was indeed "free, lawful and unequivocal". According to the two judges, it seems difficult to conceive that an individual could waive his right to an independent and impartial tribunal and still be subject to a "fair procedure" within the meaning of Article 6(1) of the Convention.

Comment
The judgment brings, at least for the time being, two long standing sagas in sport’s arbitration to a close, which has kept the arbitration community in suspense for eight long years. It furthers legal certainty in that it reinforces the legitimacy of CAS tribunals and clarifies that states have a responsibility to ensure compliance with human rights even in cases of private adjudication bodies.

The ECHR gave important explanations on parties’ right to a fair trial and a court established by law, as well as how these rights may be limited. It reiterated that compulsory arbitration proceedings are lawful, as long as the fundamental rights granted by the Convention are respected. This is of particular importance in the world of sports, given that it seems desirable for all stakeholders to have a uniform way of dispute resolution.

As a consequence of this decision, whenever arbitration is imposed on an athlete, the arbitration bodies will have to apply all guarantees of the Convention strictly. For other areas, and in particular, commercial arbitration, where the arbitration agreement was entered into voluntarily, the premise that, as a matter of principle, the Convention is not directly applicable as an arbitration is a matter between to private parties, still remains valid. The future will
show if the notion of "compulsory" arbitration used in this decision will expand to other areas, such as consumer relationships, where it is questionable if there is indeed a free will to arbitrate (that is, if any of the rights granted under the Convention have not been given up freely, lawfully and unequivocally). The strict adherence to the rights granted under the Convention includes the right to a public hearing, and the ECHR made clear that every party has the right to a public trial. Therefore, whenever a sportsperson who is subjected to involuntary arbitration proceedings so requests, the CAS will have to ensure publicity in future. According to the press release issued earlier this month, the CAS is already prepared to implement these adjustments.

Also regarding the criticisms made with respect to the independence of the ICAS and, in turn, of the CAS, it must be noted that the two sets of proceedings were conducted under the old structures of ICAS, which have since been reviewed and adjusted - in particular regarding the composition of ICAS' list of arbitrators'. However, the dissenting opinion's observations as to the closed arbitrators' list remains valid.

Pechstein and Mutu may still request to bring their dispute before the Grand Chamber of the ECHR, which would add further significant time until a final decision is handed down regarding these issues. Given the strong dissenting opinion, as well as the fact that one of the dissenting judges was of the jurisdiction of the affected state (Switzerland), the chances that a request for leave to refer the matter to the Grand Chamber would be admitted seem realistic.

**Case**

*Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018) (2 October 2018).)*

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