

Document information

Publication

ASA Bulletin

Jurisdiction

Switzerland

Bibliographic reference

Caroline Dos Santos, 'European Court of Human Rights Rules upon Sports-Related Decision: Switzerland Condemned', in Matthias Scherer (ed), ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2019, Volume 37 Issue 1) pp. 117 - 125

European Court of Human Rights Rules upon Sports-Related Decision: Switzerland Condemned

Caroline Dos Santos

(*)

Introduction

On 2 October 2018, the European Court of Human Rights (“ECHR”) issued a landmark decision in two consolidated cases initiated by two athletes, footballer Adrian Mutu and speed skater Claudia Pechstein (“**Claimants**”) against Switzerland. The ECHR condemned Switzerland. (1)

The Claimants contended that they had been denied a fair trial by the Court of Arbitration for Sport (“**CAS**”) seated in Lausanne, Switzerland, in their respective cases where each of them challenged sanctions imposed for violation of anti-doping rules. The final awards rendered by the CAS were eventually confirmed by the Swiss Federal Supreme Court, against which, each Claimant lodged a challenge before the ECHR, which consolidated the claims.

Essentially, no violation of Article 6 § 1 (i.e. right to a fair trial) of the European Convention on Human Rights (“**ECHR Convention**”) was admitted regarding the alleged lack of independence or impartiality of the CAS. However, a violation of this Article raised solely by Ms Pechstein was confirmed with respect to the lack of a public hearing before the CAS.

This decision is of considerable interest for several reasons. First, it puts an end to the longstanding debate of whether athletes freely consent to CAS arbitration. Second, this decision reinforces the CAS's position by confirming its independence and impartiality at a continental level for the signatories States of this convention. (2) Third, it also strengthens the athletes' position in proceedings before the CAS.

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Factual background of the Mutu-Pechstein saga

This saga started back in 2004, when the Romanian footballer Adrian Mutu tested positive for cocaine following his 26 million transfer to Chelsea FC (“**Chelsea**”). Mutu's relationship with his club unsurprisingly went sour, leading Chelsea to terminate his contract. Mutu and Chelsea submitted their dispute to the Football Association Premier League Appeals Committee (“**FAPLAC**”), which eventually confirmed Mutu's breach of the contract. This decision was later confirmed by the CAS. (3) On the strength of this victory, Chelsea initiated new proceedings before the Disputes Division of the International Federation of Association Football (“**FIFA**”) regarding the quantum aspects of their dispute. This eventually resulted in FIFA ordering Mutu to pay an amount of € 17 million in damages following his breach of the contract. After Mutu lodged an appeal against this decision – and unsuccessfully tried to challenge two arbitrators in his CAS panel – it was also confirmed by the CAS in a second award. (4) Mutu challenged this award before the Swiss Federal Supreme Court based on the alleged lack of independence or impartiality of two arbitrators of his panel. According to Mutu, Arbitrator Dirk-Reiner Martens was part of the CAS panel who had decided upon Mutu's first award and could therefore not be independent or impartial. Professor Luigi Fumagalli (CAS panel's President) was a partner in the same law firm as the counsel representing Chelsea's owner and could therefore not meet these guarantees either. (5) The Swiss Federal Supreme Court eventually rejected the challenge. (6)

The story of the German speed skater and five-time Olympic gold medallist Claudia Pechstein also starts with doping issues. At the World Championships held in 2009 in Norway, she was accused of doping before being banned from competitions for a two-year period by the disciplinary commission of the International Skating Union (“**ISU**”). The disciplinary sanction was upheld subsequently by the CAS in the same year, **after denying the athlete a right to a public hearing**, despite her express request. (7) Ms Pechstein then applied to the Swiss Federal Supreme Court to set aside said decision, based on the alleged lack of independence and impartiality of the CAS panel. This was based on a three-fold argument: ● first, the CAS could not constitute an independent and impartial tribunal given its **biased appointment system of arbitrators**. Second, the president of her panel had stated that a “*hard line on doping issues*” was to be followed and could therefore not be impartial. Third, the Secretary General of the CAS interfered with the final award after it was issued, therefore violating these guarantees. In addition to this line of argument, she also complained of being denied a public hearing by the CAS, despite her specific request in this regard. Eventually, the **Swiss Federal Supreme Court dismissed** the challenge, (8) just as the German Supreme Court – which was seized

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in parallel – did. (9)

In 2010, both Mutu and Pechstein individually seized the ECHR. Due to the similarity of the legal issues involved, the ECHR consolidated the two cases in 2016. (10) Both athletes claimed a violation of the right to a fair trial, enshrined in Article 6 § 1 of the ECHR Convention, based on the allegation that the CAS was not an independent and impartial tribunal. In addition, Ms Pechstein also pleaded that this article had been infringed considering that she was denied the right to a public hearing by the ISU disciplinary commission, the CAS and the Swiss Federal Supreme Court. (11)

Jurisdiction

Applicability of Article 6 § 1 of the Convention ECHR to the dispute at hand

The ECHR started by reiterating that Article 6 § 1 of the ECHR Convention only applies to the examination of challenges related to cases of a civil or criminal nature. (12)

P 120 According to the ECHR, the civil nature of Mr Mutu's case was beyond doubt as it concerned an award ordering him to pay damages to Chelsea. The same conclusion applied to Ms Pechstein, who challenged an ● award confirming her ban in the context of disciplinary proceedings, thus jeopardizing her right to practise her profession. (13)

The ECHR's jurisdiction *ratione personae*

Although the Swiss government did not raise the issue of the ECHR's competence *ratione personae*, the ECHR found that “*this question requires an ex officio examination*” and therefore, reviewed it nevertheless. (14)

The ECHR observed that although the CAS is a privately-owned entity and not a State court or a public entity, its acts or omissions may engage the defending State's liability. Both athletes challenged the composition of the CAS and proceedings held before it, which can be reviewed by the Supreme Court pursuant to Articles 190 and 191 of the Federal Statute on Private International Law. Switzerland may thus be held responsible for acts or omissions committed by the CAS if those were ultimately upheld by the Supreme Court. The ECHR therefore concluded that it “*has jurisdiction ratione personae to hear the applicants' complaints about the acts and omissions of the CAS validated by the Supreme Court*”. (15)

Merits

Validity of the Claimants' agreement to arbitrate

The ECHR recalled that the right to a “tribunal”, enshrined in Article 6 § 1 of the ECHR Convention, does not necessarily imply “*the right to bring an action before a traditional court, integrated into the ordinary judicial structures of the country*” and therefore, “*arbitral tribunals can be created to judge certain disputes of financial nature opposing private individuals*”. (16)

P 121 In this context, the ECHR emphasized that **a line should be drawn** between **voluntary arbitration** and **mandatory arbitration** (in the French original “*arbitrage forcé*”). In a mandatory arbitration (*i.e.* in cases where arbitration is imposed by the law) the parties are compelled to resort to ● arbitration. (17) The guarantees set forth by Article 6 § 1 of the ECHR Convention must then be provided. By contrast, in case of a voluntary arbitration, provided that consent to arbitration is freely given, lawful and unequivocal (in French “*libre, licite et sans équivoque*”) (18) the parties are free to exclude jurisdiction of State courts and to submit their dispute to arbitration. In such a case, parties “*voluntarily waive certain rights guaranteed by the Convention*”. (19)

Based on this line of reasoning, the ECHR sought to determine whether Ms Pechstein and Mr Mutu's agreement to arbitrate was voluntary or mandatory. Regarding Ms Pechstein, the ECHR noted that “*the Claimant did not have the choice to participate in one competition rather than another, based on her acceptance or non-acceptance of an arbitration clause [...]*”. Rather, her only choice was “*either to accept the arbitration clause and be able to earn a living by practicing her discipline at a professional level, or not to accept it and have to completely renounce earning a living by practicing her discipline at such a level*”. (20) Therefore, the ECHR concluded that **Ms Pechstein did not accept the arbitration clause freely and unequivocally** and held that arbitration was mandatory. (21)

Things were different regarding Mr Mutu. He had been provided with a **choice** between arbitration or litigation before State courts. In this context, it could not be considered that the underlying arbitration was **mandatory for him**. Having said that, the ECHR considered that the guarantees set out in Article 6 § 1 of the ECHR Convention also applied to him since he **had not waived “unequivocally” his right to challenge the independence and impartiality of the CAS in a possible dispute with the Chelsea Club**. (22) Indeed, Mr Mutu had challenged two arbitrators.

The ECHR then moved on to determining whether, *in casu*, the requirements of independence and impartiality under Article 6 § 1 of the ECHR Convention had been complied with.

Independence and impartiality of the CAS

Article 6 § 1 of the ECHR Convention requires tribunals (including non-State tribunals) to be established by the law (23) as well as to be independent and impartial. According to the ECHR, independence relates to “*the method of appointment and term of office of its members, the existence of a protection against external pressures and whether there is or is not no appearance of independence*”. With respect to impartiality, “[it] is usually defined as the absence of prejudice or bias”. In this matter, the ECHR recalled that appearances can be important, as the English saying goes: “*justice must not only be done, it must also be seen to be done*”. (24) The ECHR undertook to apply these principles in both cases.

Ms Pechstein essentially objected to the **appointment method of arbitrators on the CAS list, in particular the over-representation of arbitrators representing federations**. In other words, there was a **structural flaw** in the appointment system of the CAS resulting in its lack of independence and impartiality towards athletes. **The ECHR rejected the argument** and ruled that Article 6 § 1 of the ECHR Convention had not been violated *in casu*. While it acknowledged that “*organizations likely to oppose athletes in disputes brought before the CAS exercised real influence in the mechanism of appointment of arbitrators in force at the time of the facts*”, this did not entail that the entire list, composed of approximately 300 arbitrators at that time was only composed of “*arbitrators who could not be considered independent and impartial, individually, objectively or subjectively, with regard to these organizations*”. Ms Pechstein's other arguments were equally dismissed. (25)

Regarding Mr Mutu's case, the ECHR also rejected a violation of Article 6 § 1 of the ECHR Convention. It notably considered that even if Mr Dirk-Reiner Martens had already sat as arbitrator in the first arbitration involving Mr Mutu, “*the essential point is whether the questions it had dealt with in the award of 31 July 2009 were similar to those on which it had to rule in the award of 15 December 2005*”. It then concluded that “*although the ● facts giving rise to the case are the same, the legal issues decided by the two arbitral panels are clearly distinct*” (i.e. interpretation of “breach” vs. quantum). The argument regarding the President of the panel was equally dismissed for lack of proof. (26)

Violation of Article 6 § 1 of the ECHR Convention due to the absence of a public hearing before the CAS

The ECHR stressed the importance of the right to a public hearing, enshrined in Article 6 § 1 of the ECHR Convention, which contributed to protection of individuals from a “*secret justice beyond public control*” and helped to preserve the “*trust in the courts*”. It also recalled that this principle was however not absolute and did not require a public hearing in all proceedings, particularly where the case at hand “*does not raise credibility issues or controversy regarding the facts that would have required a hearing [...]*”. (27)

In casu, the ECHR **upheld the Claimant's argument**, according to which **a public hearing should have been held before the CAS**. Such a lack of publicity **should therefore have been condemned by the Swiss Federal Supreme Court**.

Thus, the ECHR, recognised that **Switzerland had violated Article 6 § 1 of the ECHR Convention** by failing to set aside the award rendered by the CAS. It notably observed that “*there was a controversy on the facts and on whether the sanction imposed on the applicant was of an infamous nature, as it was likely to prejudice her professional integrity and credit*”. It however did not rule that such a public hearing was required before the Supreme Court. (28)

Conclusion

While this decision confirms the independence and impartiality of the CAS, it also improves the athletes' situation in sports arbitration: the ECHR recognised that arbitration clauses enshrined in sports agreements are (often) imposed entailing the application of Article 6 § 1 of the ECHR Convention, ● including the right to a public hearing under certain circumstances. The CAS has already taken this decision into account and amended its Code, on 1 January 2019, ensuring that the right to a public hearing is now enshrined in the Code. (29)

The joint (partly) dissenting opinions of the Swiss and Cypriot judges highlight that this decision is not entirely satisfactory and that beyond the right to a public hearing there might be more fundamental issues with CAS proceedings: the appointment method of arbitrators in the CAS could be problematic with regard to Article 6 § 1 of the ECHR Convention. In this respect, the two dissenting judges noted the following: “[w]hile we agree with the majority that the absence of a public hearing in Ms Pechstein's case constitutes a violation of Article 6 § 1 of the ECHR Convention, we consider that the structural problems of this arbitration institution should have led the ECHR to find a violation of Article 6 § 1 in its section on the independence and impartiality of the courts” (30) notably because “*the CAS does not appear as independent*”. (31) One could indeed regret that that several aspects of this structural matter are not further discussed or that certain issues even remain untouched at all (i.e. closed list appointment system; method

of designation of the CAS President of the panel; modalities to comply with in case of a public hearing).

This decision puts an end to a long saga as this decision is now final and binding. (32)

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Summary

In the recent Mutu and Pechstein v. Switzerland case (dated 2 October 2018), the European Court of Human Rights (“ECHR”), while dealing with the (consolidated) challenge filed by the two athletes against Switzerland, found that arbitration proceedings held before the Court of Arbitration for Sport (“CAS”) were required to offer all the safeguards of a fair hearing (Article 6 § 1 of the ECHR Convention). In this context, it held that there had been no violation of this provision regarding the alleged lack of independence and impartiality of the CAS. It nevertheless considered that this same provision had been violated with regard to the lack of a public hearing before the CAS, in response to the objection raised to this effect by Ms Pechstein. The ECHR further condemned Switzerland for not setting aside the award of the CAS in the first place on this ground. The decision of the ECHR gave rise to a joint (partly) dissenting opinion by two judges, who considered that the structural flaw in the appointment system of the arbitrators in the CAS should have led the ECHR to confirm the lack of independence and impartiality of the CAS. This decision is now final and binding.

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References

- *) Caroline Dos Santos: Associate, Lalive.
- 1) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, original in French. The translations provided in this article are free.
- 2) At the national Swiss level, see the “*Lazutina case*”, Swiss Federal Supreme Court Decision 4P.267/2002 (129 III 445), ASA Bull. 3/2003, p. 601 and the “*RFC Seraing v. FIFA case*”, Swiss Federal Supreme Court Decision 4A_260/2017 of 20 February 2018, ASA Bull. 2/2018, p. 429.
- 3) CAS 2005/A/876 dated 15 December 2005.
- 4) CAS 2008/A/1644 dated 31 July 2009.
- 5) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 5-10, paras 9 *et seq.*
- 6) Swiss Federal Supreme Court Decision 4A_458/2009 dated 10 June 2010, ASA Bull. 3/2010, p. 520.
- 7) CAS 2009/A/1912 and CAS 2009/A/1913 dated 25 November 2009.
- 8) Swiss Federal Supreme Court Decision 4A_612/2009 dated 10 February 2010, ASA Bull. 3/2010, p. 612.
- 9) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 13, para. 25.
- 10) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 4-5, paras 1 *et seq.*
- 11) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 25, para. 52.
- 12) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 26, para. 56.
- 13) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 26, paras 57 *et seq.*
- 14) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 27, para. 63.
- 15) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 27, para. 67.
- 16) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 33, para. 94.
- 17) The ECHR noted regarding Ms Pechstein's case “*although it was not imposed by the law but by the ISU regulations, the acceptance of the CAS jurisdiction by [Ms Pechstein] must be analysed as a “mandatory” arbitration [...]*”, p. 37, para. 115.
- 18) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 33-33, para. 96.
- 19) *Idem.*
- 20) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 37, para. 113.
- 21) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 37, para. 114.
- 22) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 37-39, paras 114 *et seq.*

- 23) Mutu and Pechstein v. Switzerland, Nos. 40575/10 and 67474/10, 2 October 2018, p. 60, paras 18 et seq. The joint (partly) dissenting opinions of the Swiss and Cypriot judges stated: “Therefore, the majority should have first considered the question of whether the CAS was a tribunal “established by law” before concluding that it was indeed independent and impartial”.
- 24) Cited in English in the decision, *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 44, para. 143.
- 25) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 46-48, paras. 150 et seq.
- 26) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 49, para 166 et seq.
- 27) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 50-51, para. 177.
- 28) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 52, para. 182.
- 29) New Article R58 of the CAS Code, which entered into force in 1 January 2019, provides as follows: “[...] At the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Such request may however be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public”.
- 30) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 62, para. 28.
- 31) *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018, p. 59, para. 15.
- 32) Press Release issued by the Registrar of the ECHR on 5 February 2019 “Grand Chamber Panel's decisions”, see <https://hudoc.echr.coe.int/eng-press#%20>.

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