

Sports Arbitration and the European Convention of Human Rights – *Pechstein* and beyond

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* I wish to thank my colleagues Erika Hasler, Brianna Quinn and Riccardo Coppa at LKK for their invaluable help in drafting this article.

I. Introduction

Until recently, the European Court of Human Rights (hereinafter the **ECtHR** or **the Court**) had been only marginally involved in sports matters in general, and even less in matters related to sports arbitration. Since the creation of the Court of Arbitration for Sport (**CAS**), a couple of sports arbitration matters were brought to Strasbourg but nothing really meaningful until the landmark *Mutu & Pechstein* case of 2018.¹ Since then, the sports arbitration case law of the Court has developed to a point where it is worth attempting an analysis, in particular now that the first cases relying on such case law are being brought before the Swiss Federal Tribunal.

II. Pechstein v. Switzerland....

As is apparent from the title of this section, we will discuss the ECtHR' judgment in *Mutu & Pechstein* only in its "Pechstein limb". Indeed, while the Mutu and Pechstein applications were consolidated before the ECtHR, only the case of Claudia Pechstein v. the International Skating Union (ISU) was a typical CAS appeals arbitration case, where a governing body sanctions an athlete based on its sports regulations, which also provide that any dispute about such sanctions shall be finally decided by the CAS. This is also why we will refer to the ECtHR's judgement as the **Pechstein Decision**. For the purposes of the present contribution, in this section, we shall briefly recall the factual and procedural background of the *Pechstein* case (A.), in order to introduce the athlete's claims (B.) and the Court's analysis, including the dissenting opinion

¹ ECtHR, Case of *Mutu & Pechstein v. Switzerland* (Applications nos. 40575/10 and 67474/10), judgment of 2 October 2018, available at <http://hudoc.echr.coe.int/eng?i=001-186828> and at https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?highlight_docid=cedh://20181002_40575_10:fr&lang=fr&type=show_document.

on the central question of the structural independence of the CAS (C.).

A. Factual and procedural background

Following a series of anti-doping controls that showed an anomalous pattern in her blood profile, on 1st July 2009, Claudia Pechstein was found guilty of doping and banned for two years by the ISU. Ms Pechstein and her national federation (the *Deutsche Eisschnelllauf- Gemeinschaft - DESG*) appealed the ISU's decision before the CAS.

During the CAS proceedings, the Panel rejected Ms Pechstein's request for a public hearing, heard testimony from twelve experts, and eventually, by an award dated 25 November 2009, dismissed the appeal (confirming the 2-year ban).

Ms Pechstein then filed an action to set aside the CAS award before the Swiss Federal Tribunal based on the following main contentions:

- the CAS does not constitute an independent and impartial tribunal under Article 190(2)(a) of the Swiss Private International Law Act (**PILA**) given (i) the way in which the arbitrators are appointed, (ii) the fact that the President of the Panel in question was (according to Ms Pechstein) a notorious hardliner in anti-doping matters and (iii) that, again according to Ms Pechstein, the CAS Secretary General had modified the award when conducting his scrutiny prior to the award's issuance.
- By refusing to hold the hearing in public, the CAS breached Ms Pechstein's right to be heard, in violation of Articles 182(3) and 190(2)(d) PILA.
- The award was incompatible with public policy within the meaning of Article 190(2)(e) PILA.

By a decision dated 10 February 2010, the Swiss Federal Tribunal rejected Ms Pechstein's action to set aside the CAS award.²

On 11 November 2010, Ms Pechstein filed an application against the Swiss Confederation under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the **ECHR** or the **Convention**). As will be further discussed below, Ms Pechstein's complaints related to alleged contraventions of Articles 6(1) and 6(2) of the ECHR.³

B. Ms Pechstein's complaints under Article 6(1) ECHR

In its relevant part, Article 6(1) ECHR reads as follows:

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 [...] by an independent and impartial tribunal [...] 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.

Ms Pechstein claimed in substance that both (i) the Swiss Federal Tribunal's case law acknowledging the CAS as an independent – and thus genuine – arbitral tribunal and (ii) the fact that she was not provided a public hearing (either before

² SFSCD 4A_612/2009 of 10 February 2009.

³ Pechstein Decision, cit. Fn. 1, § 1-4.

the CAS or before the Swiss Federal Tribunal), constituted a breach of Article 6(1) ECHR.⁴

As an aside, it is worth noting that that Ms Pechstein also complained that Swiss law does not provide for any possibility to re-examine the fact-finding process by the CAS and that the Swiss Federal Tribunal has a very narrow scope of review, which would constitute a separate violation of the right to a fair hearing.⁵ Curiously, this complaint was not discussed in the Decision, neither in the majority opinion, nor by the minority judges. Interestingly, the issue was addressed in a subsequent ECtHR judgment, in the *Bakker v. Switzerland* case, where the Court held that the complaint based on the limited scope of review by the Federal Tribunal under Article 190 PILA was groundless since (i) the athlete could benefit from a *de novo* hearing before the CAS, with full review of both the facts and the law, and (ii) precisely, the CAS had been deemed an independent tribunal by (the majority of) the Court in *Pechstein*.⁶

C. The Court's analysis

In its Decision, the Court first considered the questions of the applicability of Article 6(1) ECHR to arbitration (1.) and jurisdiction *ratione personae* (2.). The Court then moved on to consider a possible waiver of the applicability of Article 6(1) ECHR in arbitration proceedings (3.), as well as the specific rights and requirements which were alleged by Ms Pechstein to have been breached, namely (i) the right to a public hearing (4.) and (ii) the requirement of independence and impartiality in arbitration proceedings (5.).

⁴ Pechstein Decision, cit. Fn. 1, § 52.

⁵ *Ibid.*

⁶ *Erwin Bakker v. Switzerland*, application No. 7198/07, judgment of 3 September 2019, § 47.

1. The applicability of Article 6(1) ECHR

As far as the applicability of Article 6(1) ECHR was concerned, the ECtHR rejected the traditional case law of the Swiss Federal Tribunal according to which Article 6(1) ECHR is only “indirectly applicable” in arbitration (i.e. to the extent that some of the protections of Article 6(1) are implemented at the stage of the action to set aside the award). According to the ECtHR, Article 6(1) ECHR is directly applicable to all adjudication proceedings, including arbitration, where they concern the determination of “civil rights and obligations or of any criminal charge”.⁷ The ECtHR considered that civil rights and obligations were clearly at issue in the *Pechstein* case, which arose from a “disciplinary procedure before the professional bodies and in the context of which the right to carry on an occupation is at stake”.⁸

2. Jurisdiction *ratione personae*

The Court acknowledged that it had *ratione personae* jurisdiction to rule on the complaint based on Article 6 ECHR despite the CAS being a private entity and not a state court or another institution of Swiss public law, since CAS awards are given *res judicata* effect in Switzerland by operation of Chapter 12 of the PILA.⁹

⁷ Pechstein Decision, cit. Fn. 1, § 56.

⁸ *Id.*, § 58.

⁹ *Id.*, §§ 66-67, where the Court noted that “in certain exhaustively enumerated circumstances, especially as regards the lawfulness of the composition of the arbitral tribunal, Swiss law confers jurisdiction on the [Federal Tribunal] to examine the validity of CAS awards”.

3. Possible waiver of Article 6(1) ECHR in arbitration proceedings

The first substantive issue addressed by the ECtHR was the possibility for the parties to the arbitration to (have) waive(d) the guarantees enshrined in Article 6(1) ECHR.

a) Voluntary arbitration v. compulsory arbitration

The Court held that such a waiver is conceivable only in case of “voluntary arbitration” freely agreed upon by the parties, but is excluded “[i]f arbitration is compulsory, in the sense of being required by law”. In the latter case “the parties have no option but to refer their dispute to an arbitral tribunal, which [then] must afford the safeguards secured by Article 6 § 1 of the Convention”.¹⁰

b) CAS arbitration in disciplinary matters is compulsory

According to the case law developed by the ECtHR with regard to arbitration matters, a waiver of guarantees under the Convention is compatible with the ECHR only if consent is given “in a free, lawful and unequivocal manner”.¹¹ Applying these principles to CAS arbitration, the Court noted that CAS jurisdiction is often provided for by the applicable sports regulations, which means that athletes are “obliged [...] to accept the arbitration agreement in order to take part in competitions”. Considering the monopolistic structure of sports-governing bodies, the Court held that the “choice before the [athlete] had not been whether to take part in one competition rather than another, depending on whether or not she had accepted the arbitration clause”. Rather, the only choice available to Ms Pechstein was between “accepting the

¹⁰ *Id.*, § 95.

¹¹ *Id.*, § 96, referring in particular to *Eiffage S.A. and others v. Switzerland*, application No. 1742/05, judgment of 15 September 2009.

arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level".¹²

This might appear an obvious conclusion, and indeed the Swiss Federal Tribunal had already acknowledged that.¹³ However, the Federal Tribunal only analyzed the issue in connection with the validity of a waiver of the action to set aside under Article 192(1) PILA. The ECtHR's Pechstein Decision is the first instance where a court discussed the consequences that the compulsory nature of CAS appeals arbitration has on the conduct of proceedings before the CAS.

c) Full applicability of Article 6(1) ECHR

Confirming the views of some authors,¹⁴ the Court concluded that "even though it had not been imposed by law but by [sports] regulations, the acceptance of CAS jurisdiction by [the athlete] must be regarded as 'compulsory' arbitration", which means that CAS "arbitration proceedings therefore had to afford the safeguards secured by Article 6 § 1 of the Convention".¹⁵

4. The right to a public hearing

Public hearings and arbitration are traditionally antonymous notions, as the parties' choice to arbitrate their dispute is deemed to include an explicit or implicit waiver of the right to a public hearing. Until the Pechstein Decision, this was also

¹² Pechstein Decision, cit. Fn. 1, § 113.

¹³ SFSCD 133 III 235.

¹⁴ MATHIEU MAISONNEUVE, *Le Tribunal arbitral du sport et le droit au procès équitable : l'arbitrage bienveillant de la Cour européenne des droits de l'homme*, *Revue trimestrielle des droits de l'homme (RTDH)*, Vol. 30, No. 119, 2019, pp. 687-705; ULRICH HAAS, *The Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures*, *International Sports Law Review* 2012/3, pp. 43-60.

¹⁵ Pechstein Decision, cit. Fn. 1, § 115.

the case in all CAS proceedings (i.e. including in appeals and disciplinary cases). While the awards rendered in such cases are, as a matter of principle, non-confidential (Article R59 CAS Code *in fine*) and to some extent published,¹⁶ Article R57 of the CAS Code in its version in force at the time Ms Pechstein's case was heard by the CAS specifically provided that "[a]t the hearing, the proceedings take place in camera, unless the parties agree otherwise".

As the Court ruled that the compulsory nature of CAS arbitration requires the full applicability of Article 6(1) ECHR, and that "the public character of proceedings constitutes a fundamental principle enshrined in Article 6 § 1 of the Convention",¹⁷ it was inevitable that the guarantee of public hearings would also be declared applicable to CAS proceedings.

According to the Court, the right to a public hearing "protects litigants against the administration of justice in secret with no public scrutiny and is thus one of the means whereby confidence in the courts can be maintained."¹⁸ Moreover, and while Article 6(1) ECHR explicitly provides for exceptions (in particular "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"), the Court's jurisprudence also makes clear that such exceptions are to be interpreted narrowly and that hearings "in camera must be strictly required by the circumstances of the case", in particular:

¹⁶ On the limits of the CAS's policy with respect to the publication (of the non-confidential awards) see ANTOINE DUVAL, *Time to go Public? The Need for Transparency at the Court of Arbitration for Sport*, in: DUVAL/RIGOZZI (Eds), *Yearbook of International Sports Arbitration 2017*, pp. 3-27.

¹⁷ Pechstein Decision, cit. Fn. 1, § 175.

¹⁸ *Ibid.*

- “where there are no issues of credibility of contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties’ submissions and other written material”,¹⁹
- where the proceedings are “devoted exclusively to legal or highly technical questions”.²⁰

In Ms Pechstein’s case, the Court held that given the “stigma[tizing]” nature of the sanctions imposed in anti-doping proceedings, which have an impact on the athletes’ “professional honour and reputation”, and the fact that the finding of a doping offence was based on the examination of numerous experts, the hearing ought to have taken place in public.²¹

Applying this to the decision(s) in question, and as the Swiss Federal Tribunal had only noted, in its ruling, that a public hearing was “desirable” in the circumstances (to strengthen trust in the independence and fairness of the arbitration), but did not require it on the (ultimately incorrect) ground that “the principle was not applicable to voluntary arbitration”,²² the Court held that Switzerland had breached Article 6(1) ECHR.²³

5. The requirement of independence and impartiality under Article 6(1) ECHR

With respect to the requirement of independence and impartiality in arbitration proceedings, the Court started by setting out the relevant case law (a.), before considering the specificities of CAS arbitration (b.).

¹⁹ *Id.*, § 177.

²⁰ *Id.*, § 177.

²¹ *Id.*, § 182.

²² *Id.*, § 178 referring to § 23, which in turn quotes the relevant passages of the Swiss Federal Tribunal’s Decision.

²³ *Id.*, § 183.

a) The case law of the ECtHR

The requirement of independence and impartiality under Article 6(1) ECHR has often been relied upon by complainants before the Court, which has developed a significant body of case law in this regard.²⁴ Among the many principles distilled by the ECtHR's case law in this context, the Court considered the following to be of particular relevance in the case at hand:

- A "tribunal" within the meaning of Article 6(1) ECHR must be understood in a "substantive sense", i.e. focusing on its judicial function, "that is to say determining matters within its competence on the basis of legal rules, with full jurisdiction and after proceedings conducted in a prescribed manner", and it must "satisf[y] a number of requirements, such as independence from the executive and also from the parties".²⁵
- The independence of a tribunal must be determined taking into account, *inter alia*, "the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence".²⁶
- Impartiality under Article 6(1) ECHR, being "the absence of prejudice or bias", must be determined both subjectively, i.e. "on the basis of the personal conviction and conduct of a particular judge", and objectively, i.e. based on "whether the court offered, in particular through its composition,

²⁴ For a comprehensive review see EUROPEAN COURT OF HUMAN RIGHTS, Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), available at https://www.echr.coe.int/documents/guide_art_6_eng.pdf.

²⁵ Pechstein Decision, cit. Fn. 1, § 139.

²⁶ *Id.*, § 140.

guarantees sufficient to exclude any legitimate doubt about [its] impartiality".²⁷

- The objective test is particularly important as it might "be difficult to procure evidence with which to rebut the presumption of a judge's subjective impartiality". In this context, the Court emphasized that "justice must not only be done, it must also be seen to be done", as ultimately what is at stake "is the confidence which the courts in a democratic society must inspire in the public".²⁸

b) The independence and impartiality of the CAS

The issue of the "structural independence" of the CAS, i.e. its independence as an institution from sports-governing bodies, has been hotly debated since the CAS's creation. The case law of the Swiss Federal Tribunal, acknowledging that the CAS, while certainly "perfectible", was "sufficiently" independent to be considered as a genuine arbitral tribunal did not entirely convince academics, whether in Switzerland²⁹ or abroad.³⁰

The Pechstein Decision was eagerly awaited as it was supposed to bring final clarity on this point. And whilst it did so, to a significant extent, on the questions actually posed by

²⁷ *Id.*, § 141.

²⁸ *Id.*, §§ 142-143.

²⁹ ANDREAS BUCHER, commentary to Chapter 12 PILA, *passim*, in A. BUCHER (Ed.), *Loi fédérale sur le droit international privé (LDIP)/Convention de Lugano – Commentaire romand*, Basel 2011 (online updates, available at <http://www.andreasbucher-law.ch/NewFlash/bis.html>); MARGARETA BADDELEY, *The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to Be Drawn*, *The International Sports Law Journal (ISLJ)*, Vol. 20, 2020, pp. 3-17; PIERMARCO ZEN-RUFFINEN, *La nécessaire réforme du Tribunal Arbitral du Sport*, in : *Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald*, Bâle et al. 2012, pp. 483-537; JÉRÔME DE MONTMOLLIN/DMITRY A. PENTSOV, *Do Athletes Have Right to a Fair Trial in Doping Cases*, *The American Review of International Arbitration* 2011/22, No. 2, pp. 187-240.

³⁰ ANTOINE DUVAL, *Time to go Public?*, cit. Fn 16.

Ms Pechstein, certain – important – issues were seemingly not put forward in her complaint and were thus not discussed by the Court. It is therefore important to set out exactly Ms Pechstein’s complaints and arguments before the ECtHR, as this will also be critical in examining whether the issue of the structural independence of the CAS is indeed settled once and for all.

(i) Ms Pechstein’s claims/complaints

The Court set out Ms Pechstein’s main³¹ grievances as follows:

- Under the CAS Code “the two parties to a dispute could each appoint an arbitrator of their choosing, but [...] they had no influence on the appointment of the third arbitrator as president of the arbitral panel, who was in fact appointed by the CAS court office, and in particular by its Secretary General.”³²
- The arbitrators had to be chosen from the CAS List of Arbitrators, compiled by the International Council of Arbitration for Sport (**ICAS**), “the vast majority of whose members would be appointed by the federations”, which resulted in an unbalanced “representation of the interests of athletes in relation to those of the federations”.³³
- The obligation to choose the arbitrators from the closed CAS List “showed that the CAS did not

³¹ Ms Pechstein also relied on the fact that “CAS was financed by the sports federations and, consequently, this appointment system meant that the arbitrators chosen by the CAS court office were inclined to favour the federations” (§ 124), an argument that the Court summarily dismissed “by analogy” with the fact that “national courts are always financed by the State budget and yet this fact does not imply that those courts lack independence and impartiality in disputes between litigants and the State” (§ 151).

³² Pechstein Decision, cit. Fn. 1, § 124.

³³ *Id.*, § 125.

constitute a genuine arbitral tribunal, since in [Ms Pechstein's] view the parties to traditional arbitration could choose their arbitrators freely."³⁴

(ii) The reasoning of the majority of the Court

As mentioned in the introduction of this analysis, the Court's decision was not unanimous insofar as this question was concerned and a dissenting opinion was issued together with the Decision (see further below, section (iii)).

As far as the majority's reasoning is concerned, the Court first acknowledged that under the CAS rules in force at the time of the relevant facts there was a certain imbalance in the way in which CAS arbitrators were appointed. The Court noted specifically that:

- pursuant to the then applicable version of Article S14 of the CAS Code, "the list of CAS arbitrators was established by the ICAS and was to be composed as follows: three fifths of arbitrators selected from among the persons proposed by the [International Olympic Committee (**IOC**), the International Federations (**IFs**) and the National Olympic Committee (**NOCs**)] chosen from within their membership or outside; one fifth of arbitrators chosen by the ICAS "after appropriate consultations, with a view to safeguarding the interests of the athletes"; and one fifth of arbitrators chosen, again by the ICAS, from among "persons independent" of the above-mentioned bodies."³⁵
- In other words, Article S14 of the CAS Code "only required to choose one-fifth of the arbitrators from

³⁴ *Ibid.*

³⁵ *Id.*, § 153.

among persons independent of the sports bodies which could be involved in disputes with athletes before the CAS”.³⁶

- The ICAS itself was composed entirely of figures from the bodies who play a predominant role in proposing the arbitrators to be chosen by the ICAS, “thus revealing the existence of a certain link between the ICAS and organisations that might be involved in disputes with athletes before the CAS, especially those of a disciplinary nature”.³⁷
- In addition, while the arbitrators are appointed by ICAS “for a renewable term of four years, without any limitation on the number of terms of office”, ICAS has the power to “remove, by a decision with ‘brief reasons’ under Article R35” any arbitrator who refuses to or is prevented from carrying out her/his duties or if she/he fails to fulfil her/his duties pursuant to the CAS Code within a reasonable time.³⁸

This notwithstanding, the majority held that the combined effect of (i) the modalities of the appointment of CAS arbitrators by the ICAS and (ii) the organic links between the ICAS and the sports-governing bodies does not constitute a breach of Article 6(1) ECHR, on the ground that:

[...] the list of arbitrators drawn up by the ICAS included, at the relevant time, some 300 arbitrators yet the applicant did not submit any factual evidence such as to cast any general doubt on the independence and impartiality of these arbitrators. [...]

³⁶ *Ibid.*

³⁷ *Id.*, § 154.

³⁸ *Id.*, § 155.

While the Court is prepared to acknowledge that the organisations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators, as applicable at the relevant time, it cannot conclude that, solely on account of this influence, the list of arbitrators, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial, on an individual basis, whether objectively or subjectively, vis-à-vis those organisations.

(iii) The Dissenting Opinion

As noted, the above ruling was a majority ruling, with Judge Georgios A. Serghides from Cyprus and – remarkably – Judge Helen Keller from Switzerland dissenting. In their “Joint Partly Dissenting, Partly Concurring Opinion” (**Dissenting Opinion**), Judges Serghides and Keller noted the following:

The majority seem to acknowledge the “influence” of the ICAS on the procedure for selecting arbitrators, yet at the same time they do not believe that this “influence” could have had an impact on the independence and/or impartiality of the arbitrators on the list from which the panels are composed.³⁹

The dissenting judges added that the “majority seem to require that this ‘influence’ be proven ‘on an individual basis’ [...]”, which “goes beyond what the Court requires” in its case law.⁴⁰

Ultimately, the dissenting judges found that the links between the ICAS and the sports-governing bodies were “worrying”⁴¹ and that the “influence” the sports-governing bodies have on

³⁹ Pechstein Decision, Dissenting Opinion, § 7.

⁴⁰ *Id.*, §§ 12-13.

⁴¹ *Id.*, § 11.

the composition of the ICAS is not only “not insignificant” as accepted by the majority⁴² but indeed “considerable”.⁴³ The dissenting judges also found that the influence of the governing bodies over the procedure for selecting the arbitrators to be included in the CAS List is “disproportionate and unjustified”⁴⁴ and concluded that “the structural problems of this arbitration institution should have led the Court to find a violation of Article 6 § 1” in its section on the independence and impartiality of the courts.⁴⁵

It appears from a close reading of the Pechstein Decision that the difference in assessment between the minority and the majority judges was not only due to the emphasis on appearance, but also to the fact that the dissenting judges did not limit their analysis to the way in which the arbitrators were appointed to the List of CAS arbitrators – they also took into account how the actual arbitration panels are constituted under the CAS rules. Indeed, unlike the majority’s, the minority’s analysis also took into account the fact that:

- the List is closed, “result[ing] in the athletes being obliged to choose their arbitrator from among the individuals selected by the ICAS”,⁴⁶ and
- the Presidents of the CAS Divisions, who are ICAS members, play a role in the appointment of the president of the panel (an aspect that was totally overlooked in the majority’s analysis).⁴⁷

While missing the fact that this latter role goes well beyond appointing the president of the panel when “the parties fail to

⁴² *Id.*, § 9.

⁴³ *Id.*, § 14.

⁴⁴ *Id.*, § 11.

⁴⁵ *Id.*, § 28.

⁴⁶ *Id.*, § 14.

⁴⁷ *Ibid.*

reach agreement”,⁴⁸ the minority opinion appears to deal with all the grievances of Ms Pechstein in a more comprehensive way than the majority. This brings us to the question of the persuasiveness (and thus the authoritativeness) of the (majority) Pechstein Decision, which will be addressed in the next section.

III. ...and beyond

Having considered what was said – and decided – in the Pechstein Decision, the question is: what’s next? The even more specific question is: how can we ensure that sports arbitration is compatible with the ECHR – both procedurally and substantively?

- From a procedural perspective, relevant considerations include the modalities for securing the structural independence of the CAS, the right to a public hearing, and the extent to which the analogous application of criminal law guarantees should be taken into account.
- Substantively, we must consider the guarantees under the ECHR, in particular with respect to upholding the athletes’ right to their private life and the principle of non-discrimination.

⁴⁸ In reality in disciplinary proceedings the president of the panel (or, where applicable, the sole arbitrator) is *always* directly appointed by the President of the CAS Appeals Division (Article R54 CAS Code).

A. Procedural guarantees

1. Article 6 ECHR and the structural independence of CAS

a) The persuasiveness of the Pechstein Decision

Technically, the Pechstein (majority) decision resolved the hotly debated question of whether the CAS is sufficiently structurally independent to be considered as a genuine arbitral tribunal. However, regrettably, the reasoning is not entirely convincing.⁴⁹

At the outset, it is puzzling that such an important (and debated) issue was dealt with in a single paragraph (in a 57 page decision). It is also problematic that the Decision did not address what is generally considered as the main issue, namely that the president of each CAS Panel⁵⁰ in appeals cases is appointed by the arbitral institution (i.e. by the member of ICAS who acts as the President of the CAS Appeals Division). In our view, this element alone significantly undermines, if not the authoritativeness, at least the persuasiveness of the Decision.

The CAS may have dodged this first bullet but there could well be others. In order to avoid a fatal blow, it would therefore be wise to proactively acknowledge the limitations of the

⁴⁹ See also CLIFFORD J. HENDEL/GARY SMADJA, A Riff on the Legal Saga of Claudia Pechstein – Litigation as a Sub-Optimal Means of Advancing Transparency and Legitimacy in Sports Arbitration, *Spain arbitration review: Revista del Club Español del Arbitraje*, No. 35, 2019, p. 118. More uncritical PAOLO MARZOLINI/DANIEL DURANTE, Legittimità del Tribunale Arbitrale dello Sport: game, set, match? La recente giurisprudenza del tribunale federale svizzero e della corte europea dei diritti dell'uomo, *Rivista dell'arbitrato*, Vol. 28/4, 2018, pp. 655-677.

⁵⁰ Under the CAS Code, the President of the Panel has the casting vote in case a majority decision cannot be reached (Article R46(1) and R59(1) of the CAS Code). He or she also plays a predominant role in the conduct of the proceedings, in particular the hearing (Article R44.2 of the CAS Code) and can decide alone on important issues like the admissibility of new documents (Article R56 of the CAS Code).

Pechstein majority ruling and to make sure that the system is bulletproof when the next shot is fired.

This is even more the case because the majority's analysis was not only based on an incomplete assessment of the CAS rules, but also at times legally unconvincing. For instance, the Court found that there are structural links between the ICAS and the sports-governing bodies and indeed an influence of the latter on the former, but then found that this influence alone does not mean that the list of arbitrators compiled by the ICAS, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial "on an individual basis" *vis-à-vis* those governing bodies.

As noted by the dissenting judges, this reasoning seems to suggest that Ms Pechstein should have proven that these structural links actually resulted in a personal lack of independence of the arbitrators in question. Quite apart from the fact that this would be tantamount to a *probatio diabolica*,⁵¹ the reasoning constitutes a shortcut in the syllogism that would have required to properly apply the law (i.e. the case law set out at § 140 of the Decision and summarized above)⁵² to the facts (i.e. the structure of the CAS and the way in which the arbitrators are appointed to the CAS List of arbitrators).⁵³

This shortcoming is all the more significant given that the Court itself made clear that Ms Pechstein was challenging "*l'indépendance [...] structurelle du TAS en raison du mode de*

⁵¹ MATHIEU MAISONNEUVE, *Le Tribunal arbitral du sport et le droit au procès équitable*, cit. Fn. 14, p. 700 (speaking of "*une preuve impossible à rapporter*").

⁵² See section II.5.a. above.

⁵³ ANTONIO RIGOZZI, *Chronique de jurisprudence arbitrale en matière sportive*, *Revue de l'arbitrage*, 2019/3, pp. 926-927. See also MATHIEU MAISONNEUVE, *Le Tribunal arbitral du sport et le droit au procès équitable*, cit. Fn. 14, p. 699, who speaks of 'questionable [...] legal logic'.

*nomination des arbitres*⁵⁴ and referred to the so-called doctrine of appearances, reflecting the old adage according to which “justice must not only be done, it must also be seen to be done”.⁵⁵

Indeed, the Court correctly emphasized that ultimately “[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public”.⁵⁶ However, as we noted elsewhere,⁵⁷ readers wishing to be convinced would then have expected the Court to answer the question whether the way in which the CAS is structured and CAS arbitrators are appointed can indeed inspire the confidence of the athletes who are forced to accept CAS arbitration.⁵⁸ One can

⁵⁴ Pechstein Decision, cit. Fn. 1, § 100 of the original French version of the decision (the English translation incorrectly omits the adjective “structural”).

⁵⁵ *Id.*, § 143.

⁵⁶ *Ibid.*, and the reference to *Oleksandr Volkov v. Ukraine*, application No. 21722/11, judgment of 9 February 2013, § 106 and *Morice v. France* [GC], application No 29369/10, judgment of 23 April 2015, § 78.

⁵⁷ ANTONIO RIGOZZI, *Chronique de jurisprudence arbitrale en matière sportive*, cit. Fn. 53, p. 927.

⁵⁸ See also, and more forcefully, MATHIEU MAISONNEUVE, *Le Tribunal arbitral du sport et le droit au procès équitable*, cit. Fn. 14, pp. 701-702, who frames the question as follows : “[i]l faut en effet se mettre à la place de l’athlète à qui son avocat annoncerait qu’il pourra certes en principe choisir un arbitre, mais qu’il devra obligatoirement le choisir sur une liste fermée constituée par le CIAS, un organisme composé de membres directement et indirectement désignés par des institutions sportives ; que si cet organisme est maintenant libre de la composition de cette liste, une bonne partie des personnes y figurant ont été choisies avant le 1er février 2012, à une époque où – comme lorsque Madame Pechstein a dû choisir un arbitre – trois cinquièmes d’entre elles devaient l’être parmi des noms proposés par des institutions sportives et où un cinquième seulement devait formellement l’être parmi des personnes indépendantes de ces institutions ; qu’un arbitre figurant sur cette liste peut théoriquement ne pas être renouvelé à l’issue de son mandat de quatre ans, par une simple décision implicite du CIAS, lequel a un “certain lien” avec les institutions sportives ; que rien n’interdit à ce jour à l’institution sportive à laquelle il est opposé de nommer systématiquement le même arbitre lorsqu’elle est partie à une procédure devant le TAS, ce qui, pour certaines fédérations, arrive plusieurs dizaines de fois par an ; que le président de la formation arbitrale, dont la voix est décisive en cas de partage des voix entre les deux co-arbitres, est choisi par le président de la chambre d’appel, lequel est un membre du CIAS élu par ses pairs, une majorité de ceux-ci étant directement désignés par des institutions sportives ; que s’il veut

only agree with the dissenting judges that “the Court should have carried out a more in-depth analysis as to the legitimate fear of the athletes to be bound by the jurisdiction of a body which has no appearance of independence”,⁵⁹ an observation which clearly – and legitimately – undermines the persuasiveness of the majority decision.

The reality is that, as noted by the minority in their Dissenting Opinion, the Court extensively presented its case law but did not really apply it.⁶⁰ In particular, one cannot help but note that the majority did not discuss in any detail the jurisprudential requirement that due regard should be given to “the manner of appointment of [the tribunal’s] members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence”.⁶¹

The Court did note the renewable nature of the appointment on the CAS List of arbitrators,⁶² which indeed suggests some level of protection. However, when the majority referred to the possibility for the ICAS to remove an arbitrator (*from a Panel*) under Article R35 of the CAS Code – a provision that is common in all arbitration rules – it missed the problematic point⁶³ that CAS arbitrators can be removed *from the List*

demander la récusation d’un arbitre, il devra adresser sa demande à une commission du CIAS ; et enfin, que le secrétaire général du TAS, nommé par le CIAS, a le pouvoir d’attirer l’attention de la formation arbitrale sur des questions de principe fondamentales avant la signature de la sentence” (references to the relevant provisions of the CAS Code omitted).

⁵⁹ Pechstein Decision, Dissenting Opinion, § 15.

⁶⁰ *Id.*, § 13.

⁶¹ Pechstein Decision, cit. Fn. 1, § 140.

⁶² *Id.*, § 155.

⁶³ The Court’s reference to the fact that “the ICAS had the power to remove, by a decision with ‘brief reasons’ under Article R35 of the [CAS Code], any arbitrator who refused to perform or was prevented from performing his duties, or who failed to fulfil his duties pursuant to that Code” is correct in and of itself – and indeed a general principle of arbitration law – but beside the point.

without reasons, let alone due process (Articles S6(4)⁶⁴ and S19⁶⁵ of the CAS Code). Also, the reasons why CAS arbitrators are not reappointed to the List (Article S13 of the CAS Code),⁶⁶ or on what basis their performance (or lack thereof) has been assessed for re-appointment purposes, are not disclosed. Technically therefore, the way in which the CAS List of arbitrators is compiled and renewed does not provide the required “guarantees against outside pressure” contemplated by the ECtHR’s jurisprudence. This is another fundamentally problematic point that was not addressed by the Court and that, in our view, reduces the authoritativeness and persuasiveness of the Pechstein Decision.

Finally, one cannot rule out that further challenges may be brought against the CAS system and that, as contemplated by leading scholars, the analysis might, if not focus on, at least also take into account the right to information enshrined in

⁶⁴ Article S6(4) of the CAS Code provides that the ICAS “appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators on the proposal of the CAS Membership Commission. It can also remove them from those lists”.

⁶⁵ According to this provision, “ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if she/he violates any rule of this Code or if her/his action affects the reputation of ICAS and/or CAS”.

⁶⁶ In its relevant part, Article S13 of the CAS Code states that “ICAS reviews the complete list every four years; the new list enters into force on 1 January of the year following its establishment” with no indication of how this “renewal” takes place.

Article 10 ECHR.⁶⁷ In our view, transparency is indeed of the essence, in particular when it comes to perception issues.⁶⁸

b) The indirect effect of *Pechstein*

Whilst not discussed in detail above, as noted by the ECtHR in the *Pechstein* Decision, the CAS had already changed its rules with respect to the compilation of the List of CAS arbitrators pending the outcome of the case.⁶⁹ While the way in which the members of ICAS are appointed (Article S4 of the CAS Code) has remained unchanged, under the new article S14 of the CAS Code the ICAS is now free to appoint “personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention

⁶⁷ ANTOINE DUVAL, *Time to go Public?*, cit. Fn 16, who notes that “[w]hile major international courts, such as the CJEU, ECtHR or the International Court of Justice regularly report on their judicial activities, the CAS has never published an annual report providing specific information on its operations, including its financial results, detailed statistics on its annual productivity, major decisions by the ICAS or even just the size of its staff. Only scattered sources of information are available on these questions through rare press releases of the CAS, incomplete statistics provided on its website or indirect disclosure in proceedings before the [Swiss Federal Tribunal]” (reference omitted).

⁶⁸ ANTONIO RIGOZZI, *L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux*, *Revue de droit suisse (RDS/ZSR)*, 2013, Vol. 1, pp. 305-306 where, with respect to the approach of the Swiss Federal Tribunal we noted that “[l]e caractère obligatoire de l'arbitrage sportif requiert qu'il ne puisse exister aucun doute dans l'esprit des athlètes quant à l'indépendance structurelle du TAS (vis-à-vis des fédérations sportives qui leur imposent l'arbitrage). Or, en l'état des textes, il n'est pas aisé de lever la perception de déséquilibre structurel qui résulte du poids prépondérant des organisations sportives dans la nomination des membres du CIAS et donc, par ricochet, sur la composition de la liste d'arbitres imposée aux athlètes. Le fait qu'en pratique ce déficit structurel ne se traduit pas par un problème d'indépendance permet sans doute de supporter la conclusion du Tribunal fédéral quant à l'indépendance du TAS, mais n'est pas nécessairement propre à asseoir la légitimité du système du point de vue de ses utilisateurs et notamment des athlètes”.

⁶⁹ *Pechstein* Decision, cit. Fn. 1, § 38; *Pechstein* Decision, Dissenting Opinion, § 10.

of ICAS, *including* by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs".⁷⁰ In other words, anyone can now propose arbitrators for appointment to the CAS List, or even spontaneously apply to be listed as a CAS arbitrator.

This has been seen as a significant progress, as the ICAS finally abandoned the wording in the rules requiring that a majority of arbitrators be appointed upon proposals from sports-governing bodies, and for only a minority to be independent from said sports organisations (which might suggest that a large majority could not meet this criterion).⁷¹ The dissenting judges seemed to criticise this choice on the ground that, as a result, "no rule currently provides that athletes *must* be represented, but for the one fifth of members of the ICAS".⁷² In our opinion however, this is an issue of only relative importance as the real problem of perception lies in the opacity of the nomination process. Under the old regime, no one knew how the persons independent from sports organisations – or who were supposed to safeguard the interests of athletes – were appointed and what compliance process was in place to make sure that this requirement was respected. The same is true today, under the new rules, and this therefore remains an issue.⁷³

Should further challenges be brought also from the perspective of the right to information under Article 10 ECHR,

⁷⁰ Emphasis added.

⁷¹ SFSCD 144 III 120, para 3.4.3 noting that the sports-governing bodies no longer enjoy a "privileged status as, like their athletes' commissions, they can [now] only submit, for ICAS's consideration, the names and qualifications of arbitrators they would contemplate for inclusion in the [L]ist" (free translation of the original passage in French which reads : "*les organisations sportives [...] ne jouiss[ent] plus d'un statut privilégié puisque, à l'instar de leurs commissions d'athlètes, elles ne peuvent que porter à l'attention du CIAS les noms et qualifications d'arbitres susceptibles de figurer sur la liste*").

⁷² Pechstein Decision, Dissenting Opinion, § 10 *in fine*, emphasis added.

⁷³ ANTONIO RIGOZZI, *Chronique de jurisprudence arbitrale en matière sportive*, cit. Fn. 53, p. 929.

it is doubtful that the changes made to Article S14 alone would make a big difference to the assessment of the structural independence of CAS. Until it is possible to determine who proposed the arbitrators for appointment by the ICAS – or indeed which arbitrator(s) applied spontaneously, without being proposed by anyone – and the way in which the newly created CAS Membership Commission evaluates the various candidatures, it remains difficult to see how the change to Article S14 is supposed to increase the confidence of the athletes in terms of how candidates are selected as CAS arbitrators.⁷⁴

The creation of the above-mentioned Membership Commission is also an indirect effect of the Pechstein Decision. This Commission is composed of five members and it is in charge of “review[ing] the lists of CAS arbitrators [...], as well as the candidatures of potential new CAS members”.⁷⁵ The composition of the CAS Membership Commission is interesting as it includes two [of the eight] ICAS Members [who are not directly appointed by the sports-governing bodies⁷⁶] pursuant

⁷⁴ This is an opportunity to recall an important aspect of the *Lazutina* decision that tends to be forgotten. When the Swiss Federal Tribunal specified that the CAS was an arbitral institution that could be “perfected” (“*perfectible*”), it noted that it would be desirable, in order to improve the transparency (“*lisibilité*”) of the list of arbitrators, to indicate which organization had proposed each arbitrator to ICAS for appointment on the list (SFSCD 129 III 445 cited above, § 3.3.3.2). Not following this recommendation is not conducive to improving the athletes' confidence in the selection process/the manner in which the selection is made.

⁷⁵ MATTHIEU REEB, Editorial, CAS Bulletin 2018/2, pp. 4-5. According to Article S7(2)(a) in fine of the CAS Code, “[t]he CAS Membership Commission is responsible to propose the nomination of new CAS arbitrators and mediators to the ICAS. It may also suggest the removal of arbitrators and mediators from the CAS lists”.

⁷⁶ More precisely, two members shall be appointed among (i) the four ICAS members appointed by the 12 ICAS members directly appointed by the sports-governing bodies “after appropriate consultation with a view to safeguarding the interests of the athletes” (Article S4(d) of the CAS Code) and (ii) the “four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS” (Article S4(e) of the CAS Code).

to Article S4(d) or (e) of the Code, one of them being appointed as commission chair, and by the three Division Presidents” (Article S7(2)(a) *in fine* of the CAS Code).

Apart from the fact that the actual composition of the CAS Membership Commission is not easy to determine,⁷⁷ there is still the possibility that the majority of its members are direct appointees of the sports-governing bodies.⁷⁸ Moreover, the final decision to appoint an individual to the List of CAS arbitrators still belongs to the ICAS, which means that, when closely scrutinized, the new rules do not do much to reinforce the confidence that athletes should be able to have in the structure of the CAS.

In our view, the most relevant change that occurred while the sports community was waiting for the Pechstein Decision might not be in the CAS rules themselves, but in the actual composition of the ICAS. Indeed, while its members are still appointed directly or indirectly by the sports-governing bodies and the ICAS President is still a member of the IOC, the reality is that the latest election(s) saw the inclusion of a significant number (arguably, a majority) of personalities with no apparent link with the sport movement at all.⁷⁹ This improvement is however somewhat diminished by the fact that the ICAS Board, i.e. the ICAS President, Vice President

⁷⁷ The latest communication available indicates that the Membership Commission is “chaired by Federal Judge Yves Rüedi and composed of Ms Tricia Smith and the three Division Presidents” but the webpage devoted to the composition of ICAS does not mention Mr Rüedi and does not indicate which of the ICAS members is the President of the Membership Commission, <https://www.tas-cas.org/en/icas/members-2019-2022.html>.

⁷⁸ According to the CAS Website, “the three Division Presidents” are (i) Ms Carole Malinvaud, President of the Ordinary Division; Ms Corinne Schmidhauser, President of the Appeals Arbitration Division and (iii) Mr Ivo Eusebio, President of the Anti-Doping Division. However, it is not possible to determine by whom they were originally appointed as ICAS members.

⁷⁹ FRANK LATTY, *Le TAS marque des points devant la CEDH*, *Jurisport*, Vol. 192, 2018, p. 36; the current full list of ICAS members can be found at <https://www.tas-cas.org/cias/les-membres-2019-2022.html>.

and Division Presidents, is still predominantly composed of persons with significant links to the sport movement.⁸⁰ Probably the most significant change is the fact that the President of the Appeals Division, who directly appoints the presidents of the CAS panels in appeals cases without any consultation with the parties,⁸¹ is now a former athlete, and not, as in the past, the Vice President (now the President) of the IOC.⁸² The identity of the current CAS Appeals Division President is indeed a positive development⁸³ but in no case constitutes a guarantee for the future.⁸⁴

c) Conclusion and outlook

In light of the above, we hope that the Pechstein Decision is perceived for what it is – i.e. a dodged bullet – and that the sports arbitration community will continue to push for the changes that are necessary to ensure that the athletes who are forced to accept CAS arbitration can trust its fairness.

Based on the rationale (and the limitations) of the Pechstein Decision, if the CAS intends to implement changes that would put an end to the existing issues of perception and the related questions about the confidence that athletes can have in the system, the following adjustments to its Statutes and procedures could be contemplated:

⁸⁰ <https://www.tas-cas.org/cias/le-bureau.html>

⁸¹ In accordance with Article R54 CAS Code.

⁸² ANTONIO RIGOZZI, *L'importance du droit suisse de l'arbitrage*, cit. Fn. 68, p. 301 ss, referred to by the Swiss Federal Tribunal in SFSCD 144 III 120, pp. 126-127.

⁸³ That being said, in at least one doping case currently before the CAS that we are aware of, and which will most likely end up before the ECtHR, the athlete complained that the President of the Appeals Division might have been an athlete, but is currently also the President of Antidoping Switzerland, i.e. the Swiss national anti-doping organization.

⁸⁴ This development also does not address Ms Pechstein's contention and complaint that "the [...] president of the arbitral panel, [...] was in fact appointed by the CAS court office, and in particular by its Secretary General" (Pechstein Decision, cit. Fn. 1, § 124).

- A majority of the members of ICAS and of its Board, including the ICAS President, should be appointed from among personalities with no link with the sports-governing bodies.
- The CAS Membership Commission – including and in particular its chair – should be composed of a majority of ICAS Members who have no link with the sports-governing bodies.
- The CAS Membership Commission should issue guidelines clarifying the requirements of Article S14 of the CAS Code (i.e. that candidates have “appropriate legal training, recognized competence with regard to sports law and/or international arbitration, good knowledge of sport in general and a good command of at least one CAS working language”) and any other criteria it will apply or take into account when reviewing applications for appointment to the List of CAS arbitrators.
- The CAS Membership Commission should inform the relevant candidates of the reasons why their candidature has not been retained for appointment.
- The ICAS should publish the names of the arbitrators who were (re)appointed to the List, the names of those who were removed, and the names of the arbitrators who were put forward by the CAS Membership Commission and who were not elected.
- The CAS Membership Commission should be required to consult an arbitrator before removing him or her from the List of arbitrators, or deciding not to renew his or her appointment to the List

and, where relevant and requested by the arbitrator, render a reasoned decision.

- The ICAS should have its own secretariat and operate independently from the CAS Secretary General.
- The ICAS should publish a yearly report of its activities.
- The President of the Appeals Division should be an ICAS member with no link with the sports-governing bodies.
- The president of the Panel in CAS appeals proceedings should be appointed by the arbitrators appointed by the parties and, only if they cannot agree on a president within a set time limit, by the President of the Appeals Division.

2. Public hearings in CAS arbitration

One of the most notable – and visible – developments following the Pechstein Decision is that related to public hearings at the CAS.

The ECHR provides, in its Article 46 (“Binding force and execution of judgments”), that “[t]he final judgment of the Court shall be transmitted to the Committee of Ministers [of the Council of Europe], which shall supervise its execution”. During its Human Rights meeting of June 2020, the Committee of Ministers decided to end the supervision of the execution of the Pechstein Decision on the ground that “the CAS adopted new procedural rules allowing public hearings at the sole request of the athlete if the dispute is of disciplinary

or ethics nature”.⁸⁵ Indeed, the new Article R57 of the CAS Code (in force as from 1st January 2019) now reads as follows:

At the hearing, the proceedings take place in camera, unless the parties agree otherwise. 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.

There are several areas where the new wording of Article R57 could still be deemed inconsistent with the guarantee of a public hearing under Article 6(1) ECHR, which have been overlooked by both the Committee of Ministers in its June 2020 decision⁸⁶ and the first commentators writing on this addition to the CAS Code:⁸⁷

- The limitation to disciplinary proceedings: as discussed above, in the Court’s reasoning, the full

⁸⁵ See <https://www.coe.int/en/web/execution/latest-developments>, Switzerland: Public hearings allowed in disciplinary proceedings before the Court of Arbitration for Sport, 8 June 2020.

⁸⁶ It is worth mentioning in this context that the Committee of Ministers also noted that “[f]ollowing these amendments, a public hearing took place on 14 November 2019 in the case of *World Anti-Doping Agency (WADA) v. Sun Yang and FINA*”, which is not entirely on point since WADA did not object to a public hearing in that case (CAS 2019/A/6148, *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation*, award of 28 February 2020, § 65).

⁸⁷ GÉRALD SIMON, L’applicabilité de la Convention européenne des droits de l’homme aux arbitrages du TAS : réflexions sur le sens et la portée de l’arrêt de la Cour Européenne des Droits de l’Homme du 2 octobre 2018 Mutu et Pechstein, CAS Bulletin TAS/CAS Bulletin, Special Issue Budapest seminar October 2019, p. 115, according to whom “[l]a mise en conformité du TAS à l’article 6.1 CEDH ne s’est pas fait attendre !”.

applicability of Article 6(1) ECHR is the result of the compulsory nature of CAS arbitration.⁸⁸ While it is true that the ECtHR emphasized the stigma that comes with disciplinary sanctions and the impact that they might have on the professional honour and reputation of an athlete, disciplinary proceedings are not the only CAS cases that are compulsory in nature. Indeed, all CAS proceedings where a party (athlete, official, club, federation) challenges a decision of a sports-governing body are inherently compulsory in nature and should thus be fully governed by Article 6(1) ECHR. Hence, it is submitted that the principle that the hearing must be held in public is applicable to the vast majority of the CAS appeals proceedings within the meaning of Article R47 of the CAS Code.⁸⁹

- The limitation to physical persons: disciplinary cases are not only directed against individuals (athletes, coaches or sports officials) but also against clubs (for instance with respect to the conduct of their supporters or their financial fair play obligations) and international federations. Moreover, such legal entities can also be affected in terms of their honour and reputation. Indeed, under Swiss law both individuals and legal entities are protected by the personality rights enshrined in Article 28 of the Swiss Civil Code. We therefore

⁸⁸ See also ANTOINE DUVAL, *Time to go Public?*, cit. Fn 16.

⁸⁹ According to this provision, “[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement [...]”. It is submitted that it is only in the (rare) cases where the parties concluded a “*compromis d’arbitrage*” in favour of a CAS appeals proceeding that they can be deemed to have waived the relevant guarantees of Article 6(1) ECHR, including the right to a public hearing.

fail to see how the ECtHR’s Pechstein Decision can support the limitation provided for in the latest iteration of Article R57 of the CAS Code.⁹⁰

With respect to the exceptions provided for by Article 6(1) ECHR and copy-pasted into Article R57 of the CAS Code, it seems obvious that the CAS should apply the same “strict interpretation” applied by the ECtHR, including by restricting public access to some parts of the hearing where necessary and appropriate.⁹¹

In a case that was initiated under the old CAS rules but decided after the Pechstein Decision, the Panel first held that it was entitled (in accordance with the CAS Code version then in force) to decide that the hearing was not to be held in public. However, “given the recent Mutu and Pechstein judgment”, the Panel went on to “conside[r] the question under the aspect of Art. 6 ECHR”.⁹² In doing so, the Panel first recited certain exceptions to the guarantee of a public hearing in the context of Article 6(1) ECHR (including, *inter alia*, the guarantee of public order, proceedings which relate exclusively to points of law or highly technical questions, proceedings which require the examination of only limited legal issues, and proceedings in which the facts are undisputed and the legal questions not particularly complex).

⁹⁰ This also appears to have been the approach of the Panel in the *Trabzonspor* case discussed below (see Fn. 92 and 93), which was decided before the entry into force of the new wording of Article R57(2).

⁹¹ On this issue see DUVAL, *Time to go Public?*, cit. Fn. 16, who notes that the ECtHR’s case law would require “for example, [that] ‘the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public’ [*Belashev v. Russia*, application No. 28617/03, judgment of 4 December 2008, § 83]” and that, “[i]nstead, ‘courts must consider whether such exclusion is necessary in the specific circumstances in order to protect a public interest, and must confine the measure to what is strictly necessary in order to attain the objective pursued’ [*Nikolova and Vandova v. Bulgaria*, application No. 20688/04, judgment of 17 December 2013, § 74]”.

⁹² CAS 2018/A/5746, *Trabzonspor v. TFF, Fenerbahce & FIFA*, award of 30 July 2019, §§ 99-100.

Applying those considerations to the proceedings in question – which involved both undisputed facts and, in the opinion of the Panel, highly technical and complex legal questions – the Panel ultimately refused to hold a public hearing.⁹³

Finally, it is worth noting that it has been contemplated whether in cases of “a broader public interest” hearings should be public even if the accused party does not request this,⁹⁴ especially when they are of a quasi-criminal nature. In our opinion, the publication of the award in these cases is sufficient to maintain the confidence of the public at large in CAS arbitration proceedings. Whilst this of course requires systematic publication of decisions (which is another routine criticism of the CAS), it seems to strike a fairer balance between the “public interest” referred to by such authors and the rights of the athlete involved (who is, after all, not charged with a crime – at least as far as the CAS proceedings are concerned).

⁹³ *Id.*, §§ 100-105. Interestingly, the CAS Panel distanced themselves from a letter of the CAS Secretary General that they summarized as follows: “Mr Reeb answered the next day, underlining that the modification of Art. R57 §2 of the Code was only applicable to proceedings started after 1 January 2019 and that, for this reason, the request for a public hearing (including video recording and live streaming) should be rejected. In addition, the modified provision of Art. R57 of the Code referred to proceedings involving physical persons, which was not the case in this matter. Furthermore, that provision allowed exceptions in order to protect public order. The Secretary General stressed the fact that Trabzonspor's fans had demonstrated before the CAS during the last hearing involving this club and that they were currently sending emails to the CAS, affecting the serenity of this procedure. He stressed the importance for the CAS that the hearing should not be disturbed and added that, for this reason also, the CAS did not make any particular publicity about the hearing. Finally, Trabzonspor was advised that the CAS did not have an obligation to publish all the hearings on its website” (CAS 2018/A/5746, § 81 and § 106, where the Panel noted that “[h]e wrote for himself, as he was entitled to do, and correctly did not purport to express a view on behalf of the Panel”).

⁹⁴ ANTOINE DUVAL, *Time to go Public?*, cit. Fn. 16.

3. Legal aid

Article 6(3) ECHR guarantees the right to free legal aid in criminal proceedings subject to certain conditions. To the contrary, Article 6(1), which makes no reference to legal aid, does not require the State to provide free legal aid for every dispute relating to a “civil right”. However, the Convention is intended to safeguard rights which are “practical and effective, in particular the right of access to a court”.⁹⁵ Hence, Article 6(1) ECHR may in some cases compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court.⁹⁶

We would not be surprised if the question whether the limited scope of the current CAS Legal Aid system is consistent with Article 6(1) ECHR (or indeed Article 6(3) ECHR to the extent that it is applicable based on the severity of the sanction) were also to arise in the near future.

4. Analogous application of criminal law guarantees

The application of criminal law guarantees in CAS arbitration is another matter that has been subject to significant debate, and must be considered in the context of the ECHR. Indeed, under the heading “No punishment without law” Article 7 ECHR reads as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

⁹⁵ Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), cit. Fn. 24, para. 131.

⁹⁶ *Airey v. Ireland*, application No. 6289/73, judgment of 9 October 1979, § 26.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations.”.

The applicability of this provision to sports disciplinary sanctions was discussed in the recent case of *Platini v. Switzerland* (the **Platini Decision**).⁹⁷

a) *Platini v. Switzerland* - Article 7 ECHR and sports sanctions

As most will know, Michel Platini is a former professional football player, having been captain and coach of the French national team. He was also an adviser to former FIFA President Mr Joseph Blatter. In 2011, Mr Blatter approved the payment to Mr Platini of an invoice for CHF 2 million, presented by Mr Platini as a salary “supplement” that had allegedly been agreed orally at the time he was acting as an adviser to Mr Blatter.

By way of short summary of the proceedings that led to the Court’s decision: following the opening of criminal proceedings against Mr Blatter in connection with the payment, disciplinary proceedings were brought against Mr Platini for breaching the FIFA Code of Ethics. FIFA imposed a sanction consisting of a six-year suspension from any football-related professional activity, at national and international levels, plus a fine of CHF 80,000. The CAS reduced the suspension period from six to four years and lowered the fine to CHF 60,000. Following this, the Swiss Federal Tribunal dismissed the action to set aside the CAS award on the ground

⁹⁷ ECtHR, *Platini v. Switzerland* (Application No. 526/18), judgment of 11 February 2020, available at <http://hudoc.echr.coe.int/eng?i=001-201734> and at https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?highlight_do cid=cedh://20200211_526_18:fr&lang=fr&type=show_document.

that the sanction against Mr Platini was not arbitrary within the meaning of Article 393(e) of the Swiss Code of Civil Procedure (**CPC**) (Mr Platini being domiciled in Switzerland the CAS arbitration was deemed domestic).

Before both the CAS and the Swiss Federal Tribunal, Mr Platini argued that the alleged offence took place in 2007 and 2011 and that the application of the FIFA regulations in force in 2012 was a breach of Article 7 ECHR as the regulations in force at the time of the facts did not provide for an equivalent or similar offence.⁹⁸

In the Court's decision, Switzerland's international responsibility under the ECHR and the ECtHR's jurisdiction *ratione personae* for a breach of Article 7 were accepted, despite the fact that both FIFA and the CAS are private entities, for the same reasons developed in the Pechstein Decision,⁹⁹ namely that (i) Swiss law provided for the legal effects of CAS awards and for the jurisdiction of the Swiss Federal Tribunal to examine their validity (here under Articles 387 and 393 CPC) and (ii) the Swiss Federal Tribunal's dismissal of Mr Platini's action to set aside had given the CAS award *res judicata* effect in the Swiss legal order.¹⁰⁰

With respect to the applicability of Article 7 ECHR, the Court noted that this provision applies to sanctions imposed for "criminal offences" but that the concept of "penalty" set out in Article 7(1) of the Convention is autonomous in scope ("*possède [...] une portée autonome*"): ¹⁰¹ "in order to ensure the efficacy of the protection secured under this article, the Court must be free to go beyond appearances and autonomously assess whether a specific measure is, substantively, a 'penalty' within the meaning of Article 7

⁹⁸ Platini Decision, cit. Fn. 97, § 34.

⁹⁹ Section II.C.2. above.

¹⁰⁰ Platini Decision, cit. Fn. 97, § 38.

¹⁰¹ *Id.*, § 44.

§ 1".¹⁰² As part of this assessment, the Court may also take into account the specific conditions of execution of the measure, as well its nature and purpose, and its severity.¹⁰³

Comparing the situation of Mr Platini to its previous jurisprudence, the Court excluded the applicability of Article 7 ECHR on the ground that the FIFA Code of Ethics was a private disciplinary regime that resulted in "specific measures taken against a member of a relative[ly] small group of individuals who had a specific status and was subject to specific rules",¹⁰⁴ without really addressing the purpose and the severity of the measure.

b) Outlook

Based on this, rather unclear, language the Platini Decision does not allow any final conclusion on the applicability *ratione materiae* of Article 7(1) ECHR to (for example) anti-doping sanctions, which might be significantly more severe and which, by operation of the World Anti-Doping Code, are applicable to all the athletes around the world.

The issue of the quasi-criminal nature of anti-doping sanctions goes beyond the specific guarantees of Article 7 ECHR as the Court in *Platini* has made clear that the same "autonomous approach" applies to the concept of "criminal charge" in Article 6 of the Convention.¹⁰⁵ This means that sports disciplinary proceedings in general and anti-doping proceedings in

¹⁰² *Ibid.* See also Guide on Article 7 of the European Convention of Human Rights – No punishment without law: the principle that only the law can define a crime and prescribe a penalty, available on the Court's website at https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, paras. 11 et seq.

¹⁰³ *Ibid.*

¹⁰⁴ Platini Decision, cit. Fn. 97, § 48.

¹⁰⁵ *Id.*, § 44. See also: *Brown v. the United Kingdom*, application No. 38644/97, decision of 24 November 1998; *Société Oxygène Plus v. France*, application No. 76959/11, decision, § 43; *Žaja v. Croatia*, judgment of 4 October 2016, § 86.

particular might have to comply also with the specific guarantees of Article 6(2) ECHR.¹⁰⁶

B. Substantive guarantees

1. Article 8 ECHR

Under the heading “Right to respect for private and family life”, Article 8 ECHR reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

a) Sanctions affecting private life

In the Platini Decision, the Court also discussed the applicability of Article 8 of the ECHR to sports sanctions. In substance, Mr Platini claimed that given the fact that he was 61 years old and that he had devoted his entire career to football, the ban imposed by the CAS and confirmed by the Swiss Federal Tribunal was a disproportionate and unjustified measure that *de facto* prevented him from exercising any professional activity – in breach of Article 8 ECHR.¹⁰⁷

¹⁰⁶ For the scope of Article 6 (criminal aspect) and the concept of a “criminal charge”, see the Guide on Article 6 (criminal limb), available on the Court’s website (www.echr.coe.int – Case-law).

¹⁰⁷ Platini Decision, cit. Fn. 97, § 55.

(i) The applicability of Article 8 to sports sanctions

The Court first considered the applicability of Article 8 ECHR to sports sanctions.

According to the Court, the concept of “private life” is broad and incapable of exhaustive definition.¹⁰⁸ Article 8 ECHR protects the right to personal development, whether in terms of personality or of personal autonomy, and encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world. The Court found that the case law developed in the area of professional disputes is particularly relevant also to determine the applicability of Article 8 in sports disciplinary disputes. In particular, the Court referred to the test summarized in *Denisov*¹⁰⁹ according to which Article 8 can be applicable if either (i) the grounds for the sanction are related to private life or (ii) the impact of the sanction extends to private life. In the Platini Decision it was the second limb of the Denisov test, also referred to as “*approche fondée sur les conséquences*” that was relevant.¹¹⁰

Specifically, the Court found that this so-called ‘severity test’ was met on the ground that the ban from any football-related professional activity, at national and international levels:

- prevented Mr Platini from earning a living from football, his sole source of income throughout his life (a situation aggravated by his age and by FIFA's dominant position or even monopoly in the organisation of football worldwide);
- interfered with the possibility of establishing and developing social relations with others, in view of

¹⁰⁸ Platini Decision, cit. Fn. 97, § 52.

¹⁰⁹ *Denisov c. Ukraine* [GC], application No. 76639/11, judgment of 25 September 2018.

¹¹⁰ Platini Decision, cit. Fn. 97, § 56.

the very broad nature of the sanction, which extended to “any” football-related activity, given that the applicant was commonly identified with football by the general public and the media;

- had a negative impact on his reputation (as a result of a certain stigmatisation).

Hence, the Court concluded that the sanction imposed by the CAS had to comply with Article 8 ECHR.

(ii) The so-called “margin of appreciation” doctrine

As the sanction was private in nature and was not imposed by the State, the Court examined whether Switzerland “complied with its positive obligations with respect to Article 8 ECHR”.¹¹¹ Indeed, Article 1 of the ECHR requires member States to “secure” the rights and freedoms included therein. This requirement imposes both negative and positive obligations on the member States.¹¹²

Such positive obligations might require the adoption of measures aimed at ensuring the respect of private life in the relationships between individuals, it being understood that the State enjoys some discretion (“*l’État jouissant en toute hypothèse d’une marge d’appréciation*”)¹¹³ in the way in which it strikes the right balance between the public interest and the interests of the individual.¹¹⁴

In the Platini Decision, the Court applied the so-called “margin of appreciation doctrine” by examining whether Switzerland had put in place adequate institutional and procedural

¹¹¹ Platini Decision, cit. Fn. 97, § 59.

¹¹² DANIEL RIETIKER, *The European Court of Human Rights and FIFA – Current Issues and Potential Challenges*, *European Convention on Human Rights Law Review* 1 (2020), p. 77 and the references at Fn. 66.

¹¹³ On this doctrine see ANDREW LEGG, *The Margin of Appreciation in International Human Rights Law* (Oxford) 2012.

¹¹⁴ Platini Decision, cit. Fn. 97, § 60.

safeguards to protect the applicant's private life. Specifically, the Court indicated that the relevant question in the setting of sports sanctions is whether and to what extent Switzerland was required to positively protect Mr Platini's private life, and in particular: (i) if the combined effect of CAS appeals arbitration and of the action to set aside provided a jurisdictional framework that allowed him to put forward his complaints; and (ii) whether the decisions rendered were duly reasoned.

In its analysis, the Court took account of the specificity of Mr Platini's situation, in that he had freely chosen a career in football, first as player and coach, then in official capacities in football's federative governing bodies, which were private entities and thus not directly bound by the Convention. While that career had no doubt endowed him with many privileges and benefits, it had also involved waiving certain rights. In this context, the Court specifically noted that Mr Platini did not claim that he had no choice but to waive the state courts' jurisdiction and to agree to CAS arbitration and that his case was thus different from Ms Pechstein's case.

It is with these peculiarities ("*particularités*") in mind that the Court assessed whether the combination of the CAS Code and of Swiss arbitration law (here Articles 353 *et seq.* CPC) provided adequate institutional and procedural safeguards:

- with respect to the CAS, the Court started by noting that its independence was confirmed in the Pechstein Decision.¹¹⁵ It added that the CAS Panel hearing Mr Platini's appeal had carefully examined his arguments in a 63-page long award and convincingly balanced the interests at stake taking into account the specificity of CAS arbitration proceedings. In effect, the Court's analysis focused on whether the CAS had addressed

¹¹⁵ Platini Decision, cit. Fn. 97, § 65.

Mr Platini's argument that the sanction was disproportionate:

The CAS had in particular found that a four-year period was reasonable in view of the aim pursued: to impose a sufficiently harsh sanction for the breach, which it deemed serious, of the Code of Ethics, in order to send a "strong signal" to restore the reputation of football and of FIFA. Neither the applicant's current situation nor his outstanding services to football had been overlooked by the arbitrators; on the contrary, the CAS had given due regard to the applicant's senior position in the highest football bodies at the time of the offences of which he stood accused, and also to his lack of remorse.¹¹⁶

- Concerning the Swiss Federal Tribunal, the Court noted that its decision of 6 June 2017 had:

[...] upheld the CAS award on the basis of plausible and convincing reasoning. It had taken the view that the duration of the suspension did not appear manifestly excessive in view of the criteria set out by the arbitral tribunal, which had taken account of all the incriminating and exonerating factors in the file before it, and had not disregarded any material circumstance in deciding on that duration.¹¹⁷

On this basis, and noting in passing that the decision confirmed by the Federal Tribunal "pursued not only the legitimate aim of punishing breaches of the relevant rules by a high-ranking official of FIFA, but also the general-interest aim of restoring the reputation of football and of FIFA",¹¹⁸ the

¹¹⁶ Platini Decision, cit. Fn. 97, § 67 as translated in the Court's Information Note 238 of March 2020, available at <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/clin>

¹¹⁷ *Id.*, § 69 as translated in the Court's Information Note 238, cit. Fn. 116.

¹¹⁸ *Id.*, § 70 as translated in the Court's Information Note 238, cit. Fn. 116.

Court held that – given the broad margin of appreciation afforded to it – Switzerland had not failed to fulfil its positive obligations under Article 8 ECHR.

(iii) Bearing of the Platini Decision

In substance, the Court held in the Platini Decision that when sports sanctions reach a certain “threshold of seriousness”, such that Article 8 ECHR is applicable, Switzerland has the positive obligation to ensure that the governing legal regime produces decisions that are sufficiently reasoned to allow the Court to ensure that the sanctions are proportionate.

The obvious question is whether and to what extent this principle applies to sports sanctions other than those considered in the Platini Decision, in particular anti-doping sanctions. We have already noted that in anti-doping cases the sanctions are at least, or potentially even more severe than the four-year ban imposed on Mr Platini. Hence, Article 8 ECHR requires that Switzerland ensure that the combined effect of the CAS proceedings and the action to set aside before the Federal Tribunal convincingly show that the sanction is proportionate to the offence, taking into account all the interests at stake.

In this respect, there are certain considerations to keep in mind. First of all, the starting point that the *Platini* situation is different from the *Pechstein* situation will not apply. Moreover, given the way in which certain CAS Panels point blank refuse to conduct proportionality analyses in anti-doping proceedings, it is far from certain that the Court would necessarily come to the same conclusion. Furthermore, in the vast majority of cases the arbitration will be international and the action to set aside will be governed by Article 190(2) PILA (and not, as in *Platini*, by Article 393 CPC). With respect to the merits, and as noted by the Swiss Federal Tribunal in the *Platini* case, the ground for setting aside an award in international arbitration (inconsistency with public policy

within the meaning of Article 190(2)(e) PILA) is significantly narrower than the ground available in domestic arbitration (arbitrariness under Article 393(e) CPC,¹¹⁹ i.e. where the decision is “evidently unsustainable, [...] clearly contradicts the factual situation, blatantly violates a provision or well-established principle of law or [...] clearly runs contrary to fairness and equity”).¹²⁰ This means that in the vast majority of disciplinary matters, the Swiss Federal Tribunal will only consider whether the CAS award is consistent with public policy and will not review the *reasoning* of the CAS award.

In *Platini* the Federal Tribunal ruled that it had the power to examine whether not only the application of the law, but also the applicable disciplinary regulations were arbitrary or not, or arbitrarily applied. Indeed, it discussed the CAS award over several pages to conclude that this was not the case. With respect to the proportionality of the sanction, the arbitrariness standard allows the Federal Tribunal to examine whether the CAS has “grossly breached its discretion when imposing severe disciplinary punishment”,¹²¹ which is a claim that the Federal Tribunal would not even entertain when the arbitration is international (and the applicable standard of review is the violation of public policy).

In light of the above it is doubtful that in cases governed by Chapter 12 PILA the ECtHR will be in a position to determine whether, like in the *Platini* case, the Federal Tribunal has convincingly and plausibly determined that the sanction was not manifestly excessive taking into account all of the circumstances of the case.

¹¹⁹ SFSCD 4A_600/2016 of 29 June 2017, § 1.1.4.

¹²⁰ Free translation of the definition of arbitrariness given in SFSCD 132 III 209, 2.1.

¹²¹ SFSCD 4A_600/2016 of 29 June 2017, § 3.7.2 *in fine*, loose translation of the French original “seule la mise en évidence d'une ou de plusieurs violations crasses de leur pouvoir d'appréciation par les arbitres, qui plus est à l'origine d'une peine disciplinaire excessivement sévère, pourrait justifier l'intervention du Tribunal fédéral.”

As such, it remains to be seen whether the “margin of appreciation doctrine” will be sufficient to rule out a breach of Article 8 ECHR in cases where a severe sanction is imposed without any analysis of its proportionality.

b) Article 8 ECHR - private and family life in anti-doping

As noted by a senior lawyer at the ECtHR,¹²² the World Anti-Doping Code raises several human rights issues (beyond the severity of the sanctions), in particular the use of surveillance measures, issues of data protection concerning sensitive information, and interference with privacy by the so-called whereabouts requirements in anti-doping rules and regulations.

This last issue was addressed in a recent judgment following a complaint brought by the Fédération Nationale des Associations et Syndicats Sportifs (**FNASS**) against France with respect to the requirement for certain professional athletes to provide complete quarterly information on their whereabouts and to specify a sixty-minute time-slot during which they would be available for testing every day.¹²³ The applicants claimed that such requirement amounted to unjustified interference with their right to respect for private and family life and their home under Article 8 ECHR.¹²⁴

The Court found that the whereabouts requirements in question represented an interference with the applicants’ rights under Article 8(1) ECHR¹²⁵ but that the duties imposed on athletes by these requirements furthered the legitimate

¹²² DANIEL RIETIKER, *The European Court of Human Rights and FIFA*, cit. Fn. 112.

¹²³ *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France*, application No. 48151/11 and 77769/13, judgment of 18 January 2018.

¹²⁴ *Id.*, §§ 115 and 138.

¹²⁵ *Id.*, § 151.

aim of protecting “the rights and freedoms of others”.¹²⁶ The Court noted in particular that the use of prohibited substances would (i) provide an unfair competitive advantage over other athletes, (ii) operate as an encouragement of amateur athletes, and especially young people, to follow suit thus endangering their health, and (iii) deprive spectators of the fair competition which they legitimately expected.¹²⁷ Moreover, the Court noted that to reduce or remove the whereabouts requirements could increase the dangers of doping for the applicants’ health and for the health of the whole sports community, running contrary to the European and international consensus on the need for unannounced testing.¹²⁸ In short, the Court held that the relevant whereabouts requirements struck a fair balance between these objectives and the rights enshrined in Article 8 ECHR.

In the well-known *Sun Yang* CAS case, there was an interesting debate on the requirements that need to be followed in order to collect blood from an athlete, in particular as to the notification formalities and the qualifications of doping control personnel. A careful reading of the CAS award¹²⁹ suggests that there is room for an argument that the way in which the doping control was conducted in the circumstances and the severity of the sanction imposed (an 8 year ban) would allow for scrutiny under Article 8 ECHR. Still with respect to anti-doping controls, Article 8 ECHR is certainly also relevant with regard to night-time testing.

2. Article 14 ECHR – Non-discrimination

In its recent judgment in the *Caster Semenya* matter, the Swiss Federal Tribunal held that the principle of non-

¹²⁶ *Id.*, §§ 160–163.

¹²⁷ *Id.*, §§ 164–166.

¹²⁸ *Id.*, §§ 184 and 191.

¹²⁹ CAS 2019/A/6148, *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation*, award of 28 February 2020.

discrimination is encompassed by the concept of public policy within the meaning of Article 190(2)(e) PILA, but primarily in order to protect the individual from illegitimate State interventions. The Federal Tribunal noted that under Swiss constitutional law the principle of non-discrimination does not have “horizontal effects” and thus does not apply to the relationships between private persons, such as those in sports matters.

While recognizing that the “relationship between an athlete and a global sports federation shows some similarities to those between an individual and a State”, the Federal Tribunal was not prepared to accept that a prohibition of discrimination originating from such private party could be characterized as part of the essential values that form public policy within the meaning of Article 190(2)(e) PILA.¹³⁰

Legal commentators have pointed out that the ECtHR is more proactive in ensuring compliance with the principle of non-discrimination, even when it is breached by non-State entities, and that it has held the State responsible when the domestic courts did not redress such private discrimination. As noted by the ECtHR:

*In exercising the European supervision incumbent on it, [the Court] cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.*¹³¹

¹³⁰ SFSCD 4A_248/2019 and 4A_398/2019 of 25 August 2020, § 9.4.

¹³¹ *Pla and Puncernau v. Andorra*, application No. 69498/01, judgment of 13 July 2004.

In light of this case law, one cannot rule out that Article 14 ECHR will be increasingly invoked in CAS proceedings. The interesting question will be the extent to which such arguments are accepted – or even discussed – by the Panels in question.

C. How to ensure compliance with the ECHR?

At this stage, it may be worth considering at least briefly certain practices that may assist in ensuring compliance with the ECHR.

1. Exhaustion of domestic remedies

Under the heading “Admissibility criteria”, Article 35(1) ECHR provides that “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law”. The Court has underlined the need to apply this requirement rule with some degree of flexibility and without excessive formalism. In particular, it has held that it is not necessary for a right under the Convention to be explicitly invoked in domestic proceedings, provided that the corresponding complaint is raised “at least in substance”.¹³²

Indeed, in the Platini Decision, the Court ruled that the fact that the applicant had (only) claimed before the Swiss Federal Tribunal that the sanction at issue breached his personality rights under Swiss law, without mentioning Article 8 ECHR, did not prevent it from examining whether the sanction was proportionate under Article 8 ECHR.¹³³

¹³² *Castells v. Spain*, application No. 11798/85, judgment of 23 April 1992, § 32.

¹³³ Platini Decision, cit. Fn. 97, § 51.

2. Breaches of the ECHR as ground to set aside the award?

a) Article 6(1) ECHR

As Article 6(1) ECHR is self-executing, one would think that after the Pechstein Decision the CAS is now under an obligation to apply all the guarantees of Article 6(1) ECHR in appeals cases, and that the Swiss Federal Tribunal ought to ensure that this is indeed the case. The extent to which the CAS will in practice apply the guarantees of Article 6(1) ECHR will of course depend on the way in which the Swiss Federal Tribunal will sanction any relevant breaches.

In a recent decision dated 17 August 2020, the Swiss Federal Tribunal has ruled that even in cases where Article 6(1) ECHR is applicable in CAS arbitration under the so-called *Pechstein* test, a breach of Article 6(1) ECHR does not constitute a separate, *sui generis* ground for setting aside CAS awards.¹³⁴

The Federal Tribunal also held that a breach of Article 6(1) ECHR does not constitute *per se* a breach of procedural public policy within the meaning of Article 190(2)(e) PILA and that the party seeking to have the award set aside must “show how the alleged violation of Article 6(1) ECHR would constitute a violation of procedural public policy”.¹³⁵

This approach is difficult to understand since a breach of Article 6(1) would expose Switzerland to a condemnation by the ECtHR, irrespective of whether a party has demonstrated in the action to set aside that the breach of Article 6(1) ECHR would also qualify as a breach of procedural public policy within the meaning of Article 190(2)(e) PILA.

After all, the Swiss Federal Tribunal accepts that federal legislation can be interpreted in accordance with the Swiss

¹³⁴ SFSCD 4A_486/2019 of 17 August 2020, § 4.1.

¹³⁵ *Ibid.*

Constitution (and arguably the ECHR) when the other rules of interpretation do not dissipate all the doubts as to the meaning of the law. With specific respect to Article 190(2)(e) PILA, the legislator historically contemplated public policy in a substantive sense. It was the Swiss Federal Tribunal that clarified that public policy also has a procedural limb, covering all fundamental and generally recognized procedural principles (i) that are not already covered by Article 190(2)(d) PILA and (ii) the disregard of which contradicts the sense of justice in an intolerable way.¹³⁶ This case law was rendered well before the Pechstein Decision. One therefore fails to see why the Swiss Federal Tribunal cannot “go the extra mile” and rule that in sports matters the concept of procedural public policy should be interpreted in such a way as to include all the guarantees of Article 6(1) ECHR that are not already covered by Article 190(2)(d) PILA.

b) Substantive guarantees

When it comes to substantive guarantees, the Swiss Federal Tribunal has consistently held that the principles underpinning the relevant provisions of the ECHR or of the Swiss Constitution can be taken into account to crystallize the concept of public policy under Article 190(2)(e) PILA.

This approach makes sense in sports disputes given the fact that the ECtHR consistently applies the doctrine of the margin of appreciation, which allows the Swiss Federal Tribunal to exercise some level of discretion in determining how and to what extent potential breaches of the ECHR shall be redressed.

¹³⁶ SFSCD 126 III 249, § 3b with the reference.

D. Concluding remarks

At the end of this discussion of the relevance of human rights in sports arbitration, one could easily predict that the ECHR will be increasingly relied upon by the parties both before the CAS and before the Swiss Federal Tribunal. Already, there has been a sharp increase in the number of sports-related cases being brought before, and considered by, the ECtHR in recent years.¹³⁷ In view of this, one can only hope that Judge Costa, a former President of the ECtHR who is well acquainted with sports law and anti-doping rules in particular, was right when writing, very recently, that “*c’est plus une autodiscipline des procédures arbitrales qui est probable pour l’avenir qu’une multiplication forte des litiges portés dans cette matière à Strasbourg*”.¹³⁸

¹³⁷ In addition to the *Pechstein* (cit. Fn. 1), *Bakker* (cit. Fn. 6), *Platini* (cit. Fn. 97) and *FNASS* (cit. Fn. 123) cases discussed in this contribution, another recent case was that of *Ali Riza and Others v. Turkey*, applications No. 30226/10 and 4 others, judgment of 28 January 2020. All of the ECtHR rulings in the aforementioned cases were issued between 2018 and 2020.

¹³⁸ JEAN-PAUL COSTA, *La Cour européenne des droits de l’homme et l’arbitrage*, b-Arbitra 2019/2, p. 308.

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