Claudia PECHSTEIN v. Court of Arbitration for Sport: Advantage CAS?

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As the read can easily guess, I was thinking of a title for this contribution while Wimbledon *was in full swing. As to this short introduction, I was literally interrupted in the drafting by the news of the German Federal Constitutional Court ("*Bundesverfassungsgerichts*") upholding* Claudia PECHSTEIN*'s claim that the arbitration agreement in favour of the Court of Arbitration for Sport (CAS) was null and void.*[1] *The first thought that crossed my mind was whether I should change the title from "*advantage CAS*" to "*deuce*". Upon reflection, I opted for a typically Swiss neutral version and simply added a question mark to indicate that the sports arbitration community shall continue to reflect on the issue and be proactive to ensure that it maintains the advantage.*

In this issue of *Football Legal* devoted to CAS arbitration, I thought that it would be a good idea to reflect on the decision of the European Court of Human Rights (the ECtHR or the Court) in *PECHSTEIN* (the *PECHSTEIN* Decision) that could have jeopardised if not disrupted the CAS as we know it.[2] Expectations were high on all fronts and the Court kept us waiting for eight years. Eventually, the ECtHR considered that the CAS was independent and impartial but that Ms *PECHSTEIN*'s right to be heard within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR or the Convention) had been violated because she had not been granted a public hearing. Now that the dust has settled, I believe it is fair to say that the CAS dodged a bullet, which is good news for the sports arbitration community and - I would submit - for the sport in general (see below II). The question is whether, based on the findings and the reasoning of the Court, one can conclude that the current CAS system is bulletproof and would survive another bullet fired by a sniper who, unlike Ms *PECHSTEIN* in the ECtHR, will hit where it could really hurt (see below III). The above-mentioned decision of the Constitutional Court in the German limb of the *PECHSTEIN* dispute[3] should operate a reminder that sports arbitration does not operate in a vacuum and that the dust might not have settled after all. In light of this latest wakeup call, I hope that that the analysis and suggestions included in this contribution might be of some help to reinforce once and for all the trust of all stakeholders in the CAS system as the best way to resolve sport disputes.

I. PECHSTEIN v. Switzerland*: The Dodged Bullet*

In order to fully assess the relevance of the *PECHSTEIN* Decision, it is necessary to 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 on the central question of the structural independence of the CAS (C.).

A. Factual and Procedural Background

On 1 July 2009, following a series of anti-doping controls that showed an anomalous pattern in her blood profile, *Claudia PECHSTEIN* was found guilty of doping and banned for two years by the International Skating Union (ISU). Ms *PECHSTEIN* and her national federation (the *Deutsche Eisschnelllauf- und Shorttrack-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 (thus confirming the two-year ban).

1 Bundesverfassungsgericht decision no. 2103/16, 3 June 2022, available at: www.bundesverfassungsgericht.de

2 ECtHR, Case of *MUTU & PECHSTEIN* v. Switzerland (Applications nos. 40575/10 and 67474/10), judgment of 2 October 2018, available at: hudoc.echr.coe.int and at www.bger.ch
I will discuss the ECtHR judgment in *MUTU and 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.

3 This parallel aspect of the *PECHSTEIN* case does not concern the CAS award directly but rather the validity of the CAS arbitration agreement in the context of a claim for damages in the German courts.

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.[4]

On 11 November 2010, Ms *PECHSTEIN* filed an application against the Swiss Confederation under Article 34 of 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.[5]

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

C. *The Court's Analysis*

After having accepted both applicability of Article 6(1) ECHR to arbitration and its *ratione personae* jurisdiction, the Court considered whether Article 6(1) ECHR could be waived in arbitration proceedings (1.) and whether the specific rights and requirements arising out of this provision according to Ms *PECHSTEIN* had been breached, namely (i) the right to a public hearing (2.) and (ii) the requirement of independence and impartiality in arbitration proceedings (3.).

1. No waiver of Article 6(1) ECHR in CAS appeals arbitration proceedings

Having accepted that Article 6(1) ECHR applies to arbitration (in the present case notably because "*the right to carry on an occupation [was] at stake*"),[7] the Court addressed 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*".[8]

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*".[9] 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*

4 SFT, 10 February 2010, no. 4A_612/2009.
5 *PECHSTEIN* Decision, cit. Fn. 1, par. 1-4.
6 *PECHSTEIN* Decision, cit. Fn. 1, par. 52.
7 *Id.*, par. 58.
8 *Id.*, par. 95.
9 *Id.*, par. 96, referring in particular to *Eiffage S.A. and others v. Switzerland*, application no. 1742/05, judgment of 15 September 2009.

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 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".[10]

This might appear an obvious conclusion, and indeed the Swiss Federal Tribunal had already acknowledged that.[11] However, the Swiss Federal Tribunal only analysed 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 most authoritative doctrinal views,[12] 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*".[13]

Article 6(1) ECHR encompasses numerous procedural guarantees.[14] Ms *PECHSTEIN* relied on two of them, namely the guarantee to a fair and public hearing and the guarantee to an independent and impartial tribunal.

2. 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 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,[15] 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*",[16] 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.*"[17] 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:

- "*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*";[18]
- where the proceedings are "*devoted exclusively to legal or highly technical questions*".[19]

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.[20]

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*" ("*wünschenswert*"), 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*

10 *PECHSTEIN* Decision, cit. Fn. 1, par. 113.
11 ATF 133 III 235.
12 *U. 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; *M. 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.
13 *PECHSTEIN* Decision, cit. Fn. 1, par. 115.
14 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 www.echr.coe.int
15 On the limits of the CAS's policy with respect to the publication (of the non-confidential awards) see *A. DUVAL*, '*Time to go Public? The Need for Transparency at the Court of Arbitration for Sport*', in: *A. DUVAL/A. RIGOZZI* (Eds), Yearbook of International Sports Arbitration 2017, pp. 3-27.
16 *PECHSTEIN* Decision, cit. Fn. 1, par. 175.
17 *Ibid.*
18 *Id.*, par. 177.
19 *Id.*, par. 177.
20 *Id.*, par. 182.

arbitration"[21] - the Court held that Switzerland had breached Article 6(1) ECHR.[22]

Sensational at first sight (Switzerland is not often condemned by the ECtHR), the Court ruling is uneventful in practice (the CAS merely adjusted the CAS Code on the public hearing point). The ECtHR rejected Ms *PECHSTEIN*'s "*3,584,126.09 euros (EUR), plus interest*" pecuniary damages claim on the ground that it "*fail[ed] to see any causal link between the violation found and the pecuniary damage alleged*".[23] This specific finding about lack of causal link also might have discouraged Ms *PECHSTEIN* from asking for the revision of the decision of the Swiss Federal Tribunal confirming the CAS award against her since revision for breach of the ECHR is open only if "*the consequences of the violation of the Convention cannot be remedied by a financial indemnity*" and "*the revision is necessary to remedy the violation*".[24]

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In my view, the public hearing limb of the *PECHSTEIN* Decision was a sort of side show.[25] Of course the recent decision of the German Constitutional Court is also focused on the public hearing requirement, and even conclude that the CAS arbitration agreements are null and void to the extent that CAS does not provide for a public hearing, but I believe that the most important issue is still the requirement of independence and impartiality (which the German Constitutional Court left explicitly left open despite the ruling of the ECtHR in *PECHSTEIN*).

3. 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.).

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.[26] 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*".[27]

- 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*".[28]

- 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, guarantees sufficient to exclude any legitimate doubt about [its] impartiality*".[29]

- 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*".[30]

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

21 *Id.*, par. 178 referring to par. 23, which in turn quotes the relevant passages of the Swiss Federal Tribunal's Decision.
22 *Id.*, par. 183.
23 *Id.*, par. 194. Ms *PECHSTEIN* also claimed EUR 400,000 in *"tort moral"* but Court only awarded a minimal part of this *"claim for non-pecuniary damage, ruling on an equitable basis" i.e. "EUR 8,000 for the violation found in respect of her application"* (*Id.*, par. 195).
24 Art. 122 of the Swiss Federal Tribunal Act (LTF).
25 Readers familiar with the case will note, not without irony, that Ms *PECHSTEIN* originally relied on the right to have a public hearing simply to have her manager attend the hearing despite the limited space available in the hearing room.
26 For a comprehensive review, see Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), cit. Fn. 13, par. 131.
27 *PECHSTEIN* Decision, cit. Fn. 1, par. 139.
28 *Id.*, par. 140.
29 *Id.*, par. 141.
30 *Id.*, par. 142-143.

"*perfectible*", was "*sufficiently*" independent to be considered as a genuine arbitral tribunal, did not entirely convince academics, whether in Switzerland[31] or abroad.[32]

As mentioned in the introduction, 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 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 was indeed settled once and for all.

(i) Ms *PECHSTEIN*'s claims/complaints

The Court set out Ms *PECHSTEIN*'s main[33] 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.*"[34]

- 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*".[35]

- The obligation to choose the arbitrators from the closed CAS List "*showed that the CAS did not constitute a genuine arbitral tribunal, since in [Ms PECHSTEIN's] view the parties to traditional arbitration could choose their arbitrators freely.*"[36]

31 *A. 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 www.andreasbucher-law.ch); *M. 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; *P. 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; *J. DE MONTMOLLIN/D. 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.

32 *A. DUVAL*, '*Time to go Public?*', cit. Fn 16.

33 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"* (par. 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"* (par. 151).

34 *PECHSTEIN* Decision, cit. Fn. 1, par. 124.

35 *Id.*, par. 125.

36 *Ibid.*

(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.*"[37]

- In other words, Article S14 of the CAS Code "*only required to choose one-fifth of the arbitrators from among persons independent of the sports bodies which could be involved in disputes with athletes before the CAS*".[38]

- 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*".[39]

- 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.[40]

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

37 *Id.*, par. 153.

38 *Ibid.*

39 *Id.*, par. 154.

40 *Id.*, par. 155.

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.* [...]
>
> *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.*"[41]

(iii) The Dissenting Opinion

As noted, the above ruling was a majority ruling, with Judge *Georgios A. SERGHIDES* form 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.*"[42]

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.[43]

Ultimately, the dissenting judges found that the links between the ICAS and the sports-governing bodies were "*worrying*"[44] and that the "*influence*" the sports-governing bodies have on the composition of the ICAS is not only "*not insignificant*", as accepted by the majority,[45] but indeed "*considerable*".[46] 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*"[47] 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.[48]

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*";[49] 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).[50]

While missing the fact that this latter role goes well beyond appointing the president of the panel when "*the parties fail to reach agreement*",[51] 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.

II. Is the CAS Bulletproof?

Having considered what was decided in the *PECHSTEIN* Decision, *i.e.* the "*dodged bullet*", the question is whether and to what extent there are other issues, not examined in *PECHSTEIN*, that could jeopardize the CAS system, *i.e.* whether the CAS is ready to take a bullet that actually hits the target.

A. The Structural Independence of CAS

1. The persuasiveness of the *PECHSTEIN* Decision

Technically, the *PECHSTEIN* (majority) decision resolved the hotly debated question of whether the CAS is

41 *Id.*, par. 157.
42 *PECHSTEIN* Decision, Dissenting Opinion, par. 7.
43 *Id.*, par. 12-13.
44 *Id.*, par. 11.
45 *Id.*, par. 9.
46 *Id.*, par. 14.
47 *Id.*, par. 11.
48 *Id.*, par. 28.
49 *Id.*, par. 14.
50 *Ibid.*
51 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).

sufficiently structurally independent to be considered as a genuine arbitral tribunal. However, regretfully, the reasoning is not entirely convincing.[52]

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 *PECHSTEIN* Decision did not address what is generally considered as the main issue, namely that the president of each CAS Panel[53] in appeals cases is appointed by the arbitral institution (*i.e.* by the member of the ICAS who acts as the President of the CAS Appeals Division). In my view, this element alone significantly undermines, if not the authoritativeness, at least the persuasiveness of the *PECHSTEIN* Decision.

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.

> ***The majority's analysis was not only based on an incomplete assessment of the CAS rules, but also at times legally unconvincing***

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*,[54] 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 par. 140 of the *PECHSTEIN* Decision and summarized above)[55] 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).[56]

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 nomination des arbitres*"[57] 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*".[58]

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*".[59] However, as I noted elsewhere,[60] 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.[61] One can 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*",[62] 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.[63] 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.*"[64]

The Court did note the renewable nature of the appointment on the CAS List of arbitrators,[65] 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

52 See also *C. J. HENDEL/G. 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, *P. MARZOLINI/D. 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.

53 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).

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

55 See section II.5.a. above.

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

57 *PECHSTEIN* Decision, cit. Fn. 1, par. 100 of the original French version of the decision (the English translation incorrectly omits the adjective *"structural"*).

58 *Id.*, par. 143.

59 *Ibid.*, and the reference to *Oleksandr VOLKOV v. Ukraine*, application no. 21722/11, judgment of 9 February 2013, par. 106 and *MORICE v. France* [GC], application no 29369/10, judgment of 23 April 2015, par. 78.

60 *A. RIGOZZI*, '*Chronique de jurisprudence arbitrale en matière sportive*', cit. Fn. 53, p. 927.

61 See also, and more forcefully, *M. MAISONNEUVE*, '*Le Tribunal arbitral du sport et le droit au procès équitable*', cit. Fn. 14, pp. 701-702.

62 *PECHSTEIN* Decision, Dissenting Opinion, par. 15.

63 *Id.*, par. 13.

64 *PECHSTEIN* Decision, cit. Fn. 1, par. 140.

65 *Id.*, par. 155.

of the CAS Code - a provision that is common in all arbitration rules - it missed the problematic point[66] that CAS arbitrators can be removed *from the List* without reasons, let alone due process (Art. S6(4)[67] and S19[68] of the CAS Code). Also, the reasons why CAS arbitrators are not reappointed to the List (Art. S13 of the CAS Code),[69] 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 my 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 Article 10 ECHR.[70] In my view, transparency is indeed of the essence, in particular when it comes to perception issues.[71]

2. 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.[72] While the way in which the members of ICAS are appointed (Art. 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 [which now includes Spanish in addition to French and English], whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs*".[73] 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).[74] This was one of the major problems in terms of independence of the system[75] and I am relieved that it has been finally improved.

Is this enough to prevent future challenges to the system? The dissenting judges seemed to be unimpressed by the change of Article S14 of the CAS Code on the ground that, since the composition of the ICAS has remained unchanged, "*no rule currently provides that athletes must be represented, but for the one fifth of members of the ICAS*".[76] In my view, this is an issue of only relative importance. What matters more is not how the ICAS is appointed but rather how transparently it appoints the arbitrators on the list now that it is not bound by the original nomination requirements. 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. Unfortunately, the same is true today, despite the change of Article S14, and this therefore remains an issue.[77]

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

66 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.

67 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."*

68 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."*

69 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.

70 *A. 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).

71 *A. 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.

72 *PECHSTEIN* Decision, cit. Fn. 1, par. 38; *PECHSTEIN* Decision, Dissenting Opinion, par. 10.

73 Emphasis added.

74 ATF 144 III 120, par. 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 French original).

75 See already ATF 129 III 445.

76 *PECHSTEIN* Decision, Dissenting Opinion, par. 10 *in fine*, emphasis added.

77 *A. RIGOZZI*, '*Chronique de jurisprudence arbitrale en matière sportive*', cit. Fn. 53, p. 929.

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 guarantee the confidence of the athletes in terms of how candidates are selected as CAS arbitrators.[78]

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*".[79] 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 bodies[80]] pursuant to Article S4(d) or (e) of the Code, "*one of them being appointed as commission chair, and by the three Division Presidents*" (Art. 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,[81] there is still the possibility that the majority of its members are direct appointees of the sports-governing bodies,[82] which is something that could be addressed. 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 my 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 sports movement at all.[83] This improvement is however somewhat diminished by the fact that the ICAS Board, *i.e.* the ICAS President, Vice President and Division Presidents, is still predominantly composed of persons with significant links to the sports movement.[84] 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,[85] is now a former athlete, and not, as in the past, the Vice President (now the President) of the IOC.[86] The identity of the current CAS Appeals Division President is indeed a positive development[87] but in no case constitutes a guarantee for the future.[88]

3. Conclusion and proposal

In light of the above, I hope that the *PECHSTEIN* Decision is perceived for what it is - *i.e.* a dodged bullet - and that, realizing that the CAS system is not entirely bullet proof and that future challenges are, if not in the pipeline at least on the horizons, 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. The fact that the German Constitutional Court explicitly left the question of the CAS structural independence open reinforces me in thinking that the time to be proactive and to address the issue head on has come.

The German Constitutional Court seems to be puzzled by the way in which the CAS Appeals Division President is involved in the appointment of the president of the CAS panels.[89] This is an issue that can be fixed by

78 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 (ATF 129 III 445 cited above, par. 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.

79 *M. 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."*

80 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"* (Art. 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"* (Art. S4(e) of the CAS Code).

81 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: www.tas-cas.org

82 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.

83 *F. 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 www.tas-cas.org

84 www.tas-cas.org

85 In accordance with Art. R54 CAS Code.

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

87 That being said, in at least one doping case currently pending 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.

88 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, par. 124).

89 Bundesverfassungsgericht decision no. 2103/16, *op. cit.* Fn.1, par. 53, referring to this question as *"die weitere Frage, ob ein strukturelles Übergewicht der Verbände insbesondere bei der Benennung der 'neutralen' dritten Schiedsrichterperson ebenfalls gegen den Justizgewährleistungsanspruch aus Art. 2 Abs. 1 in Verbindung mit Art. 20 Abs. 3 GG verstößt"*.

providing either that the sports governing bodies do not play a predominant role in the appointment of the ICAS or, more pragmatically and as suggested in the past, that the president of the Panel in appeals proceedings should (also) be nominated by the party-appointed arbitrators and, only if they cannot agree on a president within a set time limit, by the Division President (like in CAS ordinary arbitration) or by an entirely independent appointing authority.

However, based on the *rationale* (and the limitations) of the *PECHSTEIN* Decision, I tend to believe that in order to put a final end to the existing issues of perception and the related questions about the confidence that athletes can have in the system, one should also reconsider the closed arbitrators list. Allowing a party that is not happy with the arbitrators on the CAS list to appoint an arbitrator who is not on the list[90] would put to bed the persistent claims and innuendos that the list is used or at least can be used to exercise a certain level of control over the arbitrator, in particular knowing that all draft awards will have to go through the scrutiny of the CAS Secretary General. Such a solution might however have significant drawbacks in the sense that it could facilitate a party that intends to disrupt the arbitration by appointing an independent but obviously biased arbitrator (which is a tactic that is not unheard of in commercial arbitration and would be particularly damaging in sports arbitration given the inherent need for swift resolution). Hence, I believe that a more comprehensive approach should be preferred, focusing not only on the way in which arbitrators end up on the list but also on how they can be removed from the same. In particular, the following "*transparency oriented*" adjustments to the CAS Statutes and procedures could be contemplated:

- A majority of the members of ICAS and of its Board, including the ICAS President, should be appointed from among personalities with no links to 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 links to 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.

- After each appointment meeting, 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 CAS Appeals Division should be an ICAS member with no link to the sports-governing bodies.

Contrary to what is recurrently alluded and explicitly suggested by our colleague *Lucien VALLONI* in *Football Legal*, I do not think that the scrutiny of the Award by CAS Secretary General should "*merely correct a decision's linguistic mistakes and shall not examine the decision's material reasoning*".[91] In my view, it makes lot of sense for the CAS to make sure that the award does not contain anything that could expose it to a challenge and, crucially, to alert the arbitrators on the existence of case-law that might be at first sight inconsistent and allow them to consider this case-law and, possibly, explain on what basis they distinguish or decide otherwise. Arguments based on the peculiarity of the CAS scrutiny of the award has been put forward both before the Swiss Federal Tribunal and the ECtHR but always rejected for lack of evidence that the scrutiny was somehow abused to "*amend the arbitral award a posteriori*"[92] or otherwise exercise and "*undue influence on the tribunal such that its independence can be called into question*".[93] As such tactics would work only *vis-à-vis* captive arbitrators, I believe that increasing the transparency of the way in which arbitrators are both included in and removed from

90 *L. W. VALLONI*, '*CAS Structure and Procedure - Is it now Time for a Change*', in Football Legal # 6 (November 2016), pp. 42-43.

91 *Id.*, p. 42.

92 *PECHSTEIN* Decision, par. 22 and 158.

93 SFT, 22 September 2021, no. 4A_166/2021, par. 3.2, published in the official digest at ATF 147 III 586, which implicitly confirm that any interference by the institution in the judicial adjudication process would obviously affect the independence of the process and be totally at odds with the guarantees of Article 6(1).

the CAS arbitrators list along the lines of the above mentioned suggestions would be sufficient to put an end to the recurring speculations in this respect.

B. Public hearings in CAS arbitration

The most visible (and indeed unavoidable) development following the *PECHSTEIN* Decision is the new wording of Article R57(2) of the CAS Code with respect 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*".[94] Indeed, the new Article R57 of the CAS Code (in force as from 1 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.*"

However, a closer look to that provision reveals that 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 decision[95] and the first commentators writing on this addition to the CAS Code:[96]

- The limitation to disciplinary proceedings: as discussed above, in the Court's reasoning, the full applicability of Article 6(1) ECHR is the result of the compulsory nature of CAS arbitration.[97] 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 honor 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.[98]

- 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 honor 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. I therefore 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.

From this perspective, one can only conclude that the CAS Code would still need some adjustments to be bulletproof. In my view, this will not be a big issue as it is far from being certain that the party accused of a disciplinary offence would like the see the alleged wrongdoing being publicly discussed and exposed. For instance, I am not sure that *Sun YANG* would ask for a public hearing again and I find it telling that ever since the possibility of having a public hearing has been implemented, it has been used only in a couple of cases.[99]

But if a party does indeed request a public hearing, the CAS will have to apply the exceptions provided for by Article 6(1) ECHR and copy-pasted into Article R57 of the CAS Code, in the same "*strict*" way applied by the

94 See www.coe.int, Switzerland: Public hearings allowed in disciplinary proceedings before the Court of Arbitration for Sport, 8 June 2020.

95 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, par. 65).

96 *G. 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 !"*.

97 See also *A. DUVAL*, '*Time to go Public?*', cit. Fn 16.

98 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.

99 See, in particular, ATF 147 III 586, discussed below.

ECtHR, including by restricting public access to some parts of the hearing where necessary and appropriate.[100] I would submit that the specificities of sports arbitration can be taken into account in this process, and parts of the hearing devoted for instance to technical discussions between experts or other sensitive issues be held in camera.

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,[101] especially when they are of a quasi-criminal nature. In my 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 invoked "*public interest*" 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).

C. 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) ECHR, 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*".[102] 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.[103]

The current version of the Guidelines on Legal Aid before the Court of Arbitration for Sport was recently discussed in a case brought forward before the Swiss Federal Tribunal by a Portuguese cyclist who was complaining that the legal aid he was granted by the CAS (which provides for a limited choice of *pro bono* lawyers and a maximum reimbursement of CHF 5,000 for travel, witness and experts costs) was not sufficient under the standards of Article 6(1) ECHR.[104]

The Court held that if an arbitral institution, such as CAS, provides legal aid to indigent parties, this precludes the indigent party from terminating the arbitration agreement due to a lack of financial means based on Article 6(1) ECHR (or indeed the similar guarantee of Article 29a of the Swiss Constitution). Such party should thus proceed with the arbitration with what it is provided for and possibly seek the setting aside of the award for violation of the right to be heard and/or equality of arms (Art. 190(2)(d) PILA).[105] In order to do so, the Court requires an actual demonstration of how these procedural rights were impacted, which the cyclist did not manage to do in the case at hand. It also noted that while the free choice of a lawyer paid by the institution would be "*desirable*" ("*wünschenswert*"), it cannot be required from the CAS and added that even the case-law of the ECtHR does not require the contracting States to use "*public funds to ensure total equality of arms between the assisted person and the opposing party*".[106]

Depending on how serious this gap is in a specific case,[107] and given the readiness of the ECtHR to go further than what the Swiss Federal Tribunal considers desirable (in *PECHSTEIN*, the Swiss Court noted that a public hearing would be desirable using the exact same German word "*wünschenswert*"[108] and we know how it ended...), one cannot absolutely rule out that the ECtHR will find that the current CAS legal aid system is not sufficient to guarantee access to justice under Article 6(1) ECHR (or indeed Article 6(3) ECHR to the extent that it is applicable based on the severity of the sanction).

100 On this issue see *A. 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, par. 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, par. 74]"*.

101 *A. DUVAL*, '*Time to go Public?*', cit. Fn. 16.

102 Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), cit. Fn. 13, par. 131.

103 Airey v. Ireland, application no. 6289/73, judgment of 9 October 1979, par. 26.

104 ATF 147 III 586.

105 ATF 147 III 586, 592-595.

106 ATF 147 III 586, par. 5.2.2, pp. 598-599, referring to the ECtHR Decision in Steel und Morris v. United Kingdom, of 15 February 2005, Recueil CourEDH 2005-II S. 1, par. 62.

107 We understand that the *CARDOSO* matter that resulted in the ATF 147 III 586 has been challenged before the ECtHR through an application against Switzerland. Based on the developments in the decision of the Swiss Federal Tribunal (and, as a matter of full disclosure, my understanding of the specifics of this matter), this is probably not the best test case but it is also true that I had the same feeling about the public hearing limb of the *PECHSTEIN* case.

108 SFT, 10 February 2010, no. 4A_612/2009, par. 4.1.

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