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ARTICLE 6(1) ECHR AND INTERNATIONAL SPORTS ARBITRATION: BETWEEN (CERTAIN) BOUNDARIES AND (YET UNCERTAIN) CONSEQUENCES

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ABSTRACT: In the years following the Mutu-Pechstein judgment of the European Court of Human Rights (ECtHR), practitioners in the field of sports law might have noticed a significant increase in the reliance that parties have made on the provisions of the European Convention on Human Rights (ECHR) in their submissions before sports dispute resolution bodies. In particular, a complaint about alleged violations of their right to a fair trial protected by Article 6(1) ECHR has been often brought up in that context. While it is no longer doubted that this provision binds CAS panels in the adjudication of appeals brought before their attention, there is still some degree of approximation regarding the boundaries within which Article 6(1) ECHR finds room for application in the context of international sports arbitration. This paper aims at shedding some light on this and on the (yet uncertain) consequences of a misapplication of the rule in question.

Negli anni che hanno seguito la sentenza Mutu-Pechstein della Corte europea dei Diritti dell'Uomo, gli operatori del diritto sportivo potrebbero aver notato un aumento significativo del ricorso alle disposizioni della Convenzione Europea dei Diritti dell'Uomo (CEDU) da parte delle parti nei loro ricorsi agli organi di risoluzione delle controversie sportive. In particolare, in questo contesto è stata spesso sollevata una denuncia per presunte violazioni del diritto a un processo equo tutelato dall'articolo 6(1) della CEDU. Sebbene non vi siano più dubbi sul fatto che questa disposizione vincoli le formazioni arbitrali del TAS nel giudicare gli appelli sottoposti alla loro attenzione, vi è ancora un certo grado di approssimazione riguardo i confini entro i quali l'articolo 6(1) CEDU trova spazio di applicazione nel contesto dell'arbitrato sportivo internazionale. Il presente contributo intende fare luce su questo aspetto e sulle conseguenze (ancora incerte) di una errata applicazione della norma in questione.

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CEDU – Arbitrato internazionale sportivo – Tribunale indipendente e imparziale – Diritti e doveri di carattere civile – Procedimenti in contraddittorio – Parità di armi – Udienza pubblica – Organi di governo dello sport – Tribunale arbitrale dello sport – Tribunale federale svizzero – Ordine pubblico.

1. Introduction

In the aftermath of the Second World War, on 4 November 1950 the then state members of the Council of Europe,[1] drawing inspiration from the Universal Declaration of Human Rights,[2] signed in Rome the European Convention on Human Rights (ECHR) with the aim of achieving "greater unity between its members" via the "maintenance and further realisation of Human Rights and Fundamental Freedoms".[3]

The ECHR entered into force on 3 September 1953. Over time, a number of European states ratified it.[4] Relevantly for the purpose of our discussion, Switzerland ratified it in 1974.[5]

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[1] On 4 November 1950, the Council of Europe counted 14 members: the Netherlands, Belgium, Luxembourg, Denmark, France, Norway, Sweden, the United Kingdom, Ireland, Italy, Greece, Iceland, Turkey and the Federal Republic of Germany.

[2] See *https://www.un.org/en/about-us/universal-declaration-of-human-rights*.

[3] See *https://www.echr.coe.int/european-convention-on-human-rights*.

[4] All the members states of the Council of Europe (currently 46) are party to the ECHR.

[5] See *https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-organizations/council-europe/european-convention-human-rights.html#:~:text=prohibition%20of%20discrimination.-,European%20Convention%20on%20Human%20Rights%20(ECHR),Switzerland%20ratified%20it%20in%201974*.

Ten years later,[6] the Court of Arbitration for Sport (CAS) was created with the aim of resolving disputes directly or indirectly related to sport in a fast and specialised manner.[7]

Until relatively recently, these two historical occurrences would have hardly shared the same page on a paper. The reason is that the international sports domain has remained essentially disentangled from considerations related to the (respect of the) provisions of the ECHR until the first major sport case was brought before the attention of the European Court of Human Rights (ECtHR):[8] the notorious *Mutu-Pechstein*.[9]

The decision, rendered on 2 October 2018, (re)ignited debates on the interaction between sports arbitration and the ECHR and, in particular, whether the CAS is indeed fully complying with the due process guarantees enshrined in Article 6(1) ECHR.[10]

Before *Mutu-Pechstein*, the ECtHR had already pointed out that a distinction must be drawn between voluntary and compulsory arbitration. While the former does not raise any due process issues, being freely entered into by the parties, in the latter the arbitral tribunal must afford the guarantees set forth in Article 6(1) ECHR since the parties, by virtue of the law, have no other choice but to submit their dispute to the jurisdiction of that arbitral tribunal.[11]

In *Pechstein*,[12] the ECtHR went one step further, specifying that – even if not imposed by the law – arbitration might still be considered not voluntary if a refusal to accept it entails *de facto* serious consequences on one's professional life[13] and added that the *sui generis* character of football disputes is not

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[6] The International Olympic Committee (IOC) ratified the statutes of the CAS in 1983. They came into force on 30 June 1984, date in which the CAS became officially operational.

[7] Whether also truly independently from the International Federations which fund it has remained a hot topic for discussion throughout the years and, notwithstanding the changes to the CAS Code, even to these days. On the structural independence of the CAS, see A. Rigozzi, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, in Ch. Müller, S. Besson, A. Rigozzi (Eds), *New developments in International Commercial Arbitration 2020*, Stämpfli, Neuchâtel, 2020.

[8] A. Rigozzi, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, in Ch. Müller, S. Besson, A. Rigozzi (Eds), *New developments in International Commercial Arbitration 2020*, cit.

[9] See Mutu - Pechstein v. Switzerland, in *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}*.

[10] 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*, Springer, The Hauge, 2017, 182.

[11] See Suda v. the Czech Republic, paragraph 49, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-101333%22]}*.

[12] The considerations on the forced nature of CAS arbitration pertain solely to the limb of the judgment concerning Pechstein, as the ECtHR found that Mutu did have a choice for a forum alternative to the one leading to the CAS.

[13] See Mutu - Pechstein v. Switzerland, paragraphs 113-115, in *https://hudoc.echr.coe.int/fre#{%22itemid %22:[%22001-186828%22]}*.

sufficient to deprive individuals of the guarantees of a fair trial enshrined in Article 6(1) ECHR.[14]

Hence, according to the ECtHR, CAS arbitration (at least when not voluntary) must afford to the parties the due process guarantees enshrined in Article 6(1) ECHR.

In the wake of the judgment, prominent scholars predicted an increase in the reference to the ECHR in claims before the CAS and the Swiss Federal Tribunal (SFT) as a consequence.[15] These predictions were on spot.

In recent years, the ECHR was often invoked in the context of sports arbitration.[16] In particular, Article 6(1) ECHR was consistently brought up in appeal cases before CAS panels with a view to question both the proceedings of first instance (i.e., the ones carried out before the relevant deciding body of the SGB concerned) and the CAS proceedings themselves (at the hearing).

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 within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice […]".

The provision can be broken down in three sections: (i) one defining its scope of application; (ii) one defining the safeguards it entails and (iii) one contemplating exceptions to one of these safeguards (i.e., the publicity of a judgment).

Each of them must be carefully analysed in order to properly frame the debate with respect to international sports arbitration. This paper aims at shedding some light on the boundaries within which Article 6(1) ECHR finds room for

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[14] See Mutu - Pechstein v. Switzerland, paragraph 95, in *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}*. The point would be further reiterated in Ali Riza and Others v. Turkey, paragraph 180, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200548%22]}*.

[15] See A. Rigozzi, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, in Ch. Müller, S. Besson, A. Rigozzi (Eds), *New developments in International Commercial Arbitration 2020*, cit. *"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".* See also A. Duval, '*Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport'*, in *The International Sports Law Journal*, 2022, 132 ss.

[16] These are just some of the cases (publicly available) where the issue was brought up before the CAS after *Pechstein*: CAS 2018/A/6007, CAS 2019/A/6344, CAS 2019/A/6345, CAS 2019/A/6388, CAS 2019/A/6574, CAS 2019/A/6667, CAS 2019/A/6669, CAS 2020/A/6807, CAS 2020/A/7196, TAS 2021/A/7661, TAS 2021/A/8245, TAS 2021/A/8388, CAS 2022/A/8651, CAS 2022/A/8700.

application in the context of international sports arbitration and the (yet uncertain) consequences of its misapplication.[17]

2. The scope of application of Article 6(1) ECHR

The first few lines of Article 6(1) define its scope of application:

> "In the determination of his civil rights and obligations or of any criminal charge against him […] by an independent and impartial tribunal established by law".

What might appear to be a relatively simple and straightforward statement necessitates thorough analysis. It concerns the quality that both the action and the interested tribunal must have. The jurisprudence of the ECtHR over the years has helped determine what is required by both.[18]

2.1 The determination of one's civil rights and obligations

What the provision means by "the determination of his civil rights and obligations" is, first and foremost, that the one at stake must be a dispute.

This is not a trivial specification, considering that not all the matters brought before the ECtHR's attention over the years alleging a breach of the provision in the domestic jurisdiction concerned disputes. Indeed, the ECtHR has drawn a clear negative corollary from the positive formulation of Article 6(1): the provision does not apply to procedures of non-contentious nature which do not involve opposing parties and where there are no disputes over rights.[19]

In the same vein, Article 6(1) does not apply to investigative procedures which do not in themselves make a legal determination as to the criminal or civil liability of the subject of the investigation but only ascertain facts and are subsequently used as the basis for action by other competent authorities.[20]

Moreover, not all disputes are covered. Only those where the determination of one's civil rights and obligations is at stake.

In this sense, it is undisputed that Article 6(1) applies to disputes between private individuals which are classified as civil in the relevant domestic law. Fall within the scope of application of the provision also disputes which, even though

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[17] For an analysis of the compatibility of other provisions of the ECHR with disciplinary rules and decisions of SGBs, see A. Duval, '*Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport'*, cit., 132.

[18] This paper provides only an overview of selected jurisprudence on some of the prerequisites and elements delimiting the scope of application of the provision which might prove helpful in order to define the boundaries of its application in international sports arbitration. The jurisprudence of the ECtHR on Article 6(1) ECHR is particularly extensive. For a comprehensive analysis of such case law, see the Guide on Article 6 of the Convention - Right to a fair trial (civil limb).

[19] See Alaverdyan v. Armenia, paragraph 35, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-100411%22]}*.

[20] See Fayed v. the United Kingdom, paragraph 61, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57890%22]}*.

under the relevant domestic law are of 'public law', can nonetheless lead to results which are decisive for private rights and obligations.[21]

Obligations to pay damages to a football club fall within the scope of application of Article 6(1). The *Mutu* limb of the notorious judgment recalled that the payment of damages to a football club clearly concerns rights of a pecuniary nature and stem from a contractual relationship between the parties. Hence, they are "civil" rights within the meaning of Article 6(1).[22]

As far as the applicability of Article 6(1) to disciplinary proceedings is concerned – e.g. before professional bodies who determine the right of applicants to exercise a profession (one can think of bar associations) – this is determined on the basis of the sanction which is risked being incurred as a result of the alleged offence.[23]

In this respect, the *Pechstein* limb of the judgement recalled that a suspension of two years for a doping violation is a disciplinary procedure before the professional bodies and in the context of which the right to carry an occupation is at stake. Hence, the "civil nature of the rights" in question within the meaning of Article 6(1) is clear.[24]

Also, disciplinary proceedings against a professional football player resulting in his suspension for several matches can affect a club's "civil rights" within the meaning of the provision insofar as they have an adverse effect on the pecuniary rights of the player's football club.[25] Conversely, suspensions of amateur football players do not concern rights of a pecuniary nature, and thus fall outside the meaning of the provision, given that amateur footballers play without receiving wages.[26]

Matters falling within the state-authority prerogatives (e.g., tax and immigration matters) are excluded from the scope of application of Article 6(1). Even when there is a pecuniary element (such as, typically, in tax proceedings), if the public nature of the relationship between the individual and the state remains predominant the matter is excluded from the application of Article 6(1).[27]

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[21] See, for instance, Benthem v. the Netherland, paragraph 36, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57436%22]}*, on the administrative permission in connection with requirements necessary to carry an occupation or Sine Tsaggarakis A.E.E. v. Greece, paras. 38-43, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-193088%22]}*, on the issuance of licenses to competitors for the operation of businesses.

[22] See Mutu - Pechstein v. Switzerland, paragraph 57, in *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}*. In the same sense, Ali Riza and Others v. Turkey, para. 159, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200548%22]}*.

[23] See Marušić v. Croatia, paragraphs 72-73, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-174775%22]}*.

[24] See Mutu - Pechstein v. Switzerland, paragraph 58, in *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}*.

[25] See Naki et AMED Sportif Faaliyetler Kulübü Derneği v. Turkey, paragraph 20, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-209957%22]}*.

[26] See Ali Riza and Others v. Turkey, paragraph 155, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200548%22]}*.

[27] See Ferrazzini v. Italy, paragraphs 25-29, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59589%22]}*.

2.2 An independent and impartial tribunal established by law

For Article 6(1) to apply, something else is required: the interested tribunal must be an independent and impartial tribunal established by law.

The concept of tribunal is intended by the ECtHR in a substantive sense. This means that, even if a certain judicial authority is not classified by the relevant State as one of its state courts, it may still be considered as a tribunal in the sense of Article 6(1), i.e., for the purposes of application of the safeguards of the provision.[28]

The ECtHR specified that a tribunal is characterised in the substantive sense of the term by its judicial function, i.e. determining the matters within its competence on the basis of the rules of law and after proceedings conducted in a prescribed manner (as well as based on the fact that it satisfies a series of requirements such as independence, in particular from the executive, and impartiality).[29]

These principles were reaffirmed in *Pechstein*, whereby the ECtHR specified once more that a tribunal does not need to be a court of law integrated within the standard judicial machinery and it can also be set up to deal with specific subject matters which can be appropriately administered outside the ordinary court system.[30]

Over the years, the ECtHR has expressly recognised a number of bodies clearly outside of the 'standard judicial machinery' as tribunals within the meaning of Article 6(1). Among these, a Turkish football arbitration committee respecting certain prerequisites[31] and – most importantly – the CAS.[32]

With respect to the CAS, in particular, the ECtHR notoriously held that:

> "even though the CAS was the emanation of a private-law foundation […], it was endowed with full jurisdiction to entertain, on the basis of legal rules and after proceedings conducted in a prescribed manner, any question of fact or law submitted to it in the context of the disputes before it […] Its awards resolved such disputes in a judicial manner and they could be appealed against to the Federal Court in the circumstances exhaustively enumerated in sections 190 to 192 of the PILA. Moreover, the Federal Court, in its settled case-law, has regarded the CAS awards as "proper judgments comparable with those of a national court" […] by the combined effect of the PILA and the Federal

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[28] See Sramek v. Austria, paragraph 36, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57581%22]}*.

[29] See Cyprus v. Turkey, paragraph 233, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59454%22]}*.

[30] See Mutu - Pechstein v. Switzerland, paragraph 139, in *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}*.

[31] See Ali Riza and Others v. Turkey, paragraphs 202-204, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200548%22]}*.

[32] See Mutu - Pechstein v. Switzerland, paragraph 149, in *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}*.

Court's case-law, the CAS thus had the appearance of a "tribunal established by law" within the meaning of Article 6 § 1 […]".[33]

In this context, it is worth recalling that only an institution which has full jurisdiction (i.e. which has the jurisdiction to examine all questions of fact and law relevant to the dispute) is intended as a tribunal within the meaning of Article 6(1).[34] Importantly, if any structural or procedural shortcomings identified in the proceedings before the authority of first instance (often an administrative one) are remedied in the course of the subsequent review by a judicial body with full jurisdiction, no violation of Article 6(1) in the proceedings of first instance will be found.[35]

3. The safeguards afforded by Article 6(1) ECHR

The guarantee of a fair trial is one of the fundamental principles of any democratic society.[36] But what are the specific features that make a trial 'fair' within the meaning of the ECHR?

According to Article 6(1):

"[…] a fair and public hearing within a reasonable time […] judgment […] pronounced publicly […]".

This short definition has been interpreted by the ECtHR as encompassing several safeguards. From the parties' right to present observations and the tribunal's duty to conduct a proper examination of the submissions and evidence produced,[37] to the right to have a public judgment (which has to be intended also as the right to have the full text of the decision publicly available); from the right to a public hearing (provided that certain other equally prominent rights are not impinged upon) to the obligation for tribunals to give sufficient grounds for their decisions within a reasonable time-frame.

Some of these safeguards, the ones that come across most often in international sports arbitration, will be analysed in the next subsections in the light of the jurisprudence of the ECtHR.[38]

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[33] *Ibidem.*

[34] See Beaumartin v. France, paragraph 38, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57898%22]}*.

[35] See Ramos Nunes de Carvalho e Sá v. Portugal, paragraph 132, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187507%22]}*.

[36] See Pretto and Others v. Italy, paragraph 21, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57561%22]}*.

[37] See Kraska v. Switzerland, paragraph 30, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57828%22]}*.

[38] The two main safeguards not discussed in this paper are (i) the one requiring that proceedings have a reasonable length, since it seems safe to conclude that such guarantee is respected by the CAS (it is actually, together with the guarantee of a level playing field for athletes across the globe, one of the strengths of sports arbitration when compared to domestic civil jurisdiction) and (ii) the one concerning the implications of a public judgment in a broad sense (publication of awards) for the CAS practice, which deserves in itself deeper analysis. On this last topic, see A. Duval, *'Time to go public? The need for transparency at the Court of Arbitration for Sport*, cit., 182.

3.1 The adversarial proceedings and the principle of equality of arms

The concepts of adversarial proceedings and equality of arms are linked and represent, as a whole, one of the fundamental components of trial fairness as per the ECtHR jurisprudence.[39] The right to adversarial proceedings entails a party's right to obtain knowledge and have the possibility to produce observations on all the submissions and evidence produced by the other party.[40] Analogously, the principle of equality of arms requires that parties be granted the possibility to present their case under equal conditions.[41]

The right to adversarial proceedings is not an absolute one and its assessment has to be carried out in the light of the specific features of each case.[42] For instance, if it is found that a party's comment on a piece of evidence (or on a submission) would have not had any impact on the outcome of the case anyway, then such missed opportunity does not amount to a breach of the fairness of the trial.[43]

The principle of equality of arms is breached whenever a party is put at a substantial disadvantage vis-à-vis the other on elements having a bearing on the outcome of the proceedings. Typically, if out of the two 'opposing' key witnesses only one is permitted to be heard by the tribunal, the denied party is put at a disadvantage substantial enough to amount to a breach of the principle.[44]

Even a denial of legal aid to one of the parties can determine a breach of the principle of equality of arms when it deprives such party to present its case opposing a much wealthier opponent before the tribunal.[45]

In all the instances in which the respect of these principles is assessed, the benchmark always remains the potential impact on the outcome of the proceedings. In other words, if it is established that a different treatment would have not had a material impact, the breach is excluded.[46]

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[39] See Regner v. The Czech Republic, paragraph 146, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-177299%22]}*.

[40] See McMichael v. the United Kingdom, paragraph 80, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57923%22]}* and recalling Ruiz-Mateos v. Spain, paragraph 63, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57838%22]}*.

[41] See Dombo Beheer B.V. v. the Netherlands, paragraph 33, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57850%22]}*.

[42] See Hudáková and Others v. Slovakia, paragraph 26, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-98447%22]}*.

[43] See Stepinska v. France, paragraph 18, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-66375%22]}*.

[44] See Dombo Beheer B.V. v. the Netherlands, paragraphs 34–35, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57850%22]}*.

[45] See Steel and Morris v. the United Kingdom, paragraphs 67-72, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-68224%22]}*.

[46] In Ankerl v. Switzerland (paragraph 38), in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58067%22]}*, the different treatment of witnesses (one heard under oath, the other not) was not found to amount to a breach, given that it was immaterial to the outcome of the proceedings.

3.2 The administration of evidence

When it comes to issues related to the evidence produced by the parties before a tribunal, two facets of the process must be distinguished. One relates to the administration of evidence at a procedural level. Another relates to the admissibility of evidence and/or the relevance and the weight that is given to it at the stage of the assessment.

The guarantees of Article 6(1) ECHR only cover the former.[47]

Thus, the ECtHR does not evaluate how a tribunal has assessed evidence (unless it has done so in an arbitrary or manifestly unreasonable fashion), nor whether it correctly decided on the admissibility of evidence (the typical example being evidence obtained unlawfully pursuant to domestic law). What the ECtHR does assess, instead, is whether the administration of evidence at a procedural level was carried out by the tribunal in a way that kept the proceedings fair.

The administration of evidence is a component of trial fairness closely related to the right to adversarial proceedings and the principle of equality of arms. In this sense, tribunals can refuse to have witnesses called as a matter of administration of evidence provided that they give sufficient reasons for their refusal.[48] However, consideration must be given to whether the refusal still respects the principle of equality of arms.[49]

In the same vein, a refusal to order an expert opinion does not *per se* amount to a breach if the tribunal considered itself sufficiently informed in order to give the judgment.[50] On the other hand, the tribunal has to carry out proceedings whereby experts are appointed in a way that complies with the right to adversarial proceedings and the principle of equality of arms (relevant elements are, *inter alia*, the position occupied by the experts throughout the proceedings, the manner in which they perform their function and the way the judges assess their opinion).[51]

The right to a disclosure of evidence is also a component of a fair trial, however not absolute. Overriding public interests (such as the need to preserve the confidentiality of classified documents) can compel the tribunal to withhold evidence from the applicant. In such a case, the tribunal must set forth counterbalancing measures in order to limit the difficulties caused to the applicant and its right to adversarial proceedings and equality of arms.[52]

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[47] See García Ruiz v. Spain, paragraph 28, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58907%22]}*.

[48] See Wierzbicki v. Poland, paragraph 45, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60507%22]}*.

[49] See Dombo Beheer B.V. v. the Netherlands, pars. 34-35, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57850%22]}*.

[50] See H. v. France, paragraph 70, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57502%22]}*.

[51] See Devinar v. Slovenia, paragraph 47, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183127%22]}*.

[52] See Regner v. The Czech Republic, paragraph 147–149, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-177299%22]}*.

3.3 The right to a public hearing

Public hearings constitute one of the main manifestations of trial fairness because, due to the public scrutiny, they contribute to render judges (and, consequently, justice) more accountable and they bolster public confidence in the courts. As Lord Hewart famously put it, "justice must not only be done, but must also be seen to be done".[53]

However, as fundamental as it is considered to be, this right is not absolute either.[54] To start with, Article 6(1) itself mentions the instances in which a derogation from the principle is allowed:

> "[…] the interests of morals, public order or national security in a democratic society,[55] where the interests of juveniles or the protection of the private life of the parties so require,[56] or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice".[57]

This is not an exhaustive list as per the jurisprudence of the ECtHR, which held that, as general rule, the tribunal must consider the proceedings as a whole with a view to its special features[58] when assessing the requirement of publicity.[59]

Moreover, the ECtHR pointed out that the lack of public hearing in arbitration does not of itself make the arbitration procedure unreasonable, especially if the parties have chosen arbitration proceedings (which purpose is often to avoid publicity) instead of proceedings before the ordinary civil courts.[60]

When the disciplinary sanction contested carries a degree of stigma and is likely to adversely affect the professional honour and reputation of the individual (such as in a case of alleged doping offenses), a public hearing open to public scrutiny is required.[61]

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[53] See Lord Hewart in Rex v. Sussex Justices, in *King's Bench Division - Courts and Tribunals Judiciary*, 1924, 256 ss.

[54] See De Tommaso v. Italy, paragraph 163, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-171804%22]}*.

[55] See B. and P. v. the United Kingdom, paragraph 39, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59422%22]}*.

[56] *Ibidem*, paragraph 38.

[57] See Osinger v. Austria, paragraph 45, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-68605%22]}*.

[58] See Martinie v. France, paragraphs 40–44, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-73196%22]}*.

[59] See Axen v. Germany, paragraph 28, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57426%22]}*.

[60] See Klausecker v. Germany, paragraph 74, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-151029%22]}*. See also Kolgu v. Turkey, paragraphs 44-45, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-126403%22]}*. These considerations have to be evaluated in the light of whether, in the concrete instance, the arbitration is truly voluntary.

[61] See Mutu - Pechstein v. Switzerland, paragraph 182, in *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}*.

Lastly, as a general rule, an oral hearing must be guaranteed at least at one level of jurisdiction (at first instance or in appeal).[62] The ECtHR, however, has held that there are exceptional circumstances that can justify dispensing with a hearing altogether: when the proceedings concern exclusively legal or highly technical questions;[63] when the case raises only points of law of no particular complexity;[64] when there are no issues of credibility or contested facts.[65]

4. The impact on international sports arbitration

Though the ECtHR was rather unequivocal in determining that CAS panels are subject to the ECHR when CAS arbitration is essentially mandatory, caution is still required when navigating how these safeguards find application in the context of the resolution of sports related disputes.

As mentioned, alleged violations of the right to a fair trial have been increasingly brought up before the CAS in appeals procedure, interestingly enough both referring to the first instance proceedings (the ones carried out by the association's tribunals) and with respect to the CAS proceedings themselves.

It must be clarified, therefore, when Article 6(1) ECHR applies before examining what the concrete consequences of a breach of the provision are (if any).

4.1 When does Article 6(1) ECHR apply?

The wide connotations that the concept of international sports arbitration has (especially but not only) in the practitioners' jargon can determine a certain level of confusion as to the applicability of Article 6(1) ECHR before sports deciding bodies and, consequently, whether it is appropriately invoked in the specific cases.

Indeed, international sports arbitration is sometimes understood (widely and often incorrectly) as synonym of the system of international sports adjudication at large, i.e. as referring to any procedure carried out before sports deciding bodies. A cursory look at the CAS jurisprudence, especially on ethics cases, of the last few years reveals that Article 6(1) has been invoked before CAS panels also as a motive of alleged irregularity of the first instance decision rendered by an association's ethics or disciplinary body.[66]

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[62] See Ramos Nunes de Carvalho e Sá v. Portugal, paragraph 192, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187507%22]}*.

[63] See Schuler-Zgraggen v. Switzerland, paragraph 58, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57840%22]}*.

[64] See Varela Assalino v. Portugal, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-43416%22]}*.

[65] See Döry v. Sweden, paragraph 37, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60737%22]}*.

[66] See, *inter alia*, CAS 2019/A/6344 Marco Polo Del Nero v. FIFA; CAS 2019/A/6667 Patrice-Eduard Ngaïssona v. FIFA; TAS 2021/A/8245 Nella Joseph c. FIFA; CAS 2023/A/9754 Pyramids FC vs. Amor Layouni & FIFA.

These complaints have been regularly rejected by CAS panels on two grounds.

The first is that these bodies cannot be qualified as tribunals within the meaning of Article 6(1) in light of the jurisprudence of the SFT.[67] The nature of the CAS as a tribunal under Article 6(1), in other words, is deemed to be irrelevant in the context of disciplinary proceedings before an association's sports body.[68] The second derives from the *de novo* effect of the CAS power of review,[69] which in any case cures any potential violation of procedural rights occurred at first instance.[70] Interestingly in this respect, a CAS panel pointed out that the *de novo* power of review represents in itself a guarantee that parties' rights (such as those enshrined in Article 6(1) ECHR) are respected.[71]

To conclude, Article 6(1) almost invariably applies before the CAS in appeal proceedings and certainly does not before association's tribunals. What about other European sports dispute resolution venues?

The answer depends on their characteristics, i.e. whether they can be deemed to be 'true' arbitral tribunals according to the relevant applicable law and whether they have a consensual or a 'post-consensual' character.[72]

The Basketball Arbitral Tribunal (BAT), seated in Geneva, Switzerland, is an interesting example.

The BAT has peculiar features, which make it a swifter and more cost-effective dispute resolution method than the CAS (as it is established only for

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[67] Amongst others, see SFT 4A_476/2000, consid. 3.2. It shall be the case to recall that the same conclusion regarding the nature of association's tribunals has led CAS panels to a series of specifications over the years with respect to legal maxims that apply only to courts and arbitral tribunals. Most notably, the determination that decisions rendered by the FIFA tribunals do no form *res iudicata* (see, *inter alia*, CAS 2021/A/7915 Javier González López v. Hapoel Tel Aviv FC & FIFA, paragraph 84).

[68] CAS 2019/A/6667 Patrice-Eduard Ngaïssona v. FIFA, paragraph 131.

[69] Article R57(1) CAS Code: "The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance […]".

[70] CAS 2019/A/6667 Patrice-Eduard Ngaïssona v. FIFA, paragraph 129.

[71] CAS 2019/A/6344 Marco Polo Del Nero v. FIFA, paragraph 390: "disciplinary proceedings before a sport's governing body such as FIFA cannot be entirely independent in a strictly legal sense as, for example, the secretariat involved in the matters are employees of the prosecuting body (i.e. FIFA in this case; as confirmed by CAS 2014/A/3848 paragraphs 57, 58: "[…] The Panel finds that a first element to be taken into account is that internal judicial bodies are not independent arbitration tribunals… The Panel finds that the FIFA DRC is such an internal judicial body […]"). This is precisely why there is a right to appeal to the CAS, which is an independent arbitral tribunal that can hear the appeal *de novo* and guarantees that parties' rights (such as those enshrined in Article 6(1) ECHR) are respected". This reasoning is in line with that of the ECtHR in Ramos Nunes de Carvalho e Sá v. Portugal, paragraph 132, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187507%22]}*.

[72] On the post-consensual foundation of CAS arbitration, see A. Duval, *'Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport'*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL)*, 2017, 1-31.

basketball contractual disputes),[73] but with procedural guarantees and enforcement mechanisms that abundantly set it apart from association's tribunals.[74]

While the BAT is a 'true' international arbitral tribunal pursuant to the *lex arbitri* (Swiss law),[75] BAT arbitration has always a consensual character. This 'shields' it from the application of Article 6(1).

4.2 The guarantees of Article 6(1) ECHR before CAS panels

In the previous section, we have seen how the ECtHR has dealt with some of the main safeguards enshrined in Article 6(1). A complaint that is often raised in the context of appeals of ethics decisions before the CAS (e.g., typically those of the FIFA Ethics Committee) concerns witnesses.

Appellants have, on occasion, contested both the administration of witness testimony (most notably, panels' refusals to hear some witnesses) and the acceptance of anonymous testimony. In line with the jurisprudence of the ECtHR mandating that tribunals can refuse requests to have witness called provided that the refusal is reasoned and not arbitrary, CAS panels invariably justify their choice.[76]

In many instances where anonymous witnesses were involved also at the stage of the decision of first instance, appellants claimed that the CAS panel's decision to accept the anonymous testimony during the proceedings (or the refusal to accept the request of lifting the redaction in the witness statement) amounted to

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[73] The BAT does not cover disciplinary, eligibility and technical disputes. Here are some of its prominent features: it is governed by the Chapter 12 of the PILA irrespective of the parties' domicile; disputes are decided by a sole arbitrator appointed by the BAT President from a closed list and, as a rule, no hearings are held (a hearing can be held if the arbitrator decides to do so after consultation with the parties); disputes are decided *ex aeqo et bono* (unless the arbitration clause mandates the arbitrator do decide according to the rules of law chosen by the parties, or the one the arbitrator deems more appropriate); for disputes below EUR 50,000 only the operative part of the award issued (unless otherwise requested by a party). For a comprehensive analysis of all the BAT's characteristics, see E. Hasler, *'The Basketball Arbitral Tribunal – An Overview of Its Processes and Decisions'*, in A. Duval, A. Rigozzi (Eds), *Yearbook of International Sports Arbitration*, Springer, Le Hauge, 2015, 111 ss.

[74] BAT proceedings can be carried out even if the respondent is defaulting, but (unlike what happens before the FIFA tribunals) this does not entail an admission of the claimant's claim both on jurisdiction and the merits. The parties right to be heard in adversarial proceedings must be respected at all times under Article 182(3) PILA. See Hasler E. cit.

[75] BAT awards are subject to the legal remedies available under Chapter 12 PILA and can be enforced not only via the FIBA's *ad hoc* internal mechanism but also via the New York Convention (immediately upon their issuance, being Swiss arbitral awards), though this mechanism might prove difficult should the subject matter not be arbitrable (for employment disputes it is often the case) in the country concerned (Article V(2)(a) NYC provides that the recognition and enforcement of a foreign award may be refused by the courts of the countries under the laws of which the subject matter of the dispute is not arbitrable).

[76] See CAS 2018/A/5734 KS Skënderbeu v. UEFA. In CAS 2019/A/6388 Karim Keramuddin v. FIFA, the Panel held a hearing notwithstanding the unavailability of the Appellant and his witness, justifying its decision on several grounds (paragraphs 143–149).

a violation of Article 6(1) on the ground that their right to properly exercise their defence with respect to the interrogation of those witnesses was compromised.[77]

The position of the various CAS panels on the point is consistent: the anonymisation of witnesses *per se* does not breach Article 6(1) on the ground that the ECtHR itself has allowed the use of protected or anonymous witnesses (even in criminal cases) if procedural safeguards are adopted.[78] A CAS panel has recalled that, though the interest of the witnesses is not protected by Article 6(1) in itself, it is protected by other provisions of the ECHR (e.g. Article 8) and the court must organise the proceedings in a way that does not unjustifiably put in danger these interests.[79]

The same conclusion was reached by the SFT, which confirmed that the recourse to anonymous testimony does not breach the right to a fair trial.[80]

The weight to give to the anonymous testimony at the subsequent stage of the assessment is an entirely different matter (and not subject to scrutiny pursuant to Article 6(1), as seen previously).

The right to a hearing and, in some instances, a public hearing is part of the overarching principle of the right to be heard, enshrined not only in Article 6(1) ECHR but also in Article 29(2) of the Swiss Federal Constitution and Article 182(3) PILA. Parties before CAS panels sometimes also simply refer to Article R57 CAS Code (which was modified after *Pechstein*[81]) in order to request a public hearing when the appealed decision is of disciplinary nature.

However, even in cases of disciplinary nature, the right to a public hearing is not absolute. When the facts of the case are of such nature as to put in danger the security of parties (or witnesses), a public hearing will likely be denied. A CAS panel has recently ruled in this sense in a case where the facts reproached to the individual were related to acts of sexual harassment or abuse.[82]

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[77] See TAS 2021/A/8388 Rosnick Grant c. FIFA, paragraph 131; CAS 2019/A/6388 Karim Keramuddin v. FIFA paragraph 121, CAS 2019/A/6667 Patrice-Eduard Ngaïssona v. FIFA, paragraph 105.

[78] On the specific safeguards to be adopted see, *inter alia*, CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, CAS 2011/A/2384 & 2386 UCI v. Alberto Contador & RFEC / WADA v. Alberto Contador & RFEC; CAS 2018/A/5734 KS Skënderbeu v. UEFA, TAS 2021/A/7661 Yves Jean Bart c. FIFA, TAS 2021/A/8388 Rosnick Grant c. FIFA.

[79] CAS 2019/A/6388 Karim Keramuddin v. FIFA, paragraph 125. In the same vein, TAS 2021/A/8388 Rosnick Grant v. FIFA. See also L. Fumagalli, *The right to be heard: what does it really mean? Information to heal the "due process paranoia*", in *Bulletin TAS*, 2019. It could probably be even argued that, when it refers to "the protection of the private life of the parties", Article 6(1) could be intended as extending to the security of witness as well.

[80] ATF 133 I 33 at paragraph 4.

[81] Whether the new draft of the provision truly reflects the ECtHR's indications is debated. See Duval A. '*Time to go public? The need for transparency at the Court of Arbitration for Sport*' cit. and Rigozzi A. '*Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*' cit. for an analysis.

[82] See TAS 2021/A/8245 Nella Joseph c. FIFA, paragraphs 137-141.

4.3 What are the consequences of a breach of Article 6(1) ECHR?

As seen, given that Article 6(1) is not applicable before sports associations' tribunals, no adverse consequences derive from a breach of the provision in that context. Also, by reference to Article R57(1) CAS Code, CAS panels invariably considered cured any violations of the right to a fair trial that might have occurred at first instance before the association's judicial bodies.[83]

The question of what happens if a CAS panel fails to properly apply the safeguards of Article 6(1) has a less straightforward answer.

Having its seat in Lausanne, Switzerland,[84] the CAS is subject to the judicial review of the SFT. CAS awards can be challenged before the SFT on the grounds of Article 190(2) PILA (when the award is international, i.e. when one of the parties to the arbitral proceedings is not domiciled in Switzerland, otherwise on the basis of the CPP). Relevantly in this context, one of the five grounds upon which an international award can be challenged is substantive and procedural public policy (Article 190(2) lit. e) PILA).[85]

In a decision rendered after *Pechstein*, however, the SFT has confirmed that Article 6(1) ECHR does not constitute a standalone ground to set aside a CAS award and it does not *per se* coincide with a violation of public policy in the sense of Article 190(2) lit. e) PILA.[86] One of the complaints that had been brought to the attention of the SFT in that instance was the CAS panel's refusal to hold a preliminary hearing publicly, thus allegedly breaching Article 6(1) ECHR.[87] In reply, the SFT first recalled that the list of grounds of Article 190(2) PILA is exhaustive and thus there is no room for Article 6(1) ECHR as a separate further ground to challenge an international award. In other words, violations of the ECHR need to be raised under one of the five grounds of Article 190(2) lit. e) PILA. Though noting that the appellants did not have in any case standing to invoke the provision as not directly affected in their "rights and obligations in a civil matter", the SFT went further and agreed with the CAS panel that, in any case, the exclusion of the

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[83] See, *inter alia*, TAS 2021/A/8245 Nella Joseph c. FIFA, paragraphs 124-126.

[84] See *infra* on UEFA's introduction of Dublin as an alternative seat for the CAS (upon the appellant's choice) in disputes arising out of its Authorisation Rules Governing International Club Competitions.

[85] SFT 4P.278/2005, in *https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F08-03-2006-4P-278-2005&lang=de&type=show_document&zoom=YES&*, consid. 2.2.3: "[…] an award is incompatible with public policy if it disregards essential and widely recognised values which, in accordance with conceptions prevalent in Switzerland, must constitute the foundation of any legal order". A cursory look at the SFT's jurisprudence shows how high the threshold is.

[86] See SFT 4A_486/2019, in *https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_486%2F2019&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F17-08-2020-4A_486-2019&number_of_ranks=1.*

[87] For a complete overview of the facts of the case leading up to the decision of the SFT, see M. Vedovatti, L. Groselj, *Swiss Supreme Court confirms that Article 6(1) ECHR not directly applicable in setting aside proceedings*, in *Practical Law UK*, 2020, 1-8.

public from the preliminary hearing did not infringe Article 6(1) ECHR given that it only concerned purely legal and highly technical issues based on undisputed underlying facts.

In a subsequent decision,[88] the SFT dismissed allegations of violations of substantive public policy with respect to regulations of sports associations (the World Athletics, at the time IAAF, 2018 DSD Regulations) which had the effect of discriminating intersex athletes.[89] South African athlete Caster Semenya had sought to have the Regulations be declared unlawful by the CAS. The panel had dismissed the claim essentially on the basis that, although discriminatory, the Regulations had the necessary and proportionate aim of achieving integrity of female athletics and protecting the female category. The ECtHR (which found to have jurisdiction on a case between a non-European athlete and an association based in Monaco only by a majority decision), however, found (again by majority) that Switzerland had breached the athlete's human rights as protected by the ECHR.[90]

Considering the SFT's particularly narrow interpretation of public policy and the fact that the provisions of the ECHR essentially can only be brought to the attention of the SFT via Article 190(2) lit. e) PILA (unless strictly overlapping with a violation of the right to be heard, which is a ground for setting aside an award pursuant to Article 190(2) lit. d) PILA), it would seem that there might not be much room to review how CAS panels apply the ECHR after all.

However, this might not be a state of affair set in stone for at least three reasons.

First, a denial of a public hearing from a CAS panel in a context where an individual's reputation was at stake has not been tested again in front of the SFT after *Pechstein*. The type of case for a which a hearing was denied in the matter leading to SFT 4A_486/2019, in fact, presented the characteristics recognised by the ECtHR itself as not requiring a hearing pursuant to Article 6(1).

Second, considering that – as signatory of the ECHR – Switzerland is liable for its violations, the SFT might eventually change approach regarding the

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[88] See SFT 4A_398/2019, in *https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F25-08-2020-4A_248-2019&lang=de&type=show_document&zoom=YES&*.

[89] There is vast literature on the topic. See *inter alia*, P. Cannoot, C. Van de Graaf, A. Decoster, C. Poppelwell-Scevak, S. Schoentjes, *Hormonal Eligibility Criteria in Women's Professional Sports Under the ECHR: The Case of Caster Semenya v. Switzerland*, in *Sports and Human Rights*, 2024, 95-123; A. Anthony, *Caster Semenya's victory at the ECHR: A landmark case for athletes' human rights*, in *https://www.lawinsport.com/topics/item/caster-semenyas-victory-at-the-echr-a-landmark-case-for-athletes-human-rights#:~:text=On%2011%20July%202023%2C%20the,the%20World%20Athletics%20Eligibility%20Regulations.*

[90] See Semenya v. Switzerland, in *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-14151%22]}*. Though the case was not about the respect of Article 6(1) ECHR but rather Articles 8 and 14 ECHR, it is still worth mentioning in this context as it shows the restrictive approach that the SFT has with respect to alleged violations of Swiss public policy (which does interest the application of Article 6(1) ECHR at the CAS).

boundaries of Swiss public policy should the ECtHR find further violations in the next few years.

Third, the SFT's stance with respect to the issue is only relevant insofar as the CAS is seated in Switzerland.

Until recently, the possibility that the CAS would seat elsewhere appeared to be as remote as the SFT widening the scope of Swiss public policy. After the ISU judgment of the European Court of Justice (ECJ),[91] however, things have taken a different turn.[92] In essence, the ECJ found that any dispute subject to the ISU Arbitration Rules comes under EU competition law as arising in the context of economic activities linked to the organisation and marketing of international speed skating events. Consequently, the relevant decision must comply with EU Competition law and must be scrutinised by a court having jurisdiction to review the award and perform an effective judicial review to guarantee that substantive rights – part of EU public policy – are safeguarded.[93]

Likely in response to the findings of the ECJ,[94] UEFA amended Article 16 of its Authorisation Rules Governing International Club Competitions, which now allows a party challenging a decision on such matters to choose Dublin, Ireland, as the seat of arbitration in derogation of Article R28 CAS Code. If so, UEFA is bound by the choice of Dublin.[95]

In such a situation, the CAS becomes effectively a European arbitral tribunal. Its awards become subject to the scrutiny of the Irish High Court (on the limited grounds of Article 34(2) of the Model Law, which include public policy).[96] This in turn entails that the overarching concept of public policy is not shaped by the SFT but rather by the European Court of Justice (ECJ), to which the Irish High Court can refer preliminary questions.[97] This would render also the application of the ECHR by the CAS panel subject to effective judicial review (in the cases in which the various provisions of the ECHR apply).

It is possible that other SGBs might follow suit and amend some of their regulations in order to account for the fact that they touch upon EU law competition matters.[98] Should this happen by means of a relocation of the CAS in a European country for certain types of disputes, this might also determine as a consequence an effective judicial review of the application of the ECHR by CAS panels.

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[91] See International Skating Union v. European Commission, in *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0124*.

[92] A. Duval, *The international skating union ruling of the CJEU and the future of CAS arbitration in transnational sports governance*, in *The International Sports Law Journal*, 2023, 467–474.

[93] ISU judgment, paragraphs 189–199.

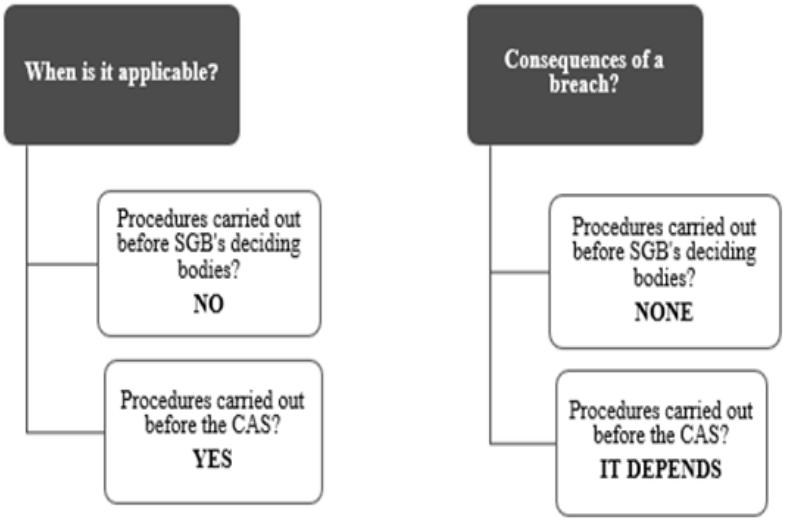
[94] S. Spera, *Luxembourg calls… is the answer from Nyon the way forward?*, in *https://www.asser.nl/SportsLaw/Blog/post/luxembourg-calls-is-the-answer-from-nyon-the-way-forward-assessing-uefa-s-response-to-the-ecj-s-isu-judgment-by-saverio-spera*.

[95] See UEFA Authorisation Rules Governing International Club Competitions (Ed. 2024), in *https://documents.uefa.com/v/u/8NRorgWVby0A4GBnfk3p8g.*

[96] See *https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/ireland.*

[97] S. Spera, *Luxembourg calls… is the answer from Nyon the way forward?*, cit.

[98] *Ibidem*.



5. Conclusions

Pechstein was perhaps the first strong blow to a widespread perception of a certain insulation of international sports arbitration from EU law.

The post-consensual foundation of CAS arbitration, especially relevant insofar as the panels' obligation to respect ECHR's provisions such as Article 6(1) is concerned, was unequivocally affirmed. Even though CAS panels had (at times) already felt bound by the ECHR (or at least compelled to engage with its provisions) even prior to *Pechstein*,[99] the judgement has had a significant impact on practitioners' submissions in sports disputes.

The second strong blow happened between December 2023 and October 2024, when the ECJ has rendered the *Superleague*,[100] *Royal Antwerp*[101] and *ISU*[102] 'hat-trick' and then the notorious *Diarra*.[103] In a nutshell, the ECJ draw the SGB's attention to the fact that their rules and decisions are not adopted in a

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[99] See for instance CAS 2009/A/1920 FK Pobeda, Alexandar Zabrcanec, Nikolce Zdraveski v. UEFA. See also U. Haas, *Role and application of Article 6 of the European Convention on human rights in CAS procedures*, in *International Sports Law Review*, 2012, 43–60.

[100] See European Superleague Company, SL v FIFA and UEFA (Case C-333/21), in *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0333*.

[101] See UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL (Case C-680/21), in *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0680.*

[102] See International Skating Union (ISU) v. European Commission – Case C-124/21, in *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0124.*

[103] See FIFA v. BZ, Case C-650/22, in *https://curia.europa.eu/juris/document/document.jsf?text=&docid=290690&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3291943.*

social and economic *vacuum* and their (*a priori* legitimate) governing authority needs to account for its effects on the EU's internal market. Hence, EU competition law must be accounted for anytime that the rules or decisions in question touch upon issues falling within the remit of the EU internal market.

As mentioned, UEFA showed a certain willingness to appease the ECJ's concerns by creating a European avenue for CAS appeals over disputes typically impinging upon EU competition law such as those arising out of UEFA's decisions not to authorise the organisation of International Club Competitions. For its part, also FIFA intervened in a timely fashion, putting in place an *interim* regulatory framework for the RSTP in an attempt to reflect the indications contained in *Diarra*.[104]

UEFA's regulatory intervention is particularly meaningful to the extent that it partly tackles the problem that, ultimately, what really matters is whether there is an effective judicial review at the end of the road.

To conclude, CAS panels have shown, especially after *Pechstein*, consideration of Article 6(1) ECHR and a deep understanding of the relevant ECtHR jurisprudence in the cases brought before their attention. However, if the arbitrator's unchecked judgment (as any misapplication bears no adverse consequences) is the ultimate bastion of a correct application of the EU law provision in question (in this case, Article 6(1) ECHR), then the system maintains an endemic 'imperfection'.[105]

While Article 6(1) ECHR has forcefully entered the landscape of international sports arbitration over the last few years and its scope of application is rather defined, there is still a certain amount of unclarity as to how effective the obligation to account for it actually is, after all.

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[104] See RSTP interim regulatory framework, in *https://inside.fifa.com/transfer-system/news/bureau-of-the-council-adopts-interim-regulatory-framework-concerning-rstp*. Whether the final version which will be approved will stand the test of EU scrutiny is hard to predict and is, in any case, beyond the scope of this paper.

[105] A similar discussion has occurred with respect to CAS panel's application of EU competition law, considering that the SFT has determined that it does not meet the test of Swiss public policy (see SFT 4P.278/2005, in *https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F08-03-2006-4P-278-2005&lang=de&type=show_document&zoom=YES&*).

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