



## The procedures followed by the Court of Arbitration for Sport complied with the right to a fair hearing, apart from the refusal to hold a public hearing

In today's Chamber judgment<sup>1</sup> in the case of [Mutu and Pechstein v. Switzerland](#) (applications no. 40575/10 and no. 67474/10) the European Court of Human Rights held, by a majority, that there had been:

**no violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights with regard to the alleged lack of independence of the Court of Arbitration for Sport (CAS), and

**a violation of Article 6 § 1** of the European Convention in the case of the second applicant (Ms Pechstein), with regard to the lack of a public hearing before the CAS.

The case concerned the lawfulness of proceedings brought by professional athletes before the CAS.

The Court found that the CAS arbitration proceedings to which the applicants had been parties were required to offer all the safeguards of a fair hearing, and that the second applicant's allegations concerning a structural absence of independence and impartiality in the CAS, like the first applicant's criticisms concerning the impartiality of certain arbitrators, had to be rejected.

In contrast, the Court held that the questions concerning the merits of the sanction imposed on the second applicant for doping, discussed before the CAS, required a hearing that was subject to public scrutiny.

### Principal facts

The applicants are a Romanian national (Mr Adrian Mutu), who was born in 1979, and a German national (Ms Claudia Pechstein), who was born in 1972.

In August 2003 Mr Mutu, a professional footballer, was transferred from the Italian club AC Parma to Chelsea for a total of 26 million euros. In October 2004 the English Football Association conducted anti-doping checks which showed cocaine traces in the sample provided by Mr Mutu. Chelsea consequently terminated their contract with him.

In April 2005 the Football Association Premier League Appeals Committee (FAPLAC), to which the footballer and the club had appealed, ruled that there had been a unilateral breach "without reasonable cause" of the contract on the footballer's part. He appealed to the CAS, which upheld that decision in December 2005. In May 2006 Chelsea filed an action for damages with the Disputes Division of the International Federation of Association Football (FIFA). It ordered Mr Mutu to pay the club over 17 million euros. In July 2009 the CAS dismissed Mr Mutu's appeal. In September 2009 he lodged an appeal with the Swiss Federal Supreme Court seeking to have the CAS decision set aside. He argued that the Court of Arbitration for Sport had been neither independent nor impartial. Mr Mutu relied on an anonymous email stating that one of the arbitrators of that court, Mr D.-R.M., had been a partner in a law firm representing the interests of the owner of Chelsea Football Club, and on the fact that another arbitrator, L.F., had previously sat on the bench which had confirmed the lack

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

of a “reasonable cause” for the breach of contract. In June 2010 the Federal Supreme Court ruled that the bench of the Court of Arbitration could be considered to have been “independent and impartial”, and therefore dismissed the applicant’s appeal.

Ms Pechstein is a professional speed skater. In February 2009 all the athletes registered for the world speed skating championships underwent anti-doping tests. After analysis of the applicant’s blood profile, the ISU’s disciplinary board imposed a two-year suspension on her. In July 2009 she and the DESG German speed skating association appealed to the CAS against that decision.

The hearing took place in private session, despite Ms Pechstein’s request for a public procedure. In November 2009 the CAS upheld the two-year suspension. In December 2009 Ms Pechstein applied to the Federal Supreme Court to set aside the decision given by the CAS. She argued that the latter was not an “independent and impartial” tribunal on account of the method of appointing the arbitrators, the “hard line” taken against doping by its President and its refusal to allow her hearing to be held in public. In February 2010 the Federal Court dismissed Ms Pechstein’s application.

## Complaints, procedure and composition of the Court

Relying on Article 6 § 1 of the Convention, the applicants submitted that the CAS could not be regarded as an independent and impartial tribunal. The second applicant complained that she had not had a public hearing before the ISU disciplinary board, the CAS or the Swiss Federal Supreme Court, despite her explicit requests to that end. Relying on Article 4 § 1 (prohibition of slavery and forced labour) and Article 8 (right to respect for private and family life) of the Convention and Article 1 of Protocol No. 1 (protection of property), the first applicant complained about the sum he had been ordered to pay to Chelsea Football Club.

The applications were lodged with the European Court of Human Rights on 13 July 2010 and 11 November 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Helena Jäderblom (Sweden), *President*,  
Branko Lubarda (Serbia),  
Luis López Guerra (Spain),  
Helen Keller (Switzerland),  
Pere Pastor Vilanova (Andorra),  
Alena Poláčková (Slovakia),  
Georgios A. Serghides (Cyprus),

and also Stephen Phillips, *Section Registrar*.

## Decision of the Court

### Article 6 § 1

The Court specified that the right of access to a court did not prevent arbitration courts being set up to rule on certain property-related disputes between private persons. In principle, arbitration clauses were not in conflict with the Convention. However, the question arose whether, in accepting the jurisdiction of the CAS, the applicants had waived freely, lawfully and in an unequivocal manner their rights to the guarantees provided for by Article 6 § 1. With regard to Ms Pechstein, the Court considered that her acceptance of the CAS’s jurisdiction had not been freely given, since the only option open to her was either to accept the arbitration clause and earn her living by practising her sport at professional level or to refuse the clause and be obliged to give up her professional activities completely. With regard to Mr Mutu, while he had not been forced to accept the CAS’s jurisdiction,

he had not, however, waived in a non-equivocal manner the right to have his case heard by an independent and impartial tribunal, in that he had requested the withdrawal of the arbitrator chosen by Chelsea.

The Court had therefore to ascertain whether the CAS was an “an independent and impartial tribunal established by law” at the time that it ruled on the applicants’ cases.

The CAS had full jurisdiction to examine, on the basis of rules of law and after proceedings conducted in a prescribed manner, any matter submitted to it in the context of disputes. In addition, its decisions provided a judicial-type solution. Moreover, an appeal could be lodged against them with the Swiss Federal Supreme Court. Lastly, the Federal Supreme Court had always considered the CAS decisions as “genuine judgments, similar to those of a State court”. The CAS thus had the appearance of a “tribunal established by law”.

In the case of Ms Pechstein, the complaints made against the president of the arbitration court were too vague and hypothetical.

With regard to the imbalance between the federations and athletes in the mechanism for selecting arbitrators, the Court pointed out that the arbitration panel in the present case had been composed of three arbitrators chosen from a list drawn up by the International Council of Arbitration for Sport (“ICAS”) and had been subject to the latter body’s power to dismiss them.

Ms Pechstein’s possibility to name the arbitrator of her choice was thus restricted by the obligation to select someone from that list. At the time, however, the list had had almost 300 names on it. Ms Pechstein had not submitted factual elements capable of casting doubt in general on the independence and impartiality of the arbitrators on the list. Even with regard to the composition of the arbitration panel that had ruled on her case, she had challenged only one arbitrator, the president of the panel, without substantiating her allegations. The Court acknowledged that the organisations likely to challenge athletes in the context of disputes before the CAS exerted a genuine influence in the selection mechanism in force at the relevant time. However, it could not conclude, on the sole basis of this influence, that the list had been composed of arbitrators who could not be regarded as independent and impartial in respect of those organisations. It therefore considered that the system of using a list of arbitrators had met the requirements of independence and impartiality applicable to arbitration courts.

The powers of the Secretary General of CAS to draw the panel’s attention to issues of principle and to make formal changes to a decision did not prove that the contested decision had been changed in a way that would have been unfavourable to Ms Pechstein.

For his part, Mr Mutu had criticised the fact that Mr D.-R.M. had sat on the panel which had issued the decision of December 2005 before participating in the panel which adopted the decision of July 2009. However, for an apprehension of partiality to exist, the accused arbitrator would have had to examine successively identical facts and reply to a similar question. Although the decision in question had concerned the same facts, the legal issues to be decided had been very different, given that the first set of proceedings had concerned the applicant’s contractual liability and the second the amount of damages to be paid to the injured party.

Mr Mutu had also criticised the arbitrator L.F. for his association with a law firm which represented the interests of the owner of Chelsea football club. In a lengthily reasoned judgment which contained no hint of arbitrariness, the Federal Supreme Court had concluded that Mr Mutu had not substantiated his allegations. The Court perceived no strong reason to substitute its own view for that of the Federal Supreme Court.

There had therefore been no violation of the applicants’ Article 6 § 1 rights on account of a lack of independence and impartiality on the part of the CAS.

With regard to Ms Pechstein's complaint concerning the absence of a public hearing before the ISU's disciplinary board, the CAS and the Federal Supreme Court, the Court reiterated that the principles concerning the public nature of hearings in civil cases were valid for the ordinary courts and professional disciplinary bodies. Indeed, Ms Pechstein had expressly requested that a public hearing be held before the CAS. Equally, the Court considered that the question of the merits of the sanction imposed on her for doping, debated in the context of those proceedings, had required a hearing that was subject to public scrutiny.

In consequence, the Court concluded that there had been a violation of Article 6 § 1 on account of the non-public nature of the proceedings before the CAS. That conclusion made it unnecessary for the Court to examine the second applicant's complaint concerning the ISU's disciplinary board, given that the CAS was the appeal body, with full jurisdiction, for the ISU.

With regard to the Swiss Federal Supreme Court, the dispute concerned highly technical legal questions in respect of which a public hearing had not been necessary. The complaint was therefore rejected as manifestly ill-founded.

### Other articles

Mr Mutu's complaints under Articles 4 § 1 and 8 showed no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols and had therefore to be declared inadmissible. In addition, since Switzerland had not ratified Protocol No. 1 to the Convention, that part of Mr Mutu's application had also to be rejected.

### Just satisfaction (Article 41)

The Court held that Switzerland was to pay the second applicant (Ms Pechstein) EUR 8,000 in respect of non-pecuniary damage.

### Separate opinions

Judges Keller and Serghides expressed a joint opinion. This opinion is annexed to the judgment.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.