ECtHR and Arbitration: A New Framework Emerges for the Organisation of Dispute Resolution in Sports?

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The findings of the recent decision Ali Riza et al. v. Turkey ("***Riza***") of the European Court of Human Rights ("**ECtHR**") dated 28 January 2020, when read in conjunction with the ECtHR's previous decision Mutu and Pechstein v. Switzerland ("***Mutu-Pechstein***") dated 2 October 2018 (which concluded the "Pechstein Saga"), could potentially have an impact on the structure and organisation of international sports arbitration.

In *Riza*, five different applicants challenged the independence of the Turkish Football Federation's ("**TFF**") Arbitration Committee ("**AC**"). Given the subjective – same Respondent – and objective – denial of justice based on the lack of impartiality and independence of the AC – identity of these five applications, the ECtHR decided to join them in a single decision, despite the different factual backgrounds.

The reasoning and the conclusions of both decisions (*i.e. Riza* and *Mutu-Pechstein*) seem to establish the necessary legal framework for sports disputes to be administered and settled through final and binding arbitration in accordance with

the right to a fair trial provided under Article 6(1) of the European Convention on Human Rights (the "**ECHR**"). We will discuss here, one by one, the positions took by the ECtHR on these divisive and complex topics.

The structural imbalance between athletes and sports governing bodies

In *Riza*, the ECtHR unanimously agreed that the AC had structural deficiencies that constituted a clear violation of Article 6(1) ECHR. In essence, the ECtHR considered that – among other elements – the guarantees to protect arbitrators from external pressure and, in particular, from the TFF's Board (the "**Board**"), were insufficient, since:

- The Board appointed the members of the AC, *i.e.* the compulsory, final and binding dispute resolution system for TFF's disciplinary and administrative issues as per Article 59(3) of the Turkish Constitution;
- The mandates of both the Board and the AC were parallel in duration.

In light of the above, the ECtHR concluded that those circumstances constituted an excessive intrusion by the Board into the activities of the AC, which resulted in a structural imbalance in the appointment of arbitrators. In addition, the ECtHR highlighted the fact that the AC was only composed of a chairman, six principal and six substitute members, which, together with the substantial influence that the Board had over the AC, increased the potential conflict of interest of the arbitrators given their very small turnover.

The *Mutu-Pechstein* ruling also addressed the issue of the structural imbalance between athletes and sports governing bodies in the appointment of arbitrators at the Court of Arbitration for Sport ("**CAS**"). In this vein, although the ECtHR recognised that sports governing bodies could have some influence on the selection mechanism of CAS arbitrators, it could not conclude – based on this element alone – that CAS arbitrators could not be considered independent and impartial *vis-à-vis* those sports governing bodies. In particular, the ECtHR indicated in *Mutu-Pechstein* that the list of arbitrators was composed of, at least, 150 members, which was considered sufficient for the purpose of the arbitrators' turnover.

In light of the above, the structural imbalance between athletes and sports

governing bodies in the appointment of arbitrators, as well as the size of the arbitrator's list, appear to be relevant issues, but not the only ones in deciding on the compliance of sports dispute resolution institutions with the requirements of Article 6(1) ECHR.

Degree of independence of an arbitral body vis-à-vis its funders and/or repeat users

Following the reasoning of *Mutu-Pechstein*, in *Riza* the ECtHR found that the AC's financial relationship with the TFF did not constitute a sufficient element to demonstrate its lack of independence. In particular, in *Mutu-Pechstein*, the ECtHR already noted that national courts are also funded by the states and yet they are still able to decide disputes involving the state and/or state-owned entities in an independent and impartial manner.

The same conclusion was reached by the Swiss Supreme Court in the *Lazutina* case. The Swiss judges teleologically excluded the possibility that an annual contribution of 1/3 to the CAS annual budget by a sport governing body could influence the CAS' independence since "[t]here appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively […]".

The arbitrators' challenge procedure

In *Riza*, the ECtHR also made a remark on incompatibility between the applicable Turkish legislation, the TFF Statutes, and Article 6(1) ECHR, since:

- The members of the AC were not required to disclose circumstances which may affect his or her independence and impartiality at any time; and,
- The applicable procedural rules did not provide for a specific procedure to be followed in cases where the independence or impartiality of a member of the AC is challenged by the parties.

Conversely, in *Mutu-Pechstein,* the ECtHR did not consider a violation of Article 6(1) ECHR with regards to the functioning of the CAS since, under its Rules, arbitrators have an ongoing duty to disclose their independence and impartiality at

any time and are subject to possible challenges for violation of the aforesaid duties.

Right to a public hearing

In *Riza* there was no request for a public hearing, while in *Mutu-Pechstein* this was explicitly demanded. In this regard, the ECtHR concluded that the refusal to grant a public hearing upon the athlete's request constituted a violation of Article 6(1) ECHR.

Possibility to set aside an arbitral award

In *Riza*, the ECtHR noted that, under the TFF's statutes, the decisions of the AC were not subject to review by any authority, excluding even the possibility of a motion to set aside an arbitral award. Such a circumstance clearly constituted another violation of Article 6(1) ECHR.

The importance of the right to set aside an arbitral award was also stressed by the Swiss Supreme Court in *Cañas* case. In fact, even though the Swiss Arbitration Act is among the few legislations that consider valid the parties' waiver to set aside an arbitral award, the Swiss Supreme Court found that such a waiver is invalid whenever it relates to athletes. This invalidity was due to – among other elements – the above-described structural imbalance which characterizes their relationship with sports governing bodies.

Analysis

If arbitration procedures within sports federations are found to be in violation of Article 6(1) ECHR, it is likely that state courts would accept to hear appeals *de novo* on their merits. This option would, however, frustrate the main goals of sports arbitration which are to increase as much as possible:

- Its legal certainty, without allowing sports governing bodies or athletes to bring sports disputes before national courts with the consequent

application of different procedural and substantive rules; and/or
- Its efficiency, which would be impossible to achieve if each dispute would end up before one or more national courts of the sports governing bodies and/or athletes involved in the proceedings.

Therefore, if sports governing bodies wish to avoid having awards rendered by "their" panels appealed *de novo* on the merits, they should ensure that those panels comply with Article 6(1) ECHR. In light of the findings of *Riza* and/or *Mutu-Pechstein* sports governing bodies shall, at least, contain the following and essential key elements:

- There should be a certain balance in the selection of the panel members to ensure sufficient representation of athletes and not only of the sports governing bodies. In this respect, it is also helpful to establish a broad list/pool of potential panel members rather than a short list since: (a) under the first scenario, the repeated appointments could only be considered as the result of the parties' free choice; (b) under the second scenario, repeated appointments of the very same panel members could be considered pathological;
- Panel members must have an ongoing obligation to disclose any circumstances that may affect their independence or impartiality throughout the case and there must be a mechanism for challenging them;
- If requested, the right to a public hearing cannot be denied;
- The decisions of the panel members shall be subject to possible set aside proceedings before the state court of the seat of arbitration.

If the above-mentioned key elements are not duly taken into account, the sports governing bodies have to presume that the decisions of the panel members can be appealed before national courts.

Lastly, the arbitral bodies' financial independence *vis-à-vis* their funders and/or repeat users does not seem to be, for the time being, an indispensable requirement since the ECtHR is apparently following the Swiss approach, leading to the understanding that the unilateral contribution of the sports governing bodies is – as Winston Churchill may have put it – the "worst form of [funding], except for all the others".