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How the European Court for Human Rights Interferes in (Sports) Arbitration

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The applicability of the European Convention on Human Rights ("ECHR") to arbitral proceedings is a complex issue. The recent decision of the European Court for Human Rights ("ECtHR") in the so-called Mutu/Pechstein cases brings some clarification in this regard, but also raises some new questions[1)]

Background

The decision concerned two independent claims by the Romanian football player Adrian Mutu and the German speed skater Claudia Pechstein, which were merged into one decision of the ECtHR.

In 2004, the relationship between Mr Mutu and Chelsea, the football club to which Mr Mutu was transferred for €26 million from AC Parma, deteriorated after Mr Mutu was tested positive for cocaine. Chelsea terminated the contract with Mr Mutu, whereupon both Mr Mutu and Chelsea submitted the matter to the Football Association Premier League Appeals Committee ("FAPLAC"). In April 2005, FAPLAC confirmed that Mr Mutu had breached the contract. In December 2005, this decision was confirmed by the Swiss-seated CAS tribunal (CAS, Award of 15 December 2005, CAS 2005/A/876). In a second proceeding following the FAPLAC proceedings, Chelsea requested damages from Mr Mutu resulting from the now-confirmed breach of contract, this time before the Disputes Division of the International Federation of Association Football (FIFA). In 2008, FIFA's Disputes Division handed down its judgment and ordered Mr Mutu to pay over €17 million in damages. The football player did not accept this decision and again appealed to the CAS. The appeal, however, was unsuccessful (CAS, Award of 31 July 2009, CAS 2008/A/1644). Not accepting this decision either, Mr Mutu applied to the Swiss Supreme Court to set aside the CAS decision. In the setting aside proceedings, Mr Mutu put forward that the CAS tribunal that heard his case was not independent or impartial because the law firm of Professor Luigi Fumagalli, the CAS tribunal's president, represented Chelsea's owner, Roman Abramovich. Mr Mutu also argued that co-arbitrator Dirk-Reiner Martens had already been involved as an arbitrator in the previous case in 2005, where a CAS tribunal heard his appeal of the FAPLAC decision, i.e. on liability in principle. This appeal was equally unsuccessful and the Swiss Supreme Court dismissed the application in 2010, holding that the CAS panel was independent and impartial (Swiss Supreme Court, Decision of 10 June 2010, 4A_458/2009, reasons 3.2–3.4.)

A positive blood test was also the trigger of the well-known “Pechstein saga”. At the occasion of the world speed skating championships in 2009, Ms Pechstein’s blood test revealed reticulocyte levels above the permitted value. This led to a two-year ban by the disciplinary board of the International Skating Union (“ISU”) against Ms Pechstein, who lodged an appeal against the decision with the CAS. However, the CAS tribunal confirmed the two-year ban in November 2009 (CAS, Award of 25 November 2009, CAS 2009/A/1912 and CAS 2009/A/1913). Importantly, the hearings before the CAS tribunal were held in private sessions, notwithstanding the fact that Ms Pechstein had requested a public hearing. Ms Pechstein also did not accept the CAS decision and applied to the Swiss Supreme Court seeking to have the CAS award set aside. She advanced three arguments and alleged the following:

- that the members of the CAS tribunal were not independent and impartial due to the way the tribunal members have been appointed,
- that the CAS tribunal’s president already had a preformed opinion, because he publicly advocated that a “hard line” should be taken in the fight against doping, and
- that the Secretary General of the CAS unduly interfered with the CAS tribunal’s award after it was rendered.

In Ms Pechstein’s case as well, the Swiss Supreme Court rejected the application in February 2010. (Swiss Supreme Court, Decision of 10 February 2010, 4A_612/2009, reasons 3 and 4).

Ms Pechstein not only attempted to overturn the suspension in Switzerland but also applied to German courts. The Higher Regional Court of Munich declared the arbitration agreement invalid. Accordingly, the decision rendered by the CAS tribunal in 2009 was inapplicable in Germany. The arbitration agreement’s invalidity, according to the German court, was based on the fact that Ms Pechstein’s consent to the arbitration agreement was not voluntary. According to the German court, Ms Pechstein was *de facto* forced to sign the athlete agreement containing the arbitration clause in order to be in a position to compete and to earn her living (Higher Regional Court of Munich, Decision of 15 January 2015, U 1110/14 Kart, reason 2./A./II./3). The lower court’s decision was, however, ultimately overturned by the German Supreme Court, which rejected the reasoning that Ms Pechstein’s consent was forced upon her (German Supreme Court, Decision of 7 June 2016, KZR 6/15, para. 69.)

In July and November 2010, respectively, Mr Mutu and Ms Pechstein applied to the ECtHR. Amongst other violations of the ECHR, both athletes alleged that their right to a fair trial according to Article 6(1) ECHR was violated. As before the national courts, they argued that the CAS could not be regarded as an independent and impartial tribunal and, in Ms Pechstein’s case, that she was denied a public hearing. In December 2016, the ECHR joined the two cases.

Decision

After eight years, the ECHR held that the CAS tribunals were independent and impartial and that, accordingly, there had been no violation of Article 6(1) ECHR. With regard to Ms Pechstein’s complaint as to the non-public nature of her hearing, however, the ECHR found that the right to a fair trial granted under Article 6(1) ECHR was violated. All other allegations were dismissed.

At the outset of the decision, the ECHR declared itself competent to hear these cases, notwithstanding the fact that the CAS is neither a state court, nor another public Swiss state entity,

but a privately-owned institution. In fact, Switzerland was found to be liable under the Convention in cases where its authorities formally or tacitly approve acts of private individuals violating human rights of other individuals. In other words, Switzerland was found to be capable of being sued under the ECHR, because it upheld the CAS decisions, which were alleged to have violated Mr Mutu's and Ms Pechstein's human rights.

In line with its previous case law, the ECtHR reiterated that arbitral tribunals are in principle compatible with the "right to a court" under Article 6(1) ECHR. However, the ECtHR distinguished between compulsory ("*arbitrage forcé*") and voluntary arbitration, holding that in compulsory arbitration all guarantees provided for in Article 6(1) ECHR must be safeguarded under all circumstances. In contrast, if parties voluntarily consent to arbitration proceedings, those rights may be waived under the condition that this is being done freely, lawfully and in an unequivocal manner.

Against this background, the ECHR found that Ms Pechstein did not freely submit to arbitration. Not accepting the arbitration clause would have meant that she could no longer pursue her professional activities and, as a consequence, to earn her living by practising her sport. This situation set Mr Mutu's case apart, because according to the contractual agreements applicable to him, he had also the possibility to submit his dispute to the ordinary courts.

The majority of the ECtHR rejected Mr Mutu's and Ms Pechstein's arguments regarding the CAS tribunal's independence and impartiality. However, the Swiss and Cypriot judges (Helen Keller and Georgios Serghides) issued a strong dissenting opinion, criticizing the influence from interested groups on the CAS and on the selection of arbitrators, which ultimately jeopardizes the independence and impartiality of CAS tribunals.

With regard to the right to a public hearing, the ECtHR found that in compulsory arbitration (such as the one of Ms Pechstein) a waiver of the right to a public hearing was not possible and determined that there had been a violation of Article 6(1) ECHR due to the CAS tribunal's denial of a public hearing. The ECtHR thereby also considered that Ms Pechstein had explicitly requested a public hearing.

Comment

This case shows, once more, the important (and ever-increasing) role of human rights in arbitration proceedings. While the ECHR is conceived as an instrument to protect persons against a State, it is now clear that the ECtHR will not shy away from interfering in certain types of what it called "compulsory" arbitration by invoking the responsibility of a State through allowing them in its territory.

For Switzerland in particular, although violations of the ECHR cannot be directly invoked before the Swiss Supreme Court in setting aside proceedings,[2)] the convention is indirectly applicable nonetheless. This is first and foremost because the content of Article 6.1 ECHR forms part of the notion of public policy in the sense of Article 190(2)(e) of the Swiss Private International Law Act (PILA) which, in turn, is one of the grounds for setting aside arbitral awards. Second, as reiterated in this decision by the ECtHR, states are indeed liable for violations of human rights in arbitration proceedings seated in their territory in cases that the ECtHR qualifies as compulsory arbitrations.

This was also the reason why in such cases waivers of the right to setting-aside pursuant to Article 192 PILA are not valid.[3)]

By holding that arbitration agreements contained in athlete agreements are non-voluntary, the ECtHR took a strong stance and protected the seemingly weaker parties in the context of sports. Indeed, the CAS announced immediately after the publication of the ECtHR decision that it would ensure the compliance of future CAS proceedings with the ruling, in particular by enabling parties to hold public hearings upon a party's request.

The rather broad definition of compulsory arbitration will likely lead to interesting developments in other areas where there is notoriously a so-called "weaker party" such as, for example, consumer arbitration and labor arbitration proceedings. This might even open the door to challenges of business contracts before the ECtHR between two sophisticated business entities, if one party could show that without the conclusion of the arbitration clause it would not, due to a simple lack of leverage, have obtained the contract.

References

?1 ECtHR, Mutu and Pechstein v. Switzerland, Decision of 2 October 2018, application no. 40575/10 and 67474/10. The decision of the ECtHR may still be brought before the Grand Chamber of the ECtHR.

?2 See for example Swiss Supreme Court, Decision of 2 June 2010, 4A_320/2009, reason 1.5.3.

?3 ECtHR, *Tabbane v. Switzerland*, Decision of 1 March 2016, application no. 41069/12; see Voser/George, ECtHR: Waiver of Recourse Against International Arbitral Award Not Incompatible with ECHR, available here (consulted on 11 December 2018). Also this decision of the ECtHR is not yet final and binding and may still be brought before the Grand Chamber of the ECtHR.

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