

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF MUTU AND PECHSTEIN v. SWITZERLAND

*(Applications nos. 40575/10 and 67474/10)*

JUDGMENT

STRASBOURG

2 October 2018

**FINAL**

**04/02/2019**

*This judgment is final but it may be subject to editorial revision.*




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**In the case of Mutu and Pechstein v. Switzerland,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Helena Jäderblom, *President,*
Branko Lubarda,
Luis López Guerra,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 6 December 2016 and on 20 February and 28 August 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in two applications (nos. 40575/10 and 67474/10) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Adrian Mutu ("the first applicant"), and a German national, Ms Claudia Pechstein ("the second applicant"), on 13 July 2010 and 11 November 2010 respectively.

2. The first applicant was represented by Mr Hissel, a lawyer practising in Eupen (Belgium), and the second applicant by Mr S. Bergmann, a lawyer practising in Berlin. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, and by their Deputy Agent, Mr A. Scheidegger, of the Federal Office of Justice.

3. The first applicant mainly complained of a violation of Article 6 § 1 of the Convention.

4. The second applicant complained of violations of Article 6 §§ 1 and 2 of the Convention.

5. Notice of the applications was given to the Government on 12 February 2013.

6. On 23 May 2013 Chelsea Football Club Ltd. (also referred to hereinafter as "Chelsea" or "the third-party intervener") was given leave to submit written comments (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court) in the context of application no. 40575/10.

7. Neither the Romanian Government nor the German Government, to which copies of applications nos. 40575/10 and 67474/10, respectively, had

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been transmitted (Article 36 § 1 of the Convention and Rule 44 § 1 (a)), wished to exercise their right to intervene.

8. On 6 December 2016 the Court decided to join the two applications in accordance with Rule 42 § 1.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASES

### A. Facts relating to application no. 40575/10

9. On 11 August 2003, the applicant, who was a professional footballer, signed an employment contract with Chelsea Football Club, expiring on 30 June 2008, stipulating that it would be governed by English law. The next day he was transferred from the Italian club AC Parma to Chelsea for the sum of 22,500,000 pounds sterling (GBP), equivalent to about 26,343,000 euros (EUR). Under the contract the applicant was to receive a gross annual salary of GBP 2,350,000 (about EUR 2,751,000), and a "once only signing-on fee" of GBP 330,000 (about EUR 386,000) payable in five instalments.

10. On 1 October 2004 a targeted drug test was held by the English Football Association (FA) and the applicant tested positive for cocaine. On 28 October 2004 Chelsea terminated the applicant's employment contract with immediate effect. He was also suspended.

11. As soon as the suspension ceased to have effect, the applicant returned to Italy, where he started playing again professionally in the spring of 2005, successively with Juventus FC, AC Fiorentina and AC Cesena. He was suspended again in 2010 for six months on account of drug use. He later played in the French first division for the Corsican club Ajaccio.

12. On 26 January 2005 the applicant and Chelsea decided jointly to refer to the Football Association Premier League Appeals Committee (the "FAPLAC"), affiliated to the Fédération Internationale de Football Association ("FIFA"), the issue of whether the applicant had acted in breach of his employment contract "without just cause", within the meaning of Article 21 of the FIFA Regulations for the Status and Transfer of Players ("the 2001 Regulations"). The applicant was not obliged to accept arbitration, in view of the possibility under Article 42 of the 2001 Regulations for players to seek redress before a domestic court in any dispute with their clubs.

13. On 20 April 2005 the FAPLAC decided that the applicant had committed such a breach.

14. The applicant lodged an appeal with the Court of Arbitration for Sport (the "CAS"), which had jurisdiction in respect of the FAPLAC's

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decisions. A panel presided over by German lawyer Mr D.-R. M upheld the decision in question on 15 December 2005. It interpreted the term "unilateral breach" in Article 21 of the 2001 Regulations and reached the conclusion that it referred to the act of breaking a contract and not its termination. The applicant did not challenge that award.

On 11 May 2006 Chelsea requested that the FIFA Dispute Resolution Chamber (the "DRC") should award it compensation following the established breach of the employment contract by the applicant. The DRC initially decided that it did not have jurisdiction. Chelsea lodged a new appeal with the CAS, which referred the case back to the DRC on 21 May 2007 for a ruling on the merits. In a decision of 7 May 2008, the DRC ordered the applicant to pay Chelsea the sum of EUR 17,173,990. The DRC calculated this amount on the basis of the unamortised costs payed by Chelsea for the applicant's transfer under Article 22 of the 2001 Regulations, in accordance with English law.

15. On 2 September 2008 the applicant filed a statement of appeal with the CAS claiming that no compensation was due by him to Chelsea. He appointed Mr J.-J. B. as arbitrator. On 22 September 2008, relying on Article R34 of the Code of Sports-related Arbitration (the "Code of Arbitration"), the applicant challenged the appointment of Mr D.-R. M, the arbitrator chosen by Chelsea, who had presided over the CAS panel which made the award of 15 December 2005. In a decision of 13 January 2009 the International Council of Arbitration for Sport (the "ICAS") dismissed the challenge. On 14 January 2009 the CAS informed the parties that the panel would be constituted by Mr J.-J. B., Mr D.-R. M. and Professor L. F., a lawyer practising in Milan, who would be its president. In an award of 31 July 2009 the CAS dismissed the applicant's appeal. It found that the only question still in dispute, namely the amount of the compensation, had been settled by the DRC in accordance with Article 22 of the 2001 Regulations and English law.

16. On 14 September 2009 the applicant lodged an appeal with the Swiss Federal Court (the "Federal Court"), submitting that the award should be annulled on the ground that the CAS had not presented sufficient guarantees of independence and impartiality. In his view, arbitrators L. F. and D.-R. M. should not have been part of the arbitral panel. As to the former, the applicant relied on an anonymous e-mail according to which the law firm in which he worked represented the interests of Chelsea Football Club's owner. As to the latter arbitrator, the applicant indicated that he had sat on the arbitral panel which had made the first award, that of 15 December 2005. The applicant further argued that the impugned award was incompatible with substantive public policy, with the prohibition on forced labour and with his right to respect for his private life.

17. In a judgment of 10 June 2010 (4A_458/2009) the Federal Court dismissed the applicant's appeal, mainly on the ground that the arbitral

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panel could, in its view, be regarded as "independent and impartial". It rejected the other grounds of appeal that it had declared admissible. The relevant part of the Federal Court's judgment reads as follows:

> "3.1 Like a national court, an arbitral tribunal must present sufficient guarantees of independence and impartiality (ATF [Federal Court judgment] 125 I 389 at 4a; 119 II 271 at 3b and cases cited). Failure to comply with this rule entails unlawful composition under the aforesaid legal provision (ATF 118 II 359 at 3b). In order to determine whether an arbitral tribunal presents such guarantees, reference must be made to the constitutional principles developed with regard to national courts (ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361). However, the specificities of arbitration and in particular those of international arbitration must be taken into account when examining the circumstances of a given case (ATF 129 III 445 at 3.3.3 p. 454). In this connection, sports arbitration as instituted by the CAS has some particularities which have already been outlined elsewhere (ATF 129 III 445 at 4.2.2.2), such as a closed list of arbitrators. These should not be disregarded, even though they do not *per se* mean that one should be less demanding of sports arbitration than of commercial arbitration.
>
> ...
>
> 3.2.1 The appellant claims that on 1 September 2009 his English counsel received an anonymous e-mail advising him, in substance, that the Milan law firm in which Professor [L. F.] worked represented the interests of [R. A.], an important Russian businessman who controlled the respondent, a circumstance that the president of the arbitral panel had failed to disclose in his declaration of independence.
>
> On 13 October 2009 [L. F.] filed a detailed written statement attached to the CAS answer, in which he vigorously denied the appellant's allegations derived from that anonymous e-mail. That statement was communicated to the appellant, who did not deem it useful to challenge its content as he abstained from filing submissions in reply.
>
> 3.2.2 As the appellant claims to have become aware of the ground for revision upon receipt of the 1 September 2009 e-mail, namely before the deadline for appeal, he rightly raised that argument in the present appeal on the basis that the arbitral panel was unlawfully composed (section 190(2)(a) PILA [Private International Law Act]) and not by seeking revision (judgment 4A_234/2008 of 18 August 2008 at 2.1).
>
> That being said, the appellant himself concedes in his observations (n. 58 and 62) that he is not in a position to verify the accuracy of the information he was given anonymously and that the facts mentioned in the aforesaid e-mail would constitute ground for a challenge only if they were established. It must be admitted, however, having regard to the detailed written statement of Professor [F.], not called into question by the appellant, that this requirement is not met. Indeed, in that statement the president of the arbitral panel refutes item by item all allegations challenging his independence in relation to the respondent. He has not been contradicted and his presence on the arbitral panel which made the award under appeal does not appear unlawful, such that the appellant has no cause to complain about it *a posteriori*.
>
> 3.3.1 The appellant also challenges the independence of arbitrator [D.-R. M.], chosen by the respondent, on the ground that this arbitrator presided over the arbitral panel which issued the first award in favour of the English club in the dispute between the parties. In this connection, the appellant refers to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration approved on 22 May 2004 (http://www.ibanet.org/publications/Publications_home.cfm;

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hereinafter ‘the Guidelines’; on this subject see judgment 4A_506/2007 of 20 March 2008 at 3.3.2.2 and the authors cited therein). In his view, the alleged circumstance fell within paragraph 2.1.2 of the Guidelines, which concerns the situation where ‘the arbitrator has previous involvement in the case’, under the so-called ‘waivable red list’ covering instances in which the arbitrator must withdraw unless otherwise expressly agreed by the parties (paragraph 2 of Part II of the Guidelines). According to the appellant, that circumstance could also come under the ‘orange list’ (intermediate situations which must be disclosed but do not necessarily justify a challenge), and specifically paragraph 3.1.5, which applies to an arbitrator ‘who currently serves or has served within the past three years as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties’. The appointment of [D.-R. M.] as arbitrator by the respondent was a reflection, in the appellant’s view, of the appreciation of the party which had won the first case between the same parties (appeal n. 75 *in fine*).

...

3.3.3.1 Whatever the appellant may claim, it is far from certain that the two rules of the Guidelines he relies upon would apply in the present case.

The first one supposes that the arbitrator was previously involved in the case (para. 2.1.2); this implies the same dispute on the basis of the heading under which that rule appears (‘2.1 Relationship of the arbitrator to the dispute’). From that perspective and on the basis of a purely formal criterion, the present case is not the same as that which gave rise to the first award dated 15 December 2005. Evidence of that is the fact that the two cases were registered under different docket numbers by the CAS Court Office (CAS 2005/A/876 for one, CAS 2008/A/1644 for the other). A third case was initiated and disposed of in the meantime through an award of 21 May 2007, made by three other arbitrators (CAS 2006/A/1192).

As to the second rule, when also taken to the letter, it deals with cases where the arbitrator acts, or has acted over the three previous years, as arbitrator in another arbitration concerning one of the parties (or an entity affiliated to one of the parties) but not both of them as is the case here. Moreover, that rule falls under the orange list and any breach thereof does not justify the automatic replacement of an arbitrator who falls foul thereof.

That being said, the weight of these formal arguments should not be overestimated. Indeed, one should not forget that the Guidelines, while admittedly a precious working instrument, do not have legislative value. Hence the circumstances of the case at hand, like the case-law of the Federal Court in this field, will remain decisive in settling any conflict of interest (judgment 4A_405/2007, cited above, ibid.).

3.3.3.2 The fact that a judge has already acted in a case may give rise to a suspicion of bias. Acting in both cases is therefore admissible only if the judge, when participating in previous decisions concerning the same case, has not already taken a position as to certain issues such that he will no longer appear to be free from bias in the future and, accordingly, the outcome of the proceedings appears to be pre-determined. To decide that issue, the facts, the procedural specificities and the specific issues raised at the various stages of the proceedings must be taken into account (ATF 126 I 168 at 2 and the cases cited). The same applies in the field of arbitration. An arbitrator’s behaviour during the arbitration proceedings may also cast doubt on his independence and impartiality. However, the Federal Court has shown itself to be demanding in assessing whether there is a risk of bias. Thus there is case-law to the effect that procedural measures, whether right or wrong, are not sufficient *per se* to justify an objective suspicion of bias on the part of the arbitrator who has taken them

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(ATF 111 Ia 259 at 3b/at p. 264 and cases cited). That remark also applies to an arbitrator who has actively participated in a partial award, even if it is erroneous (ATF 113 IA 407 at 2a p. 409 i.f.).

In the present case, the task entrusted to the CAS panel which made the first arbitral award with arbitrator [D.-R. M.] as its president was clearly circumscribed. Indeed, appearing before that appellate body, the appellant already no longer denied having committed a serious breach of his contractual obligations by taking cocaine. However, he argued that to the extent that the initiative of terminating his employment contract on that ground had been taken by the respondent, he could not be blamed for a 'unilateral breach of the contract without cause or without sporting cause' within the meaning of Article 21 of the 2001 Regulations and accordingly he could not be ordered to compensate his former employer. The arbitrators' task was therefore only to interpret the words 'unilateral breach' in the English version of Article 21 of the 2001 Regulations. The panel decided that issue of principle by finding that the aforesaid wording referred to the breaking of an employment contract and not to its termination. Moreover it rejected a second argument whereby the appellant had called for a distinction to be drawn between a player who left his club without cause and one who seriously breached his contractual obligations.

In so deciding, the panel certainly made an award in the respondent's favour, as it dismissed a major objection by the party from whom the former sought damages. However, besides the fact that the appellant never challenged the first award, and unless one attributes ulterior motives to arbitrator [M.], it is not possible to find objectively that by deciding the two aforesaid issues, essentially of a theoretical nature, the arbitrator acted in a manner which could cast doubt on his impartiality and give credence to the idea that he had already chosen to take the respondent's side. Moreover, it does not appear from the 15 December 2005 award that the panel prejudged in any way the issue of the amount of compensation due by the appellant. It must also be emphasised that we are talking here about three awards issued in the same matter, substantively speaking, which could if appropriate have been made by the same panel, the first two being interlocutory in relation to the third, namely the final award now under appeal. As a matter of principle, save in exceptional circumstances, it is not admissible to challenge *a posteriori* the lawfulness of the composition of the arbitral panel which made the final award simply because its members had already ruled on the matter by participating in interlocutory or partial awards. To admit this would be tantamount to a call for the abolition of such awards, whilst their usefulness is no longer in issue. The appellant invokes no such circumstances. Consequently, the doubts he casts retrospectively as to the independence and impartiality of arbitrator [M.] are not justified.

3.4 Accordingly the complaint of a breach of section 190 (2)(a) PILA fails with regard both to the president [F.] and to arbitrator [M.]."

## B. Facts relating to application no. 67474/10

18. The applicant is a professional speed skater and she is affiliated to the Deutsche Eisschnelllauf-Gemeinschaft ("the DESG"), which is itself a member of the International Skating Union ("ISU"), whose seat is in Lausanne.

19. On 6 February 2009, all the athletes taking part in the World Speed Skating Championships taking place on 7/8 February 2009 in Hamar

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(Norway), including the applicant, underwent anti-doping controls. On 18 February 2009 further blood samples were taken from the applicant. After reviewing her blood profile, the ISU filed a complaint with its Disciplinary Commission against the applicant. After a hearing held in Berne on 29 and 30 June 2009 the Commission, in its decision of 1 July 2009, imposed a two-year ban on her with retroactive effect from 9 February 2009.

20. On 21 July 2009 the applicant and the DESG appealed against that decision to the CAS. On 17 August 2009 the CAS announced the composition of the arbitral panel for this dispute. No objections were raised by any of the parties during the course of the CAS proceedings. The hearing was held in Lausanne on 22 and 23 October 2009. In spite of the applicant's request for the hearing to be public, it was held in camera. Twelve experts were called by the parties, who were able to question them freely.

21. On 23 and 24 November 2009 the applicant sought the reopening of the proceedings. On 25 November 2009 the CAS dismissed that request and confirmed the two-year ban.

22. On 7 December 2009 the applicant lodged an appeal with the Federal Court, submitting that the CAS award should be annulled. She argued that the CAS was not an "independent and impartial tribunal" on account of the process for the appointment of the arbitrators, that its president had not been impartial because he had previously taken a "hard line" against doping, and that its Secretary General had amended the arbitral award *a posteriori*. She also complained that the CAS had not held a public hearing. She further alleged a breach of her right to be heard and raised various public policy grounds.

23. In a judgment of 10 February 2010 the Federal Court dismissed the applicant's appeal. The relevant part reads as follows:

> "3.1.2 If an arbitral tribunal proves deficient with respect to independence or impartiality, this is a case of unlawful composition within the meaning of section 190(2)(a) PILA. In accordance with the principle of good faith, however, the right to invoke this ground of appeal is forfeited if it is not raised immediately (ATF 129 III 445 at 3.1 p. 449 with references).
>
> The appellant herself appealed to the CAS and signed the procedural order of 29 September 2009 without raising objections with respect to its independence or impartiality. Under these circumstances it is not compatible with the principle of good faith to have raised the issue of the impartiality of the arbitral panel for the first time in an appeal before the Federal Court. The complaint that the arbitral panel lacked independence must therefore be dismissed.
>
> 3.1.3 Moreover, contrary to the appellant's view, the CAS must be regarded as a proper arbitral tribunal. In addition, according to the case-law of the Federal Court, the CAS is sufficiently independent from the IOC [International Olympic Committee] for its awards, even in matters which concern the IOC's interests, to be regarded as proper judgments comparable with those of a national court (ATF 129 III 445 at 3 p. 448 ff. with references).

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Regardless of the fact that the appellant's factual allegations are not based on the factual findings of the award under appeal (see section 105(1) FCA [Federal Court Act]), her submissions of a general nature do not give rise to reasonable doubt as to the independence of the CAS. The complaint that the CAS lacks independence would thus in any event be ill-founded.

3.2 Secondly, the applicant complains that the president of the arbitral panel, F., was biased. He allegedly informed one of her current legal representatives in October 2007 that he took a 'hard line on doping issues' when the latter wished to appoint him as arbitrator in other proceedings for an athlete whom he represented. The appellant claims that F.'s appointment by G., a former member of the National Olympic Committee and president of an international sporting association and member of the IOC Sport and Law Commission, thus meant that the decision had in fact already been made.

The complaint is unfounded. The accusation directed at the president of the arbitral panel to the effect that he had stated in another context that he took a 'hard line' on doping issues is too vague and general to give rise to reasonable doubt about the independence of F., especially since there is no direct relationship to these proceedings (compare ATF 133 I 89 at 33 p. 92; and ATF 105 Ia 157 at 6a p. 163).

The complaints that the president of the arbitral panel was biased and that the IOC influenced the composition in an unlawful manner are thus unfounded.

3.3 The appellant's further complaint that the IOC and the international sporting associations could have influenced the decision through the intermediary of the CAS Secretary General, in that the latter had subsequently 'amended' the decision under appeal, is speculative and is not based on established facts. The appellant herself states that she does not know whether the Secretary General made use of the possibility of 'rectification' of the decision or not.

Moreover, she did not submit a complaint within the meaning of section 190(2)(a) PILA when she argued that, under Article R59 of the CAS Code, the decision had to be communicated to the CAS Secretary General, who was entitled to make 'rectifications of pure form' and 'to draw the attention of the [arbitral] panel to fundamental issues'. Contrary to the allegation in the appeal, this process does not give rise to any doubt that the decision was taken solely by the arbitral panel. There is nothing to suggest any undue influence on the tribunal such that its independence can be called into question.

The complaint about a lack of independence and the unlawful composition of the arbitral panel (section 190(2)(a) PILA) is unfounded and the procedural applications made in this connection must therefore be rejected.

4. The appellant further claims that there has been a violation of her right to a public hearing.

4.1 In this connection she incorrectly invokes Article 6 § 1 ECHR, Article 30 § 3 of the Federal Constitution and Article 14 § 1 ICCPR, since these are not applicable to voluntary arbitration proceedings according to the case-law of the Federal Tribunal (see judgments 4P.105/2006 of 4 August 2006 at 7.3; and 4P.64/2001 of 11 June 2001 at 2d/aa, unreported ATF 127 III 429 ff.). It is not possible to derive from the above-cited provisions a right to a public hearing in arbitration proceedings.

The CAS did not disregard the appellant's right to a public hearing in rejecting her application to allow her agent to attend the hearing as Article R57 of the CAS Code only provides for a public hearing if the parties so agree. The appellant does not show

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to what extent the right to be heard (section 190 (2) (d) PILA) and public policy (section 190 (2) (e) PILA) should require a public hearing in international arbitration proceedings, which are not public as a rule.

Regardless of the question as to the existence of such a right, in view of the key role of the CAS in the field of sport, it would be desirable [*wünschenswert*] for a public hearing to be held if the athlete concerned so requests, to strengthen trust in the independence and fairness of its awards.

4.2 Unlike the proceedings before the CAS, which freely assesses factual and legal issues, the Federal Court's scrutiny in an appeal against an arbitral award is significantly restricted. The present case thus lends itself to a decision on the basis of the record; the holding of a public hearing (section 57 FCA), as requested by the appellant, is not called for.

A mandatory public hearing before the Federal Tribunal, as is exceptionally required by a law that is higher than domestic law – for example, in the case of an application under section 120 (1) (c) FCA or where the Federal Court decides to adjudicate the matter itself (see section 107 (2) FCA) based on its own findings of fact – (see HEIMGARTNER/WIPRÄCHTIGER, in: Basler Kommentar, Bundesgerichtsgesetz, 2008, nos. 9 ff. on section 57 FCA; and JEAN-MAURICE FRÉSARD, in: *Commentaire de la LTF*, 2009, nos. 8 ff. on section 57 FCA), is not an option in the context of arbitration proceedings pursuant to section 77 FCA.

The application for a public hearing before the Federal Court must therefore be rejected."

24. After losing her case before the Federal Court and having lodged an application with this Court, the applicant also brought proceedings against the ISU in the German courts.

Initially she won her case in the Munich Court of Appeal, which, in a judgment of 15 January 2015, found the CAS awards to be inapplicable in Germany. According to that court, while it could be considered that athletes voluntarily agreed to defer to the jurisdiction of an arbitral tribunal, that could not be valid in the case of the CAS as a result of the decisive weight of sports federations in its composition. In the view of the Bavarian court, this imbalance was accepted by athletes solely because they would otherwise be unable to take part in professional competitions. It thus considered this situation to constitute an "abuse of a dominant position".

25. That judgment was quashed by the German Federal Court of Justice on 7 June 2016. In that court's view, while it was true that the ISU had a monopoly within the meaning of German competition law, athletes nevertheless freely agreed to the arbitration clause providing for the jurisdiction of the CAS and that practice did not therefore constitute an abuse of a dominant position.

### C. The operation of international sports arbitration

26. The CAS was officially set up on 30 June 1984, the date of the entry into force of its statutes, to procure the arbitral resolution of disputes arising

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within the field of sport. Its seat was established in Lausanne. Being an autonomous arbitral institution in terms of organisation, albeit without legal personality, it was composed at the outset of sixty members who were appointed, for each quarter thereof, by the International Olympic Committee ("IOC"), the International Sports Federations ("the IFs"), the National Olympic Committees ("the NOCs") and the President of the IOC. The operating expenses of the CAS were borne by the IOC, which was competent to amend the court's statutes (for further details, see Federal Court judgment ATF 119 II 271, at 3b).

27. In a judgment of 1993 the Federal Court expressed reservations as to the independence of the CAS in relation to the IOC, on account of the structural and economic links between the two institutions. It found it desirable for the CAS to become more independent of the IOC (ibid.). That judgment led to a major reform of the CAS.

28. The main innovation consisted in the creation of the ICAS, in Paris on 22 June 1994, and in the drafting of the Code of Sports-related Arbitration (the "Code"), in force from 22 November 1994.

29. The ICAS, a private-law foundation under Swiss law, with its seat in Lausanne, is composed of twenty members who are high-level jurists. Its members are appointed for a renewable term of four years.

30. A major role of the ICAS is to safeguard the independence of the CAS and the rights of parties. Among its various functions, it adopts and amends the Code, it manages the CAS and looks after its financing, it establishes the list of CAS arbitrators from which parties can choose, it takes decisions concerning the challenge and removal of arbitrators and appoints the CAS Secretary General.

31. The CAS constitutes the panels whose task it is to resolve disputes in the field of sport. It comprises an Ordinary Arbitration Division and an Appeals Arbitration Division. The former deals with disputes submitted to the CAS under the ordinary single-instance procedure (performance of contracts, civil liability, etc.), while the latter entertains appeals against disciplinary decisions taken at last instance by sports-related bodies such as federations (for example, the banning of an athlete for doping, misconduct on a pitch or insults directed at a referee).

### *1. Rules on the appointment of ICAS members, as in force at the material time*

32. At the material time, the twenty members of the ICAS were appointed in accordance with Article S4 of the Code, which read as follows:

> "a. four members are appointed by the International Sports Federations ('IFs'), viz. three by the Summer Olympic IFs (ASOIF) and one by the Winter Olympic IFs ('AIWF'), chosen from within or from outside their membership;
>
> b. four members are appointed by the Association of the National Olympic Committees ('ANOC'), chosen from within or from outside its membership;

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c. four members are appointed by the International Olympic Committee ('IOC'), chosen from within or from outside its membership;

d. four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;

e. four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS."

### *2. Rules on the designation of CAS arbitrators, as in force at the material time*

33. There had to be at least one hundred and fifty arbitrators on the CAS list and they were not assigned to a particular division. The list was established in accordance with Article S14 of the Code, which read as follows:

"In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language. In addition, the ICAS shall respect, in principle, the following distribution :

• 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside;

• 1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;

• 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;

• 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;

• 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article."

34. Only the arbitrators thus listed – who remained on the list for a renewable period of four years (Article S13 of the Code) – were entitled to serve on a panel (Articles R33, R38 and R39 of the Code).

35. Under Article R54 of the Code, the president of the panel was appointed by the president of the CAS Appeals Arbitration Division after consulting the arbitrators chosen by the parties.

36. When called upon to serve on a panel, the arbitrators were required to sign a declaration stating that they were independent (Article S18 of the Code). Moreover, every arbitrator was obliged to disclose immediately any circumstances likely to affect his independence with respect to any of the parties (Article R33 of the Code). Any arbitrator could be challenged if the circumstances gave rise to legitimate doubts over his independence. Challenges, in the exclusive power of the ICAS, had to be brought promptly as soon as the ground for the challenge became known (Article R34 of the

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Code). An arbitrator could be removed by the ICAS if he refused to carry out or was prevented from carrying out his duties or if he failed to fulfil his duties pursuant to the Code. The ICAS could exercise such power through its Board, giving "brief reasons for its decision" (Article R35 of the Code). In the case of a panel of three arbitrators, unless otherwise agreed, each party would choose its arbitrator and the president of the panel was chosen by those two arbitrators, or, in the absence of an agreement, appointed by the president of the Division (Article R40.2 of the Code). Arbitrators chosen by the parties or by other arbitrators were deemed appointed only after confirmation by the Division president. Once the panel was formed, the file was transferred to the arbitrators for their examination of the case and their award.

37. Initially composed of sixty members, the CAS had almost three hundred arbitrators at the material time.

### *3. Subsequent amendments to the rules on the appointment of CAS arbitrators*

38. On 1 January 2012 Article S14 of the Code was amended by the removal of the rules on the appointment of arbitrators by fifths. The new wording reads as follows (as shown in a file on the CAS website):

> "In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs. ~~In addition, the ICAS shall respect, in principle,~~
>
> ~~the following distribution :~~
>
> ~~• 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside;~~
>
> ~~• 1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;~~
>
> ~~• 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;~~
>
> ~~• 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;~~
>
> ~~• 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.~~

39. As regards the relevant provisions for the present case, the Code in force on 1 January 2017 reads as follows:

> "S6 ICAS exercises the following functions:

...

3. It appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators; it can also remove them from those lists ...

S14 The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators having a specific expertise to deal with certain types of disputes.

The ICAS shall appoint personalities to the list of CAS mediators with experience in mediation and a good knowledge of sport in general.

S15 ICAS shall publish such lists of CAS arbitrators and mediators, as well as all subsequent modifications thereof.

S16 When appointing arbitrators and mediators, the ICAS shall consider continental representation and the different juridical cultures."

## II. RELEVANT DOMESTIC LAW

### *1. Private International Law Act of 18 December 1987*

40. The relevant provisions of the Federal Law on Private International Law of 18 December 1987 (the "PILA") read as follows:

**Chapter 12: International Arbitration**

**Section 176**

"1 The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time when the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland.

2 The provisions of this chapter shall not apply if the parties have excluded its application explicitly in writing and agreed to the exclusive application of the cantonal rules of procedures concerning arbitration.

3 The arbitrators shall determine the seat of the arbitral tribunal if the parties or the arbitration institution designated by them fail to do so."

**Section 190**

"1 The award shall be final when communicated.

2 It can be challenged only:

a. If a sole arbitrator was designated unlawfully or the arbitral tribunal was constituted unlawfully;

b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction;

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c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;

d. If the equality of the parties or their right to be heard in adversarial proceedings was not respected;

e. If the award is incompatible with Swiss public policy *(ordre public)*.

3 An interlocutory award may only be challenged on the grounds stated in paragraph 2, letters a and b; the time-limit for lodging an appeal shall run from the communication of that award."

**Section 191**

"An appeal may be taken only to the Federal Court. The procedure shall be governed by section 77 of the Federal Court Act of 17 June 2005."

**Section 192**

"1 If neither party has a domicile, a place of habitual residence, or a place of business in Switzerland, they may, by an express declaration in the arbitration agreement or in a subsequent written agreement, exclude all appeals against the award of the arbitral tribunal. They may also exclude an appeal only on one or several of the grounds enumerated in section 190, paragraph 2.

2 If the parties have excluded all appeals against the award and enforcement of the awards is sought in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards shall apply *mutatis mutandis*."

### *2. Federal Court Act of 17 June 2005, as in force at the relevant time*

41. The relevant provisions of the Federal Court Act of 17 June 2005 ("the FCA"), as in force at the material time, read as follows:

**Art. 57 Oral proceedings**

"The President of the Court may order oral proceedings."

**Art. 58 Deliberation**

"1 The Federal Court deliberates at a hearing:

(a) if the President of the Court so orders or if a judge so requests;

(b) if there is no unanimity.

2 In other cases, the Federal Court issues its decisions by means of circulation."

**Art. 59 Publicity**

"1 Any oral proceedings, and deliberations and votes at a hearing, shall take place at a public sitting.

2 The Federal Court may order the hearing to be held totally or partly in camera in the event of a threat to safety, public order or morals, or if the interest of an implicated person so requires.

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3 The Federal Court shall make available to the public, for a period of 30 days from the date of notification, the operative part of any judgment which has not been delivered at a public sitting."

**Art. 61 Authority of *res judicata***

"The Federal Court's judgments shall acquire the authority of *res judicata* on the day of their delivery."

**Art. 77 International arbitration**

"1 A civil-law appeal shall be admissible against decisions of arbitral tribunals, under the conditions provided for in sections 190 to 192 of the Federal Law of 18 December 1987 on Private International Law.

2 In the said cases, the following provisions hereof shall be inapplicable: section 48 (3), section 93 (1) (b), sections 95 to 98, 103 (2), 105 (2), and 106 (1), together with section 107 (2) in so far as the latter provision enables the Federal Court to rule on the merits of the case.

3 The Federal Court shall examine only those complaints which have been relied upon and substantiated by the appellant."

**Art. 122 Violations of the European Convention on Human Rights**

"An application for review of a judgment of the Federal Court on account of a violation of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms may be submitted if the following conditions are satisfied:

(a) the European Court of Human Rights, in a final judgment, has found a violation of the Convention or the Protocols thereto;

(b) compensation cannot remedy the effects of the violation;

(c) the review is necessary to remedy the effects of the violation."

### *3. Relevant case-law of the Federal Court*

42. As to the question whether a professional athlete had to be regarded as "obliged" to accept arbitration, in a case concerning a professional tennis-player the Federal Court found as follows, in a judgment of 22 March 2007, published in the official reports (ATF 133 III 235):

"4.3.2.2 ... Competitive sport is characterised by a very hierarchical structure whether at international or national level. On a vertical axis, the relationship between the athletes and the organisations which deal with various sports can thus be distinguished from horizontal relationships between parties to a contractual relationship (ATF 129 III 445 point 3.3.3.2 p. 461). This structural difference between the two types of relationship is not without influence on the meeting of the minds which leads to the formation of any agreement. In principle, where two parties do business on an equal footing, each one expresses its intention without being bound to submit to the wishes of the other. This is generally the case in international commercial relations. The situation is very different in the field of sport. Leaving aside the case – which is rather academic – where a well-known athlete, on account of his or her fame, would be in a position to dictate conditions to the international federation governing the relevant sport, experience shows that, most of the time, a

sportsperson will not have free rein in his or her dealings with the federation and will be required to submit, for better or for worse, to its desires. Thus an athlete wishing to take part in a competition organised under the auspices of a sports federation whose regulations prescribe arbitration would have no choice other than to accept the arbitration clause, in particular by signing up to the instrument of the sports federation in question in which the clause is to be found, all the more so in the case of a professional. He or she will be confronted with the following dilemma: to agree to arbitration or practise his or sport in a non-professional context ... Presented with the choice between abiding by arbitration or practising the sport 'in the garden' ... while watching competitions 'on the TV' ..., an athlete who wants to play against real competitors or who must do so because it is his/her sole source of income (monetary or in kind, advertising revenue, etc.) will be obliged in actual fact, *nolens volens*, to opt for the first of those alternatives.

For similar reasons, it is obvious that a refusal to appeal against a future arbitral award, i.e. on the part of an athlete, will not generally be the result of a freely expressed will. The agreement stemming from the concordance between the will thus displayed and that expressed by the sports organisation concerned will consequently be affected thereby *ab ovo* on account of the mandatory consent given by one of the parties. By accepting beforehand to abide by any future award, the athlete, as has been shown, deprives himself at the outset of the right to seek redress at a later stage for any violation of fundamental principles or of essential procedural safeguards that could be committed by the arbitral tribunal ruling in his case. In addition, as regards any disciplinary penalty that may be imposed, such as suspension, which does not require an enforcement procedure, he will not be able to submit his complaints on such grounds to the enforcements judge. Accordingly, having regard to its importance, the objection that the athlete has waived any right of appeal may not, in principle, be raised, even where such a waiver would satisfy the formal conditions laid down in section 192 (1) PILA ... That conclusion is strengthened by the consideration that any refusal to examine the appeal of an athlete who had no choice other than to accept a waiver of a right of appeal in order to be allowed to participate in competitions also appears questionable in terms of Article 6 § 1 ECHR ..."

43. One year later the Federal Court ruled as follows in a case concerning an organiser of football matches (judgment of 20 March 2008, 4A_506/2007):

"3.2 ... It must be pointed out that this is a case involving ordinary arbitral proceedings, within the meaning of Article R38 et seq. of the Code as opposed to the vast majority of CAS cases reviewed by the Federal Tribunal, which involve the arbitral appeal procedure following the challenging of a decision issued by the organs of a sports federation having accepted CAS jurisdiction (see Article R47 et seq. of the Code). To that extent, the dispute submitted to the CAS with regard to the international contract involved had all the characteristics of an ordinary commercial arbitration, except for its sports context. The dispute was between two parties on an equal footing, which sought to have it adjudicated in arbitration and were fully aware of the financial issues involved; from that point of view, their situation was quite different from that of the humble professional sportsman confronting a powerful international federation (see ATF 133 III 235 at 4.3.2.2)."

44. As regards the independence of the CAS, especially on account of the mechanism for the appointment of arbitrators, in a judgment of 27 May

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2003 published in the Official Reports (ATF 129 III 445), the Federal Court ruled as follows:

> "3.3.3.2 ... As it has been implemented since the 1994 reform, the system of the list of arbitrators now satisfies the constitutional requirements of independence and impartiality applicable to arbitral tribunals. The arbitrators included on the list are at least 150 in number and the CAS has about 200 at the present time. The parties' ability to choose is thus certainly genuine, whatever the appellants may claim, even if one takes account of the nationality, language and sport of the athlete whose case is before the CAS. ...
>
> It must further be pointed out that the CAS, in so far as it functions as an external appellate body for the international federations, is not comparable to an association's permanent arbitral tribunal responsible for settling internal disputes at last instance. Reviewing the facts and the law with a full power of examination and having complete freedom to give a new decision in the place of the body which ruled previously (REEB, Revue, ibid.), it is more like a judicial authority that is independent of the parties. In respect thereof, the system of the list of arbitrators does not therefore raise the same objections as those encountered when it is used by arbitral tribunals set up by associations. Moreover, it is not certain that the so-called 'open list' system – providing the parties (or one of them) with the possibility of choosing an arbitrator outside the list, unlike the system of closed lists applied by the CAS (see CLAY, op. cit., n. 478 p. 400) –, which is preferred by certain authors (see esp.: BADDELEY, op. cit., p. 274; STEPHAN NETZLE, 'Das Internationale Sport-Schiedsgericht in Lausanne. Zusammensetzung, Zuständigkeit und Verfahren', in *Sportgerichtsbarkeit, in Recht und Sport*, vol. 22, p. 9 ff., 12), constitutes a panacea. On the contrary, from the perspective of the efficiency of the arbitral tribunal, this system carries the risk that there might be, within the tribunal, one or more arbitrators who are not specialised and who may be inclined to act as if they were the lawyers of the parties who appointed them (see, on this subject, SCHILLIG, op. cit., p. 160)."

## III. INTERNATIONAL MATERIAL

### *Rules of the International Court of Arbitration*

45. The relevant provisions of the Rules of Arbitration of the International Court of Arbitration (the "ICC Rules") read as follows:

**Article 12**

> "...
>
> 4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the [International] Court [of Arbitration].
>
> 5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the [International] Court [of Arbitration], unless the parties have agreed upon another procedure ..."

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## IV. RELEVANT LAW AND PRACTICE OF THE EUROPEAN UNION

46. Towards the end of the 1990s, following a number of complaints, the European Commission opened an in-depth investigation into the FIFA rules concerning international transfers of football players. The investigation led to a communication of complaints to FIFA on 14 December 1998. Following that communication and further exchanges with the European Commission, FIFA agreed to amend its regulations, so as to provide, in particular, that in the event of any dispute concerning their implementation, the players could have recourse to voluntary arbitration or take their cases to national courts. The European Commission took the view that the new rules addressed its concerns and discontinued the procedure.

47. In a decision published on 8 December 2017, following a complaint by two professional ice-skaters, the European Commission found that the ISU regulations providing for harsh sanctions against athletes who took part in speed-skating competitions that were not recognised by the ISU breached EU rules on anti-competitive practices. It thus gave the ISU three months to amend its regulations accordingly.

## V. RELEVANT FIFA RULES

### *1. The 2001 Regulations*

48. The relevant provisions of the 2001 Regulations read as follows:

**Article 21**

"1. a. In the case of all contracts signed up to the players' 28th birthday: if there is unilateral breach without just cause or sporting just cause during the first 3 years, sports sanctions shall be applied and compensation payable.

b. In the case of contracts signed after the 28th birthday, the same principles shall apply but only during the first two years.

c. In the cases cited in the preceding two paragraphs, unilateral breach of contract a without just cause is prohibited during the season.

2. a. Unilateral breach without just cause or sporting just cause after the first two or three years respectively will not result in sanctions. However, sports sanctions may be pronounced on a club and/or a players' agent for inducing a breach of contract. Compensation shall be payable.

b. A breach of contract as defined on the preceding paragraph is prohibited during the season.

c. Disciplinary measures may he applied In the Dispute Resolution Chamber if notice is not given within the 15 days following the last official match of the national season of the club with which the player is registered."

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**Article 22**

"Unless specifically provided for in the contract, and without prejudice to the provisions on training compensation laid down in Art. 13 ff, compensation for breach of contract (whether by the player or the club), shall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case, such as:

1. Remuneration and other benefits under the existing comma and or the teat co tract.

2. Length of time remaining on the existing contract (up to a maximum of 5 years).

3. Amount of any fee or expense paid or incurred by the former club, amortized over the length of the contract.

4. Whether the breach occurs dating the periods defined in Art. 21.1.

..."

**Article 42**

"Without prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players, a dispute resolution and arbitration system shall be established which shall consist of the following elements ..."

### *2. FIFA Disciplinary Code*

49. The relevant provision of the FIFA Disciplinary Code reads as follows:

**Article 64**

"1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (nonfinancial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision):

a) will be fined for failing to comply with a decision;

b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision ;

...

4. A ban on any football-related activity may also be imposed against natural persons."

## VI. RELEVANT ISU RULES

50. The relevant provisions of the ISU Regulations, as applicable at the material time, read as follows:

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**IV. Judicial Bodies**
**Article 24**

"**1. Disciplinary Commission**

The ISU Disciplinary Commission (DC) is an independent body elected by the Congress. The DC serves as a first instance authority to hear and decide all charges referred to it by any ISU authority or party against any Skater, Official, Office Holder or other participant in ISU activities (Alleged Offender) accused of a disciplinary or ethical offence (Offence).

..."

**V. Arbitration**
**Article 25**

**Court of Arbitration for Sport (CAS) – Appeals Arbitration**

"**1. Appeals**

Appeals against decisions of the DC, and of the Council when allowed by explicit provision of this Constitution, may be filed with the Appeals Arbitration Division of the Court of Arbitration for Sport (CAS), Lausanne, Switzerland.

2. **CAS Jurisdiction**

The CAS shall have the power to hear and decide appeals in the following cases:

a) Against any decision of the DC, or of the DC Chair in the case of Article 25, paragraph 8.e).

b) Against decisions of the Council imposing any penalty on or suspension of ISU Membership of an ISU Member.

c) Against any decision of the Council declaring ineligibility of a Skater, Official, Office Holder or other participant in ISU activities.

d) Against any decision of the Council sitting as a disciplinary body hearing charges against a member of the DC.

..."

**Article 26**
**Court of Arbitration for Sport (CAS) – Ordinary Arbitration**

"**1. CAS Jurisdiction**

All ISU Members, their members, and all other persons claiming standing as present or prospective participants in the ISU or ISU Competitions, Championships, Congress or other activities, and the ISU, agree to binding arbitration under the Rules of the Ordinary Arbitration Division of the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, as the exclusive jurisdiction and method of resolution of all claims or disputes not governed by the terms of Articles 25 and 26 above, that is:

a) Damage and money claims as well as other claims, which could otherwise be the subject of a lawsuit in a civil court: (1) against the ISU or any Office Holder, ISU Official, agent or employee acting on behalf of the ISU; and, (2) by the ISU against any party with standing, or claiming standing, with the ISU as identified above in this Article 27.

b) Requests under Article 75 of the Swiss Civil Code.

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...”

# THE LAW

51. Relying on Article 6 § 1 of the Convention, the first applicant argued that the arbitral tribunal which made the award of 31 July 2009 could not be regarded as independent and impartial.

52. Also relying on Article 6 § 1 of the Convention, the second applicant took the view that the ISU Disciplinary Commission and the CAS could not be regarded as independent tribunals. She also complained that she had not had a public hearing before the ISU Disciplinary Commission, before the CAS or before the Federal Court. Again under Article 6 § 1 of the Convention, she argued that her right to a fair hearing had not been upheld on the ground that Swiss law did not provide for any judicial re-examination of the facts after the CAS award and that the Federal Court had only a very limited power of review. Lastly, relying on Article 6 § 2 of the Convention, the applicant submitted that the CAS procedure was incompatible with the principle of the presumption of innocence.

53. Having the power to decide on the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 113-15, 20 March 2018), the Court finds it more appropriate to examine all the complaints solely under Article 6 § 1 of the Convention, of which the relevant part reads as follows:

> “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

## I ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF A LACK OF INDEPENDENCE AND IMPARTIALITY OF THE CAS

### A. Admissibility

#### *1. Whether Article 6 § 1 of the Convention is applicable*

##### (a) The parties’ submissions

54. The Government submitted that Article 6 of the Convention did not apply to proceedings before the CAS. They nevertheless indicated that,

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through the Federal Court's supervision under Swiss law, the CAS did in practice implement "certain procedural principles" corresponding to "certain essential safeguards of Article 6 § 1 of the Convention", being informed by the Court's case-law. According to the Government – citing the words of the Federal Court -, this was tantamount to an "indirect" application of the Article 6 § 1 safeguards to the CAS proceedings.

55. The parties and the third-party intervener submitted a number of arguments as to the voluntary or compulsory nature of the applicants' consent to CAS jurisdiction. The Court finds that those arguments do not relate to the question of the applicability of Article 6 § 1 and it will examine them in determining whether the acceptance of CAS jurisdiction by the applicants amounted to a waiver of the safeguards prescribed by that provision (see §§ 77-123 below).

**(b) The Court's assessment**

56. The Court reiterates that Article 6 § 1 applies only to the determination of "civil rights and obligations or of any criminal charge" (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 41, Series A no. 43).

57. As regards application no. 40575/10, the Court notes that the first applicant complained about the arbitral award of 31 July 2009, which ordered him to pay damages to Chelsea Football Club. The rights in question are clearly of a pecuniary nature and stem from a contractual relationship between private persons. They are therefore "civil" rights within the meaning of Article 6 of the Convention.

58. As regards application no. 67474/10, the Court observes that it is the award of 25 November 2009, confirming the second applicant's suspension for two years, which is at issue. Here too, as this is a disciplinary procedure before the professional bodies and in the context of which the right to carry on an occupation is at stake, there is no doubt as to the "civil" nature of the rights in question (see, *mutatis mutandis*, ibid., § 48).

59. Article 6 § 1 of the Convention is therefore applicable *ratione materiae* to the disputes, forming the subject matter of the present case, to which the applicants were parties before the CAS.

*2. Whether the Court has jurisdiction* ratione personae

**(a) The parties' submissions**

60. In respect of both applicants, the Government took the view that the responsibility of Switzerland could not be engaged on account of any failure on the part of the CAS unless the "Federal Court [had] failed to cure any such defect where it had the power to do so". They added that the CAS was "underpinned by an organisation and rules that [were] fully independent of those of the State".

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61. The applicants and the third-party intervener made no comments on this question.

**(b) The Court's assessment**

62. The Government did not expressly raise the objection that the applications were incompatible *ratione personae* but nevertheless took the view that the responsibility of Switzerland could not be engaged on account of any failure on the part of the CAS unless the "Federal Court [had] failed to cure any such defect where it had the power to do so".

63. The Court would point out that, although the respondent State has not raised any objection as to its jurisdiction *ratione personae*, this question calls for consideration by the Court of its own motion (see, *mutatis mutandis*, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 27, ECHR 2009).

64. Moreover, it reiterates that the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention (see, *mutatis mutandis*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 318, ECHR 2004-VII, and *Solomou and Others v. Turkey*, no. 36832/97, § 46, 24 June 2008).

65. In the present case, the Court observes that the complaints before it mainly concern, in both applications, the composition of the CAS and the proceedings before it. The CAS is neither a domestic court nor any other institution of Swiss public law, but an entity emanating from the ICAS, a private-law foundation (see paragraph 29 above).

66. That being said, the Court notes that, in certain exhaustively enumerated circumstances, especially as regards the lawfulness of the composition of the arbitral tribunal, Swiss law confers jurisdiction on the Federal Court to examine the validity of CAS awards (sections 190 and 191 PILA). In addition, that supreme court dismissed the appeals of both applicants in the present case, thereby giving the relevant awards force of law in the Swiss legal order.

67. The impugned acts or omissions are thus capable of engaging the responsibility of the respondent State under the Convention (see, *mutatis mutandis*, *Nada v. Switzerland* [GC], no. 10593/08, §§ 120-22, ECHR 2012). It also follows that the Court has jurisdiction *ratione personae* to examine the applicants' complaints as to the acts and omissions of the CAS that were validated by the Federal Court.

*3. Whether the second applicant has exhausted domestic remedies*

68. The Government expressed the view that the second applicant's complaint of a lack of independence and impartiality on the part of the CAS should be declared inadmissible for non-exhaustion of domestic remedies

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on the ground that the applicant had not raised this complaint before the CAS and that the Federal Court had not therefore addressed this matter on the merits.

69. The second applicant made no comment on this objection.

70. The Court reiterates that it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

71. The Court would further reiterate that States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as regards complaints against a State are thus obliged to use first the remedies provided by the national legal system. It should be emphasised that the Court is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic courts (ibid., § 70).

72. As the Court has also pointed out, Article 35 § 1 requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance (see *Gäfgen v. Germany* [GC], no. 22978/05, §§ 144 and 146, ECHR 2010, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I) and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see *Vučković and Others*, cited above, § 72).

73. In the present case, the Court notes that the second applicant complained of a lack of independence and impartiality on the part of the CAS in her appeal of 7 December 2009 before the Federal Court, which, in its judgment of 10 February 2010, dismissed that complaint as inadmissible

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on the ground that she had not raised it previously before the CAS (see paragraph 23 above).

74. In this connection the Court reiterates that domestic remedies have not been exhausted when an appeal is not accepted for examination because of a procedural mistake by the applicant (see *Gäfgen*, cited above, § 143). In the present case, however, since the Federal Court, after setting out the grounds of inadmissibility, nevertheless referred, albeit briefly, to the independence and impartiality of the CAS under points 3.1.3 to 3.3 of its judgment (see paragraph 23 above), the Court takes the view that this complaint cannot be rejected for non-exhaustion of domestic remedies (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, §§ 43 and 45, ECHR 2009).

75. Consequently, the Government's objection as to admissibility must be dismissed.

*4. Conclusion as to admissibility*

76. The Court finds that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

*1. The validity of the applicants' consent to arbitration*

**(a) The parties' submissions and observations of the third-party intervener**

*(i) The Government's arguments applicable to both applications*

77. With reference to the Court's case-law, the Government submitted that the right to a court under Article 6 § 1 of the Convention was not absolute. They argued in particular that an individual could waive the exercise of certain Convention rights in favour of arbitration, in order to settle a dispute as to civil rights and obligations, provided that such waiver was free, lawful and unequivocal. They added that rights could not be waived under duress and that arbitration could not be imposed by law.

78. As regards the specific case of the CAS, the Government took the view that recourse to arbitration was in the interest not only of the sports organisations but also of the athletes, members of those organisations, whose rules and regulations they could in fact influence. It was important that sports-related disputes, in particular those with an international dimension, could be referred to a specialised body which would be able to give a ruling swiftly, inexpensively and, if necessary, confidentially, while upholding the procedural safeguards listed under section 190(2) of the PILA. In view of the dimension of international sports events, it would not

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be acceptable for the question of arbitration to be negotiated individually with each of the participants in such events. The Government explained that those events were organised in different countries by organisations whose seats were situated in various States and that they were open to athletes from all over the world. In their view, if it were impossible to validly adopt any uniform solution to settle disputes stemming from such events, serious problems would arise for all those concerned and legal certainty would be severely undermined.

79. Lastly, in the Government's submission, the CAS might be tempted to relocate its seat to a country that is not a member of the Council of Europe for the purpose of removing all the relevant disputes from the Court's purview.

*(ii) Application no. 40575/10*

(α) The parties' submissions

80. The Government pointed out that the first applicant was not calling into question the arbitration procedure in general and did not allege that he had been forced into accepting that procedure under duress. They thus concluded that he had to be regarded as having voluntarily waived some of the safeguards provided for under Article 6 of the Convention. In addition, they observed that the first applicant had agreed, in his contract of employment, to abide by the 2001 Regulations, which did not provide for compulsory recourse to arbitration since, under Article 42, it was stated that the arbitration system was to be established "[w]ithout prejudice to the right of any player or club to seek redress before a civil court ..." The Government thus contended that, through the effect of that provision, the applicant could have, from the outset, challenged Chelsea's decision to terminate his contract before an English court.

81. The first applicant, for his part, referring to texts of legal analysis in support of his arguments, submitted that contracts of employment of professional football players should be regarded as standard-form contracts imposed by the stronger party, as the players would not have a strong enough negotiating position in order to demand that the clubs and federations remove the arbitration clauses. First, all of Chelsea's players were obliged to accept the arbitration clause in their contracts and, secondly, this was common practice in professional football.

His adherence to the arbitration clause had not therefore been freely agreed by him and had stemmed from a systematic practice in the world of football. For the same reasons, the possibility for a football player to bring a dispute with his club before a national court on the basis of Article 42 of the 2001 Regulations, as mentioned by the Government, was merely notional.

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(β) Observations of the third-party intervener

82. Like the Government, the third-party intervener submitted that the first applicant had freely opted for arbitration, by accepting, on 26 January 2005, the jurisdiction of the FAPLAC and therefore that of the CAS. He had thus voluntarily waived the Convention safeguards in accordance with the Court's case-law.

In this connection the third-party intervener cited the case of *Suovaniemi and Others v. Finland* ((dec.), no. 31737/96, 23 February 1999), observing that, in that case, the Court had accepted that an individual could validly waive the right to have his case examined by an impartial arbitral tribunal in so far as domestic law afforded sufficient protection.

83. The third-party intervener also stated that the 2001 Regulations did not render arbitration compulsory in view of the possibility under Article 42 for any football player to take a dispute with his club to a national court.

*(iii) Application no. 67474/10*

84. The Government observed that the second applicant had signed a statement in which she expressly accepted the application of the ISU Regulations establishing the authority of the Disciplinary Commission of that federation, together with the jurisdiction of the CAS as an appellate body. In their view, she had therefore, by signing an explicit document, voluntarily given her consent to arbitration.

85. The Government added that, while it was true that the applicable regulations obliged the applicant to consent to arbitration in order for her to be able to compete in ISU events, she had not disputed that obligation on signing the statement. Nor had she gone before a national court to challenge the imposition of an arbitration clause as a prerequisite to her participation in a sports competition, even though she would have been entitled to do so. Similarly, as an athlete having participated in numerous international competitions, she could also have relied on her renown in order to oppose the arbitration clause.

86. The Government further contended that any inequality between the parties, stemming from their respective capacities as participant in a sports competition and organiser of that competition, could not have the effect of invalidating an arbitration clause. If that were so, it would call into question all arbitration clauses and contract law as a whole.

87. The Government concluded that the arbitration clause, as accepted by the applicant, could not be regarded as having been signed under duress. In this connection, even though the Federal Court, in its case-law on sports arbitration (judgment of 22 March 2007, ATF 133 III 235; paragraph 42 above), took the view that professional athletes had no choice other than to accept the arbitration clauses imposed by the federations, that would be problematic only where the arbitral decisions could not be appealed against.

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88. Referring to the Court's case-law, the second applicant indicated that, while it was true that a person could waive certain Convention rights in favour of arbitration, the safeguards provided for under Article 6 § 1 of the Convention would be applicable in a situation where recourse to arbitration was not freely accepted.

89. She argued that the sports federations took advantage of their dominant position to oblige high-level athletes to accept recourse to CAS arbitration, otherwise those athletes would not be able to participate in competitions, in particular during the Olympic Games. The Government's suggestion that an athlete could refuse the arbitration clause and go to a national court was illusory. She added that, even assuming that a national court would rule on the matter within a time-limit that was compatible with participation in the sports event concerned, its decision could only be enforced in the State in question, whereas international competitions tended to take place in a whole range of States.

90. The second applicant pointed out that even the Federal Court, in its case-law on sports arbitration, had taken the view that professional athletes had no choice other than to accept the arbitration clause. By way of example she cited its judgment of 22 March 2007 (ATF 133 III 235; see paragraph 42 above).

91. The second applicant, claiming to have accepted the arbitration clause under duress, thus submitted that the safeguards provided for under Article 6 § 1 of the Convention were applicable as a whole to the proceedings concerning her before the CAS.

**(b) The Court's assessment**

*(i) General principles*

92. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 84, 29 November 2016, and *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18).

93. The right of access to a court, as secured by Article 6 § 1, is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. The final decision as to observance of the Convention's requirements rests with the Court, which must be persuaded that the limitations applied do not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is

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impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Lupeni Greek Catholic Parish and Others*, cited above, § 89; *Eiffage S.A. and Others v. Switzerland* (dec.), no. 1742/05, 15 September 2009; *Osman v. the United Kingdom*, 28 October 1998, § 147, *Reports of Judgments and Decisions* 1998-VIII; and *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I).

94. This access to a court is not necessarily to be understood as access to a court of law of the classic kind, integrated within the standard judicial machinery of the country; thus, the "tribunal" may be a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees (see *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 201, Series A no. 102). Article 6 does not therefore preclude the establishment of arbitral tribunals in order to settle certain pecuniary disputes between individuals (see *Suda v. Czech Republic,* no. 1643/06, § 48, 28 October 2010). Arbitration clauses, which have undeniable advantages for the individual concerned as well as for the administration of justice, do not in principle offend against the Convention (see *Tabbane v. Switzerland* (dec.), no. 41069/12, § 25, 1 March 2016).

95. In addition, a distinction must be drawn between voluntary arbitration and compulsory arbitration. If arbitration is compulsory, in the sense of being required by law, the parties have no option but to refer their dispute to an arbitral tribunal, which must afford the safeguards secured by Article 6 § 1 of the Convention (see *Suda*, cited above, § 49).

96. However, in the case of voluntary arbitration to which consent has been freely given, no real issue arises under Article 6. The parties to a dispute are free to take certain disagreements arising under a contract to a body other than an ordinary court of law. By signing an arbitration clause the parties voluntarily waive certain rights secured by the Convention. Such a waiver is not incompatible with the Convention provided it is established in a free, lawful and unequivocal manner (see *Eiffage S.A. and Others*, cited above; *Suda*, cited above, § 48; *R. v. Switzerland*, no. 10881/84, Commission decision of 4 March 1987, Decisions and Reports (DR) no. 51; *Suovaniemi and Others*, cited above; *Transportes Fluviais do Sado S.A. v. Portugal* (dec.), no. 35943/02, 16 December 2003; and *Tabbane*, cited above, § 27). In addition, in the case of certain Convention rights, a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance (see *Pfeifer and Plankl v. Austria*, 25 February 1992, § 37, Series A no. 227, and *Tabbane*, cited above, § 27).

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*(ii) Application of these principles to the present case*

(α) Considerations relevant to both applications

97. At the outset the Court would point out that, as it has previously found, the PILA reflected a choice of legislative policy which addressed the wish of the Swiss legislature to increase the attractiveness and effectiveness of international arbitration in Switzerland (see *Tabbane*, cited above, § 33) and the development of Switzerland's position as a venue for arbitration could be regarded as a legitimate aim (ibid., § 36).

98. In the specific case of sports arbitration, the Court takes the view that it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which is able to give a ruling swiftly and inexpensively. High-level international sports events are held in various countries by organisations based in different States, and they are open to athletes from all over the world. Recourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal may be appealed against before the supreme court of a single country, in this case the Swiss Federal Court, whose ruling is final.

On that point the Court thus agrees with the Government and acknowledges that a non-State mechanism of conflict resolution at first and/or second instance, with the possibility of appeal, albeit limited, before a State court at last instance, could be an appropriate solution in this field.

99. However, as regards the risk, mentioned by the Government, that the CAS might be tempted to relocate its seat to a State which is not a member of the Council of Europe in order to remove all the relevant disputes from the Court's purview (see paragraph 79 above), the Court cannot comment on such a possibility in the abstract. If such an eventuality arose, it would be the Court's task to decide on each individual case when examining applications that have been lodged with it following decisions by the ordinary courts of the States Parties to the Convention to enforce CAS awards in the respective legal orders of those States.

100. In the present case, the question to be addressed by the Court is whether the applicants' acceptance of CAS jurisdiction, in their two different situations, constituted a waiver of the safeguards under Article 6 § 1 of the Convention on which they relied in their respective applications. In the case of the first applicant, the issue was the independence and impartiality of two of the arbitrators on the arbitral panel which gave the award of 31 July 2009. In the case of the second applicant, it was the independence and objective impartiality of the CAS on account of the manner of the arbitrators' appointment.

101. That question is based on the assumption that consent to CAS jurisdiction would amount to an implicit waiver of the application of all or

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part of the safeguards provided for by Article 6 § 1 of the Convention which are normally applicable to disputes before national courts. The Government argued that it was through the effect of general principles of a procedural nature, acknowledged by the Federal Court, that Article 6 became "indirectly" applicable to proceedings before the CAS (see paragraph 54 above).

102. Consequently, at the time when they took the decision whether or not to give their consent to CAS jurisdiction, and even supposing that they had access to appropriate legal advice, the applicants could at best have hoped that, by giving that consent, they would have enjoyed an "indirect" application of Article 6 § 1. Such a hypothesis, moreover, left open the question of their respective rights to an individual remedy before this Court, in the event that the CAS and/or the Federal Court, in their "indirect" application of Article 6 § 1, misinterpreted the principles developed by the Court's case-law.

103. The Court will thus proceed from the assumption, in respect of both applications, that acceptance of the arbitration clause could constitute a waiver of all or part of the Article 6 § 1 safeguards. It must therefore determine whether that acceptance was the result of a "free, lawful and unequivocal" choice, within the meaning of its case-law. To that end the Court finds it appropriate to compare the situations now before it with cases of commercial arbitration that it has previously adjudicated.

104. In the case of *Tabbane*, cited above, the applicant was a Tunisian businessman who had commercial relations with the company Colgate. The Court took the view that by entering into an arbitration agreement the applicant had expressly and freely waived the possibility of submitting potential disputes to an ordinary court, which would have afforded him all the safeguards under Article 6 of the Convention. Moreover, there was no indication that the applicant had signed the arbitration agreement under duress, nor had that been claimed by the applicant.

105. In the case of *Eiffage S.A. and Others*, cited above, the applicants, a group of civil engineering companies, had complained about an arbitration clause in a contract they had signed with CERN (the European Council for Nuclear Research) after responding to a call for tender. The Court took the view that the applicant companies had freely decided to enter into an agreement with CERN and to accept the general terms and conditions, which provided for arbitration as an exclusive means of settling disputes.

106. In the case of *Transportes Fluviais do Sado S.A.*, cited above, the applicant company had entered into a concession agreement with a public authority. The Court noted that it was the applicant itself which had, in agreement with the authority, decided to exclude from the jurisdiction of the ordinary courts certain disputes which could arise from the performance of the agreement. The Court pointed out, moreover, that such arbitration clauses were common in that type of contract.

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107. The Court would emphasise that, in those three cases, the applicants – a businessman and commercial companies – had been free to establish commercial relations with the partners of their choosing without affecting their freedom and capacity to engage, with other partners, in projects within their respective fields of activity. For example, it is difficult to believe that the company Eiffage, which is very active in the sector of civil engineering but also in that of private housing, would be obliged to accept arbitration clauses in order to exist as a construction company. For a company of that kind, a decision to renounce one or more public procurement contracts comprising an arbitration clause could have repercussions in terms of its turnover but probably not in terms of its capacity to thrive in the construction business.

108. In the present case, the two applicants are high-level athletes who earn their living by competing in their respective sports on a professional level. Their respective situations are not comparable to those described above.

The Court will now examine them separately, starting with that of the second applicant.

(β) Application no. 67474/10

109. The Court would first observe that the applicable rules of the ISU provided for the compulsory jurisdiction of the CAS in respect of disputes stemming, as in the present case, from disciplinary proceedings (see paragraph 50 above).

110. It further notes that the Government did not dispute the fact that the applicable rules obliged the second applicant to accept the arbitration agreement in order to take part in competitions organised by the ISU (see paragraph 85 above).

111. It points out, moreover, that the Federal Court itself has, in its case-law on the CAS, admitted as follows (see paragraph 42 above):

> "an athlete wishing to take part in a competition organised under the auspices of a sports federation whose regulations prescribe arbitration would have no choice other than to accept the arbitration clause, in particular by signing up to the instrument of the sports federation in question in which the clause is to be found, all the more so in the case of a professional. He or she will be confronted with the following dilemma: to agree to arbitration or practise his or her sport in a non-professional context."

112. The Court also observes that the European Commission has suspected the ISU of holding a dominant position in the organisation of speed-skating competitions (see paragraph 47 above).

113. In the present case, the Court takes the view that the choice before the second applicant had not been whether to take part in one competition rather than another, depending on whether or not she had accepted the arbitration clause. Unlike the choices before the applicants in the *Tabbane*, *Eiffage S.A. and Others*, and *Transportes Fluviais do Sado S.A.* cases (all

cited above) – which had been in a position to enter into an agreement with one commercial partner rather than another –, the only choice in the second applicant's case was between accepting the arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level.

114. Having regard to the restriction that non-acceptance of the arbitration clause would have entailed for her professional life, it cannot be asserted that she had accepted that clause freely and unequivocally.

115. The Court thus concludes that, even though it had not been imposed by law but by the ISU regulations, the acceptance of CAS jurisdiction by the second applicant must be regarded as "compulsory" arbitration within the meaning of its case-law (contrast *Tabbane*, cited above, § 29). The arbitration proceedings therefore had to afford the safeguards secured by Article 6 § 1 of the Convention (see paragraph 95 above).

(γ) Application no. 40575/10

116. As regards the first applicant, the Court notes that, while Article 42 of the 2001 Regulations, with which he had to comply in order to play for a professional football club, certainly provided for recourse to arbitration, the system permitting such recourse was to be established "[w]ithout prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players" (see under "Relevant FIFA rules" above).

The first applicant's situation is therefore different from that of the second applicant, since the applicable rules of the sports federation concerned did not impose arbitration but left the choice of dispute settlement mechanism to the contractual freedom of clubs and players.

117. The first applicant argued that, on account of a disparity as to the power of contractual negotiation between himself and Chelsea, and between the players and football clubs in general, his acceptance of the arbitration clause was not genuinely free. He alleged that all of Chelsea's players were obliged to accept the arbitration clause in their contracts and, furthermore, that this kind of practice was commonplace in the world of professional football, where players did not, in his view, have a sufficient negotiating strength to object to its inclusion.

118. Moreover, the applicant took the view that, for the same reasons, the possibility for a football player to bring a dispute between him and his club before a national court under Article 42 of the 2001 Regulations, as relied upon by the Government, was merely notional (see paragraph 81 above).

119. The Court is able to accept that a major football club with considerable financial resources may have a greater negotiating strength than an individual player, even a famous one. That being said, not only has

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the first applicant failed to adduce evidence that all Chelsea players were obliged to give their consent to the arbitration clause, he has also failed to show that other professional football clubs, which perhaps have more modest financial means, would have refused to hire him on the basis of a contract providing for dispute settlement in the ordinary courts. Furthermore, he has not proven that it was impossible for him to rely on Article 42 of the 2001 Regulations, which allowed him to take his dispute to a national court.

120. Unlike the second applicant, the first applicant has not therefore shown that he was faced with a binary choice between accepting the arbitration clause and earning his living by practising his sport at professional level, on the one hand, or not accepting it and completely abandoning the idea of competing at that level, on the other. The Court thus finds no reason to suggest that "compulsory" arbitration is at issue in the first applicant's case (see *Tabbane*, cited above, § 29).

121. It remains to be ascertained whether the applicant's choice was "unequivocal" or in other words if, when opting, even freely, for CAS jurisdiction instead of that of a national court, the applicant knowingly waived his right to have his dispute with Chelsea settled by an independent and impartial tribunal. In this connection, the Court would refer to its decision in *Suovaniemi and Others* (cited above), where it took the view that the applicants' choice to have recourse to arbitration had not only been voluntary, because they had freely accepted the arbitration agreement, but also "unequivocal", because they had not sought the withdrawal, during the arbitral proceedings, of the arbitrator whose independence and impartiality they were challenging.

122. In the present case, the Court notes that, on 22 September 2008, relying on Article R34 of the Code of Arbitration, the applicant brought a challenge against the arbitrator appointed by Chelsea, Mr D.-R. M., whose independence and impartiality he was disputing (see paragraph 15 above). Consequently, unlike the decision reached in *Suovaniemi and Others* (cited above), it cannot be considered that, by accepting the arbitration clause in his contract and by choosing to take his case to the CAS – and not to a national court, as authorised by Article 42 of the 2001 Rules –, the applicant had "unequivocally" waived his right to challenge the independence and impartiality of the CAS in any dispute that might arise between him and Chelsea.

123. Consequently, in the case of the first applicant likewise, the arbitration proceedings had to afford the safeguards provided for under Article 6 § 1 of the Convention (see paragraph 95 above).

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### *2. Independence and impartiality of the CAS*

#### (a) The parties' submissions and the observations of the third-party intervener

##### *(i) Application no. 67474/10*

###### (α) The second applicant's submissions

124. The second applicant submitted that the CAS was neither independent nor impartial. She stated that, according to the procedural rules applicable to the CAS, the two parties to a dispute could each appoint an arbitrator of their choosing, but that they had no influence on the appointment of the third arbitrator as president of the arbitral panel, who was in fact appointed by the CAS court office, and in particular by its Secretary General. The CAS was financed by the sports federations and, consequently, this appointment system meant that the arbitrators chosen by the CAS court office were inclined to favour the federations. Moreover, the president of the panel who ruled on her case had been biased against athletes accused of doping, because he had previously always refused to be appointed as an arbitrator by athletes accused of doping, always preferring to represent the federations.

125. The applicant further stated that the arbitrators had to be chosen from among those on the list drawn up by the ICAS, the vast majority of whose members would be appointed by the federations. She took the view that the composition of that list did not therefore guarantee a balanced representation of the interests of athletes in relation to those of the federations. Moreover, the obligation for the parties to choose their respective arbitrators from this list showed that the CAS did not constitute a genuine arbitral tribunal, since in her view the parties to traditional arbitration could choose their arbitrators freely.

126. In addition, the applicant observed that, under Article R59 of the Code of Arbitration, the arbitral award was submitted, before being signed, to the Secretary General of the CAS, who was entitled to make rectifications of pure form but also to draw the attention of the panel to fundamental issues of principle, while not having sat as an arbitrator (see paragraph 23 above). She alleged that this further illustrated the lack of independence and impartiality on the part of the CAS, in view of the appointment of the CAS Secretary General by the ICAS and the alleged domination of the latter by the federations. As to her own case, the applicant was convinced that the CAS Secretary General had exerted real influence on the arbitral award, since its delivery had been delayed several times in relation to the scheduled dates.

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(β) The Government's submissions

127. The Government disputed the applicant's position on the appointment of the president of the arbitral panel. They stated that, under Article R54 of the Code of Arbitration, the president of the panel was appointed by the President of the CAS Appeals Arbitration Division after consultation with the arbitrators appointed by the parties. In their view, the CAS Secretary General played no role in this connection, even though the letter informing the parties of the appointment was signed by a member of the CAS court office.

The Government added that, in practice, if the parties agreed on the name of the president of the panel, the President of the Appeals Division generally followed their choice.

128. With regard to the independence and impartiality of the president of the panel who ruled on the second applicant's case, and who, according to her, had refused to sit as an arbitrator in similar cases and had thus shown bias against athletes accused of doping, the Government replied that she had not brought a challenge against that arbitrator, even though she was entitled to do so under Article R34 of the Code of Arbitration. They further stated that, before the Federal Court, the applicant had put forward another argument relating to previous statements allegedly made by that arbitrator regarding his adoption of a "hard line" against doping.

129. With regard to the choice of arbitrators from the CAS list, the Government acknowledged that the list was mandatory for the parties. They argued nevertheless that, first, the list was regularly updated and, secondly, the fact that the arbitrators were selected by the ICAS did not mean that they were favourable to the federations, since the ICAS itself had a balanced composition. The biographies of the ICAS members showed that they came not only from the world of sport but from legal circles and from international arbitration.

130. As to financing of the CAS, which, according to the second applicant, was another aspect of its dependence on the federations, the Government stated that approximately 60% of the ICAS budget was paid by "the various entities of the Olympic Movement", the remaining 40% being paid by CAS users through arbitration fees. The purpose of the contribution paid by the Olympic Movement was to enable all athletes wishing to challenge a disciplinary decision to benefit from the free services of the CAS and its court office, as had been the case for the second applicant.

The Government further observed that national courts were always funded by States and that the Court itself was funded by Council of Europe member States. In their view, this did not imply a lack of impartiality in disputes involving those States.

131. With regard to the role of the CAS General Secretary, the Government submitted that, under Articles R46 and R59 of the Code of Arbitration, before the arbitral award was signed, the CAS General

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Secretary could make rectifications of pure form and draw the attention of the panel to fundamental issues of principle, in particular where the award departed from CAS case-law. However, the members of the panel remained free to choose whether or not to take into account the Secretary General's comments. This was a common practice in arbitration, as evidenced by Article 31 of the ICC Rules.

Moreover, in the Government's submission, the second applicant's allegations that the CAS General Secretary had influenced the award concerning her were not substantiated and the three-day delay in the delivery of the award, to which she had pointed, could be explained by a request for an extension made by the panel itself.

*(ii) Application no. 40575/10*

(α) The parties' submissions

132. The Government indicated at the outset that, in his application, the first applicant had merely referred to his civil-law appeal in the Federal Court on 14 September 2009, without alleging a possible violation of Article 6 § 1 of the Convention or calling into question the Federal Court's findings.

133. The Government further stated that section 190 of the PILA, as interpreted by the Federal Court (ATF 118 II 359 point 3b), encompassed a failure to comply with the rule that an arbitral tribunal must offer sufficient guarantees of independence and impartiality. They also referred to the case-law of the Federal Court to the effect that the CAS constituted a genuine arbitral tribunal which upheld the necessary guarantees of independence and impartiality and whose awards were comparable to the judgments of a national court (see for example, ATF 129 III 445, point 3.3.4), and observed that this case-law had been reiterated by the Federal Court in its judgment of 10 June 2010 rejecting the applicant's appeal. Similarly, the procedural public policy laid down in section 190(2)(a) of the PILA guaranteed the parties the right to an independent judgment on the submissions and statement of facts before the court in a manner consistent with the applicable procedure. There would be a breach of that procedural public policy "where fundamental and widely recognised principles ha[d] been contravened, leading to an intolerable contradiction with the sense of justice, such that the contradiction appear[ed] incompatible with the values recognised in a State governed by the rule of law". The Government asserted that the requirement of independence and impartiality of a court was one of the fundamental principles of the Swiss conception of procedural law, as referred to in section 27(2)(b) of the PILA.

134. With regard to the president of the CAS panel which made the award of 31 July 2009 – an arbitrator who, according to the applicant, was a partner in a law firm representing the interests of the owner of Chelsea

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Football Club – the Government pointed out that the applicant himself had claimed to be unable to provide evidence of this situation, which had in fact been refuted in a detailed manner by the person concerned, and the Federal Court had therefore been wise not to follow the applicant on this point.

135. With regard to Mr D.-R. M., the Government referred to the Federal Court's finding (see paragraph 17 above) that the fact that the president of the arbitral panel which had made the award of 31 July 2009 had already sat on the panel which had made the award of 15 December 2005 was not such as to cast doubt on the objective assessment of his independence and impartiality, given the limited remit of the panel making the first award and the fact that there had been a "series of three awards in the same case", "the first two of which were of a preliminary nature in relation to the third".

136. For his part, the first applicant referred to the arguments developed in his appeal before the Federal Court (see paragraph 16 above).

(β) Comments of the third-party intervener

137. The third-party intervener argued that the system introduced by Swiss law, through the scrutiny of the Federal Court, guaranteed sufficient protection for the independence and impartiality of CAS panels.

In addition, the third-party intervener, agreeing with the Federal Court, took the view: first, that the arbitrator D.-R. M. had at no point in the proceedings displayed any bias; and secondly, that the three arbitral awards had to be regarded as forming part of the same case, which could have been heard by a single panel, and that therefore it had been legitimate for the same arbitrator to have sat on two of the panels in question; lastly, that the applicant's allegations about the independence and impartiality of arbitrator L. F. were not substantiated.

**(b) The Court's assessment**

*(i) General principles*

138. The Court reiterates that under Article 6 § 1 a "tribunal" must always be "established by law". This expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols. An organ which has not been established in accordance with the will of the legislature would necessary lack the legitimacy required in a democratic society to hear the cases of individuals. The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case (see *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002). The "law" referred to in this provision is therefore not only the legislation on the establishment and competence of judicial organs, but also any other provision of domestic law of which any breach would cause the

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participation of one or more judges in the examination of the case to be unlawful.

139. The Court further reiterates that an authority which is not classified as one of the courts of the State may, for the purposes of Article 6 § 1, fall within the concept of a "tribunal" in the substantive sense of this expression (see *Sramek v. Austria*, no. 8790/79, § 36, 22 October 1984). A court or tribunal is characterised in that substantive sense by its judicial function, that is to say determining matters within its competence on the basis of legal rules, with full jurisdiction and after proceedings conducted in a prescribed manner (see ibid., and *Cyprus v. Turkey* [GC], no. 25781/94, § 233, ECHR 2001-IV). A power of decision is inherent in the very notion of "tribunal". The procedure before it must ensure the "determination of the matters in dispute" as required by Article 6 § 1 (see *Benthem v. the Netherlands*, 23 October 1985, § 40, Series A no. 97). For the purposes of Article 6 § 1, a tribunal need not be a court of law integrated within the standard judicial machinery. It may be set up to deal with specific subject matter which can be appropriately administered outside the ordinary court system (see *Rolf Gustafson v. Sweden*, 1 July 1997, § 45, *Reports* 1997-IV). In addition, only an institution that has full jurisdiction and satisfies a number of requirements, such as independence from the executive and also from the parties, merits the designation "tribunal" within the meaning of Article 6 § 1 (see *Beaumartin v. France*, 24 November 1994, § 38, Series A no. 296-B, and *Di Giovanni v. Italy*, no. 51160/06, § 52, 9 July 2013).

140. In order to establish whether a tribunal can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence (see *Findlay v. United Kingdom*, 25 February 1997, § 73, *Reports* 1997-I, and *Brudnicka and Others v. Poland*, no. 54723/00, § 38, ECHR 2005-II).

141. Impartiality normally denotes the absence of prejudice or bias. According to the Court's settled case-law, for the purposes of Article 6 § 1 the existence of impartiality must be determined according to a subjective test, that is on the basis of the personal conviction and conduct of a particular judge, by ascertaining whether he showed any personal prejudice or partiality in a given case, and also according to an objective test, that is, whether the court offered, in particular through its composition, guarantees sufficient to exclude any legitimate doubt about his impartiality (see, among other authorities, *Fey v. Austria*, 24 February 1993, §§ 27-28 and 30, Series A no. 255-A, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000‑XII).

142. There is no watertight division between subjective and objective impartiality, since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external

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observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005‑XIII). Thus in cases where it may be difficult to procure evidence with which to rebut the presumption of a judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports* 1996-III).

143. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 106, ECHR 2013, and *Morice v. France* [GC], no. 29369/10, § 78, ECHR 2015).

144. Lastly, the concepts of independence and objective impartiality are closely linked and, depending on the circumstances, the Court may consider both issues together (see *Sacilor-Lormines v. France*, no. 65411/01, § 62, ECHR 2006‑XIII).

*(ii) Application of those principles to the present case*

145. As the Court has already observed (see paragraphs 91-94 above), Article 6 of the Convention does not prevent arbitral tribunals from being set up in order to settle certain disputes of a pecuniary nature between individuals (see *Suda,* cited above, § 48). Arbitration clauses in contracts are of undeniable interest both for the individual parties and for the administration of justice (see *Tabbane*, cited above, § 25). Parties to a dispute may waive certain rights guaranteed by Article 6 § 1 in so far as that waiver is expressed freely, lawfully and unequivocally. Otherwise the arbitral tribunal must provide the safeguards required by Article 6 § 1 of the Convention (see *Suda*, cited above, § 49).

146. The Court accepts that in matters of commercial and sports arbitration to which consent has been given freely, lawfully and unequivocally, the notions of independence and impartiality may be construed flexibly, in so far as the very essence of the arbitration system is based on the appointment of the decision-making bodies, or at least part of them, by the parties to the dispute.

147. In the present case, however, the Court has found that the waiver by the second applicant of the rights under Article 6 § 1 had not been free and "unequivocal" (see paragraph 114 above), that the waiver by the first applicant had not been "unequivocal" (see paragraph 122 above) and that, consequently, the arbitration proceedings concerning the applicants should have afforded all the safeguards of Article 6 § 1.

148. The Court must therefore ascertain whether the CAS could be regarded as an "independent and impartial tribunal established by law" within the meaning of that Article and the principles laid down in

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paragraphs 138 to 144 above, at the time when it adjudicated the applicants' respective cases.

149. It observes in that connection that, even though the CAS was the emanation of a private-law foundation (contrast *Suda*, cited above, § 53), 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 (see *Cyprus v. Turkey*, cited above, § 233, and *Sramek*, cited above, § 36). 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" (see paragraph 23 above).

At the time when it adjudicated the applicants' respective cases, by the combined effect of the PILA and the Federal Court's case-law, the CAS thus had the appearance of a "tribunal established by law" within the meaning of Article 6 § 1, and this point was not in fact expressly disputed by the applicants. It remains to be ascertained whether it could be regarded as "independent" and "impartial" within the meaning of that provision.

(α) Application no. 67474/10

150. The second applicant began by arguing that the president of the arbitral panel which decided her case had previously always refused to be appointed as an arbitrator by any athlete accused of doping and had preferred to represent the sports federations. She inferred that this arbitrator was biased against athletes accused of doping and therefore that he lacked impartiality.

The Court notes that, before the Federal Court, the applicant had used another argument in seeking to demonstrate a lack of impartiality on the part of the president of the arbitral panel. She had argued that, in the past, he had represented the "hard line" in the fight against doping (see paragraph 23 above).

In any event, like the Federal Court, the Court does not see any factual element that could cast doubt on the independence or impartiality of the arbitrator in question. The applicant's allegations are too vague and hypothetical and must therefore be rejected.

151. As regards the financing of the CAS by sports bodies, the Court notes, like the Government (see paragraph 130 above), that national courts are always financed by the State budget and yet this fact does not imply that those courts lack independence and impartiality in disputes between litigants and the State. By analogy, the CAS cannot be said to lack independence and impartiality solely on account of its financing arrangements.

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152. The Court further notes the applicant's position that the CAS cannot be regarded as an independent and impartial tribunal on account of a structural problem stemming from an imbalance between federations and athletes in the mechanism for appointing arbitrators.

153. The Court would point out that at the relevant time, in accordance with Article S14 of the Code of Arbitration, the list of CAS arbitrators was established by the ICAS and was to be composed as follows: three fifths of arbitrators selected from among the persons proposed by the IOC, IFs and NOCs, chosen from within their membership or outside; one fifth of arbitrators chosen by the ICAS "after appropriate consultations, with a view to safeguarding the interests of the athletes"; and one fifth of arbitrators chosen, again by the ICAS, from among "persons independent" of the above-mentioned bodies (paragraph 33 above). The ICAS was therefore only required to choose one-fifth of the arbitrators from among persons independent of the sports bodies which could be involved in disputes with athletes before the CAS. The Court further notes that this mechanism of appointment by fifths was abolished in 2012 and replaced by a more general wording (see paragraph 38 above).

154. In addition, the Court notes that even the appointment of one-fifth of arbitrators who were independent of sports bodies was at the discretion of the ICAS. Moreover, the ICAS itself was composed entirely of figures from those bodies (see paragraph 32 above), thus revealing the existence of a certain link between the ICAS and organisations that might be involved in disputes with athletes before the CAS, especially those of a disciplinary nature.

155. Furthermore, first, the arbitrators were appointed for a renewable term of four years, without any limitation on the number of terms of office, and secondly, the ICAS had the power to remove, by a decision with "brief reasons" under Article R35 of the Code of Arbitration, any arbitrator who refused to perform or was prevented from performing his duties, or who failed to fulfil his duties pursuant to that Code (contrast *Di Giovanni*, cited above, § 57, and see, *mutatis mutandis*, *Luka v. Romania*, no. 34197/02, § 44, 21 July 2009).

156. In the present case, the arbitral panel which ruled on the dispute between the second applicant and the ISU was made up of three arbitrators, all chosen from the list drawn up by the ICAS, in accordance with the procedures described above, and subject to the ICAS' power of removal. Even the applicant's ability to appoint the arbitrator of her choosing was limited by the obligation to use this list (see Articles R33, R38 and R39 of the Code of Arbitration), such that the applicant did not have full freedom of choice – whereas such freedom is the rule, for example, in commercial arbitration, under Article 12 of the ICC Rules.

157. That being said, the Court notes that the list of arbitrators drawn up by the ICAS included, at the relevant time, some 300 arbitrators (see

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paragraph 37 above), yet the applicant did not submit any factual evidence such as to cast any general doubt on the independence and impartiality of these arbitrators. Even with regard to the arbitral panel which ruled on her case, the applicant only actually impugned one arbitrator, namely the president of the panel, without substantiating her allegations (see paragraph 150 above).

While the Court is prepared to acknowledge that the organisations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators, as applicable at the relevant time, it cannot conclude that, solely on account of this influence, the list of arbitrators, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial, on an individual basis, whether objectively or subjectively, *vis-à-vis* those organisations.

In the Court's view, therefore, there are insufficient grounds for it to reject the settled case-law of the Federal Court to the effect that the system of the list of arbitrators meets the constitutional requirements of independence and impartiality applicable to arbitral tribunals, and that the CAS, when operating as an appellate body external to international federations, is similar to a judicial authority independent of the parties (see paragraph 44 above).

158. As regards the power of the CAS Secretary General to make formal rectifications to the arbitral award and to draw the attention of the arbitral panel, after the deliberations, to issues of principle, which, according to the applicant, further illustrates the lack of independence and impartiality of the CAS *vis-à-vis* the sports bodies, the Court notes that the applicant has not provided evidence to show that the award of 25 November 2009 was amended by the intervention of the Secretary General, still less in a manner which was unfavourable to her.

The Court therefore sees no reason to disagree with the findings of the Federal Court, which, in its judgment of 10 February 2010, held that these allegations were pure speculation not based on any established fact (see paragraph 23 above).

159. Having regard to the foregoing, the Court finds that there has been no violation of Article 6 § 1 of the Convention on account of an alleged lack of independence and impartiality on the part of the CAS.

(β) Application no. 40575/10

160. The Court observes that the first applicant's situation was different from that of the second applicant. The first applicant had freely chosen to use the CAS rather than a national court, whereas, unlike the second applicant, he could have opted for the latter (see §§ 116-123 above). Secondly, he did not complain of a lack of independence and impartiality on the part of the CAS on account of a structural problem related to the

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mechanism for the appointment of arbitrators. He complained solely of a lack of independence and impartiality on an individual basis, on the part of two arbitrators on the arbitral panel which made the award of 31 July 2009.

- *Whether the arbitrator D.-R. M. was independent and impartial*

161. The question arising is whether the fact that Mr D.-R. M. had already sat on the panel which made the award of 15 December 2005 had legitimately entailed a fear of bias on his part as regards the award of 31 July 2009.

162. In order to ascertain whether there was a legitimate reason to cast doubt on the impartiality of this arbitrator, the essential point is whether the questions that he had addressed in the award of 31 July 2009 were similar to those on which he had to rule in the award of 15 December 2005 (see, *mutatis mutandis*, *Morel v. France*, no. 34130/96, § 47, ECHR 2000-VI). For there to have been bias, it would be necessary to find that the arbitrator in question successively dealt with identical facts and that he had to answer the same question or, at least, that the difference between the questions that he had to address was tenuous (see, *mutatis mutandis*, *Liga Portuguesa de Futebol Profissional v. Portugal*, no. 4687/11, § 69, 17 May 2016).

163. The Court notes that the question settled by the first award concerned the interpretation of the words "unilateral breach" in Article 21 of the 2001 Regulations, and the question in the award of 31 July 2009 was, by contrast, related to the correct application of Article 22 of the 2001 Regulations by the DRC in its decision of 7 May 2008 concerning the compensation that the first applicant was supposed to pay to Chelsea.

164. Consequently, as the Federal Court rightly noted, even though the facts that gave rise to the case were the same, the legal questions settled by the two arbitral panels were clearly different, the first concerning the applicant's contractual liability and the second concerning the amount of damages to be paid to the aggrieved party.

165. Accordingly, the Court finds that there was no violation of Article 6 § 1 of the Convention on account of an alleged lack of impartiality on the part of the arbitrator D.-R. M.

- *Whether the arbitrator L. F. was independent and impartial*

166. In the first applicant's view, the arbitrator L. F. was a partner in a law firm representing the interests of the owner of Chelsea Football Club and could not therefore be regarded as independent and impartial *vis-à-vis* that club.

167. The Court notes that, in a judgment with lengthy reasoning and not revealing any sign of arbitrariness, the Federal Court found that the first applicant had not adduced any evidence in support of his allegations. He acknowledged this himself before that court and has not argued to the contrary before this Court.

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168. The Court does not therefore see any serious reason to substitute its own opinion for that of the Federal Court on this point and finds that there was no violation of Article 6 § 1 of the Convention on account of an alleged lack of impartiality on the part of the arbitrator L. F.

## II. THE ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LACK OF A PUBLIC HEARING

169. The second applicant complained that she had not had a public hearing, neither before the ISU Disciplinary Commission, nor before the CAS, nor before the Federal Court, in spite of her express requests to that effect. She argued that the requirement of public proceedings was one of the safeguards under Article 6 § 1 of the Convention, that States were only entitled to derogate from it in the conditions expressly enumerated in that provision, and that those conditions had not been met in the present case.

### A. The lack of a public hearing before the CAS

#### *1. Admissibility*

170. The Court reiterates its findings as to its jurisdiction *ratione personae* (see paragraph 67 above).

171. The Court finds, moreover, that this part of application no. 67474/10 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. This complaint must therefore be declared admissible.

#### *2. Merits*

172. At the outset, the Court would draw attention to its previous finding as to the compulsory nature of the arbitration to which the second applicant was a party (see paragraph 115 above).

##### (a) The parties' submissions

173. The second applicant submitted that in her case the CAS had held two days of hearings during which many experts had given testimony on complex scientific questions. She argued in this connection that the points made by the experts that she herself had called had been rejected in a non-objective manner and mockingly, and that this would not have been the case if the CAS had allowed the public to attend.

174. The Government took the view, without any further explanation, that as Article 6 § 1 had not been directly applicable to the proceedings before the CAS, it could not be required to base its decision on a public hearing.

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**(b) The Court's assessment**

*(i) General principles*

175. The Court reiterates that the public character of proceedings constitutes a fundamental principle enshrined in Article 6 § 1 of the Convention. It protects litigants against the administration of justice in secret with no public scrutiny and is thus one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, it contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society (see *Diennet v. France*, 26 September 1995, § 33, Series A no. 325-A; *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, § 36, ECHR 2001-III; *Olujić v. Croatia*, no. 22330/05, § 70, 5 February 2009; *Martinie v. France* [GC], no. 58675/00, § 39, ECHR 2006-VI; and *Nikolova and Vandova v. Bulgaria*, no. 20688/04, § 67, 17 December 2013).

176. Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision "... the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"; holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case (see *Diennet*, § 34; *Martinie*, § 40; *Olujić*, § 71; and *Nikolova and Vandova*, § 68; all cited above).

177. There may be proceedings in which an oral hearing is not required under Article 6, for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written material (see, for example, *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002; *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; and *Şahin Karakoç v. Turkey*, no. 19462/04, § 36, 29 April 2008). Accordingly, even where a court has jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 always requires a right to a public hearing irrespective of the nature of the issues to be decided. There are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts' caseload, which must be taken into account in determining the need for a public hearing (see *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002). The Court has previously found that proceedings devoted exclusively to legal or highly technical questions may

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comply with the requirements of Article 6 even if there was no public hearing (see *Jurisic and Collegium Mehrerau v. Austria*, no. 62539/00, § 65, 27 July 2006, and *Mehmet Emin Şimşek v. Turkey*, no. 5488/05, §§ 30-31, 28 February 2012).

*(ii) Application of those principles to the present case*

178. The Court would point out that, in its judgment of 10 February 2010, the Federal Court merely found that the second applicant was not entitled to rely on any right to a public hearing before the CAS, under Article 6 § 1 of the Convention, because that principle was not applicable to voluntary arbitration. The Federal Court nevertheless emphasised that, having regard to the importance of the CAS in the world of sport, such a hearing would have been "desirable" (see paragraph 23 above).

179. The Court would further observe that the principles concerning public hearings in civil cases, as described above, are valid not only for the ordinary courts but also for professional bodies ruling on disciplinary or ethical matters (see *Gautrin and Others v. France*, 20 May 1998, § 43, *Reports* 1998-III).

180. That being said, the Court has previously found that neither the letter nor the spirit of Article 6 § 1 prevents an individual from waiving, of his own free will, either expressly or tacitly, the entitlement to have his case heard in public (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A).

181. That was not the situation in the present case, however. First, as the Court has already acknowledged, the recourse to arbitration was compulsory. Secondly, it is not in dispute that the applicant expressly requested a public hearing and that the request was denied, without any of the conditions enumerated in Article 6 § 1 being met.

182. The Court is of the view that the questions arising in the impugned proceedings – as to whether it was justified for the second applicant to have been penalised for doping, and for the resolution of which the CAS heard testimony from numerous experts – rendered it necessary to hold a hearing under public scrutiny. The Court notes that the facts were disputed and the sanction imposed on the applicant carried a degree of stigma and was likely to adversely affect her professional honour and reputation (see, *mutatis mutandis*, *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, § 122, 4 March 2014). Moreover, in spite of its somewhat formalistic conclusion, the Federal Court itself, in its judgment of 10 February 2010, expressly recognised in an *obiter dictum* that a public hearing before the CAS would have been desirable.

183. Having regard to the foregoing, the Court finds that there has been a violation of Article 6 § 1 of the Convention on account of the fact that the proceedings before the CAS were not held in public.

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184. This finding releases the Court from examining the second applicant's complaint about the lack of a hearing before the ISU's Disciplinary Commission, in respect of which the CAS was the appellate body, having jurisdiction to review the case both as to facts and as to law (see paragraph 169 above).

### B. The lack of a public hearing before the Federal Court

185. The Court reiterates that proceedings devoted exclusively to legal or highly technical questions may comply with the requirements of Article 6 even if there has been no public hearing (see *Jurisic and Collegium Mehrerau*, cited above, § 65, and *Mehmet Emin Şimşek*, cited above, §§ 30-31).

186. In the present case it notes that, in its judgment of 10 February 2010, the Federal Court dismissed the second applicant's request for a public hearing pointing out that, according to the Federal Court Act, public hearings were held only in exceptional cases or where it had decided to rule on the merits of the case "based on its own findings of fact".

187. In the present case, the subject matter of the case before the Federal Court concerned only the procedural safeguards applicable to the CAS. It was thus a matter of highly technical legal questions which did not involve any examination of the facts that might possibly require a public hearing. The Court is of the view that this type of dispute may be validly settled without recourse to a public hearing (see, *mutatis mutandis*, *Döry*, cited above, § 37, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263).

188. This complaint must therefore be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

## III. THE OTHER ALLEGED VIOLATIONS

189. Relying on Article 4 § 1 and Article 8 of the Convention, and on Article 1 of Protocol No. 1 to the Convention, the first applicant complained about the sum of money he had been ordered to pay Chelsea.

190. Having regard to all the material available to it, and in so far as the applicant's complaints under Article 4 § 1 and Article 8 of the Convention fall within its jurisdiction, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set forth in the Convention or the Protocols thereto. These complaints must therefore be declared inadmissible, pursuant to Article 35 §§ 3 and 4 of the Convention.

191. Moreover, the Court observes that Switzerland has not ratified Protocol No. 1 to the Convention. It follows that this part of application no. 40575/10 is incompatible *ratione personae* (see *Ocelot S.A.*

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*v. Switzerland* (dec.), no. 20873/92, 25 May 1997) and must also be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

192. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

193. By way of just satisfaction the second applicant claimed the sum of 3,584,126.09 euros (EUR), plus interest, for pecuniary damage and EUR 400,000 for non-pecuniary damage. For the breakdown of the pecuniary damage claim she referred to her submissions in the civil proceedings against the ISU in the German courts.

In their observations, received by the Court before the end of the German proceedings (see paragraphs 24 and 25 above), the Government stated that, at the time the second applicant had submitted her observations, the proceedings before those courts were still pending. They took the view that the reference to those proceedings did not constitute a just satisfaction claim within the meaning of the Convention and that it should thus be dismissed.

194. The Court fails to see any causal link between the violation found and the pecuniary damage alleged by the second applicant (see *Gajtani v. Switzerland*, no. 43730/07, § 125, 9 September 2014). There is no evidence to suggest that, if the award had been made by an arbitral tribunal after a public hearing, the findings of that tribunal would have been in favour of the second applicant.

195. As to the claim for non-pecuniary damage, ruling on an equitable basis, the Court awards the second applicant EUR 8,000 for the violation found in respect of her application.

### B. Costs and expenses

196. The second applicant made no specific claim under this head.

## FOR THESE REASONS, THE COURT

1. Declares, unanimously, the applications admissible as to the complaints concerning a lack of independence and impartiality on the part of the

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CAS and a failure to hold a public hearing before the CAS, and inadmissible for the remainder;

2. *Holds*, by five votes to two, that there has been no violation of Article 6 § 1 of the Convention as regards the applicants' complaints of a lack of independence and impartiality on the part of the CAS;

3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention in respect of the second applicant on account of the lack of a public hearing before the CAS;

4. *Holds*, by five votes to two,
(a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, by five votes to two, the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 2 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Helena Jäderblom
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Keller and Serghides is appended to the present judgment.

H.J.*.
F.A.*.

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# JOINT PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGES KELLER AND SERGHIDES

*(Translation)*

1. For the reasons set out in paragraphs 175 to 183 of the judgment, we have voted with the majority in favour of finding a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing before the CAS.

2. However, we are appending this separate opinion to express our disagreement with the majority's reasoning on two crucial aspects. We are of the view, first, that the structure and composition of the CAS do not meet the requirements of independence and impartiality prescribed in Article 6 § 1 of the Convention and, secondly, that it is uncertain whether the CAS is a tribunal "established by law".

3. In addition, we wish to explain why any waiver by Mr Mutu of his rights under Article 6 § 1 of the Convention should not have been taken into account by the majority in rejecting his complaint questioning the impartiality of two of the three arbitrators who ruled on his case.

4. Lastly and above all, it is noteworthy that this case raises some new and significant questions. It is not clear whether a dispute between an athlete and the sports federation to which he or she belongs can fall within the Court's jurisdiction. Moreover, the Court has been required for the first time to examine the rules governing sports arbitration, an area of law in which the general public is becoming increasingly interested. It can therefore be said that this case "raises [a number of] serious question[s] affecting the interpretation or the application of the Convention ... or a serious issue of general importance" within the meaning of Article 43 § 2 of the Convention.

## I. Whether the CAS lacked independence and impartiality

5. We have voted against the majority since we take the view that the complaints concerning a lack of independence and impartiality on the part of the CAS, as raised by Ms Pechstein, should have been upheld by the Court (see paragraph 157 of the judgment). In our view, the structure of the CAS does not meet the requirements of independence and impartiality provided for in Article 6 § 1 of the Convention.

6. It is above all paragraph 157 of the judgment which raises, in our view, a number of problems. First, the majority found that Ms Pechstein only challenged the appointment of one arbitrator, namely the president of the panel (see paragraph 157 of the judgment). Secondly, it notes as follows:

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> "While the Court is prepared to acknowledge that the organisations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators, as applicable at the relevant time, it cannot conclude that, solely on account of this influence, the list of arbitrators, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial, on an individual basis, whether objectively or subjectively, *vis-à-vis* those organisations."

7. The majority seem to acknowledge the "influence" of the ICAS on the procedure for selecting arbitrators, yet at the same time they do not believe that this "influence" could have had an impact on the independence and/or impartiality of the arbitrators on the list from which the panels are composed. Moreover, the majority have not reached the conclusion that this "influence" could have had an impact on the arbitrators who settled the dispute in the present case. In our opinion, the majority should not have confined themselves to justifying such reasoning by merely referring to a judgment of the Federal Court, which held in particular as follows: "... since the 1994 reform, the system of the list of arbitrators now satisfies the constitutional requirements of independence and impartiality applicable to the arbitral tribunals" (see paragraphs 44 and 157 of the judgment). The Court should make an autonomous interpretation of the concepts in dispute.

8. However, the majority do seem to rely on three of our premises. First, the organisations which appoint the arbitrators (International Federations (FI), the International Olympic Committee (IOC) and the National Olympic Committees (NOCs)) all represent one party in the arbitration – the sports bodies and not the athletes. The majority themselves found that these organisations "might be involved in disputes with athletes before the CAS" (see paragraph 154 of the judgment). Thus the majority have conceded that there is divergence of interests between the organisations on the one hand and the athletes on the other.

9. Secondly, the majority of the members of the ICAS and of the CAS are representatives of those organisations. As to the ICAS, twelve (i.e. three fifths) of its members are appointed by the organisations. Four additional members (one fifth of its members) are elected by the twelve members appointed by the organisations. These sixteen members elect, in turn, the four remaining members. It follows from this that the organisations have a not insignificant influence on the composition of the ICAS (see paragraphs 32, 153 and 154 of the judgment).

10. As to the CAS, at the relevant time, the ICAS elected three fifths of its members on the basis of a list which was directly submitted to it by the organisations (the same organisations which had a considerable influence on the composition of the ICAS). The remaining two fifths of the members of the CAS were chosen either to safeguard the interests of the athletes (one fifth) or as independent experts (one fifth). Only one fifth of the members of the CAS, at best, could thus be regarded as independent *vis-à-vis* those organisations, and the individuals making up that fifth were, moreover,

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chosen by the ICAS, a body under the influence of the above-mentioned organisations. This situation casts doubt on the impartiality and independence not only of the independent experts appointed by the ICAS, but also of those arbitrators who were chosen with a view to safeguarding the interests of the athletes. This mechanism of appointment by one fifths was in fact abolished in 2012 and replaced by a more general scheme: the ICAS must now "call upon personalities ... whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs" (see paragraph 38 of the judgment). In other words, no rule currently provides that athletes must be represented, but for the one fifth of members of the ICAS.

11. Lastly, the system of selection of arbitrators procures for the organisations (directly and indirectly through the ICAS) a disproportionate and unjustified "influence" over the procedure for choosing the arbitrators who are responsible for settling disputes between the organisations and the athletes. In other words, this system "revealing the existence of a certain link between the ICAS and organisations that might be involved in disputes with athletes before the CAS, especially those of a disciplinary nature" (see paragraph 154 of the judgment and, *mutatis mutandis*, *Gautrin and Others v. France*, 20 May 1998, nos. 21257/93 and 3 others, § 59, *Reports of Judgments and Decisions* 1998-III). A link which, to use the precise term from *Gautrin*, we regard as "worrying".

12. For our part we take the view that the majority have not drawn the necessary conclusions from the three premises set out above. The majority seem to require that this "influence" be proven "on an individual basis", that is, for each arbitrator sitting in an arbitral tribunal or for a majority of individuals, those whose names appear on the list from which the arbitrators are chosen (see paragraph 157 of the judgment). In our view, to impose such a requirement goes beyond what the Court requires in cases concerning "objective impartiality" and "independence".

13. Under the Court's settled case-law, it is not sufficient for the arbitrators to be impartial on an individual basis if the organisation's general structure has no appearance of independence or impartiality. In determining whether a tribunal is "independent", the Court "has ... regard to the manner of appointment of its members and the duration of their term of office ..., the existence of guarantees against outside pressures ... and the question whether the body presents an appearance of independence ..." (*Campbell and Fell v. the United Kingdom*, 28 June 1984, nos. 7819/77 and 7878/77, § 78, Series A no. 80). When the Court carries out such an analysis, it need not therefore necessarily examine the question whether a particular judge was biased or lacking in independence. For instance, if it were called upon to analyse the composition of employment tribunals or lease and rent tribunals, it would always make sure that the composition is balanced. It would not accept an employment tribunal made up (almost)

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exclusively of employers' representatives, and this would be the case even if the representative in a given case were impartial. In our opinion, there is no reason why the Court should not apply this reasoning *mutatis mutandis* in the present case.

14. On account of the manner in which the members of the CAS and the ICAS are appointed, we take the view, like the majority, that those two organs are under the influence of the organisations. However, we consider that this indirect influence of the organisations is considerable. Firstly, the ICAS supervises the stability of the CAS members, that is to say, even though those members are appointed for a four-year term, they may be removed at any time by the ICAS on the basis of a decision with "brief reasons" (see paragraph 155 of the judgment). In addition, the presidents of the two divisions of the CAS are also members of the ICAS. Should the parties fail to reach agreement, they are responsible for appointing the presidents of the panels. Thirdly, the so-called "closed list" system results in the athletes being obliged to choose their arbitrator from among the individuals selected by the ICAS. The argument put forward by the Federal Court that an open list "carries the risk that there might be, within the tribunal, one or more arbitrators who are not specialised and who may be inclined to act as if they were the lawyers of the parties who appointed them" (see paragraph 44 of the judgment) is not convincing. In much more technical areas – such as in the pharmaceutical or aeronautical industry – the parties may choose their arbitrator freely without there being any problem.

15. Unlike the majority, we are of the view that it has been shown by the above observations that the CAS presents no *appearance* of independence and that, more generally, does not offer the safeguards of Article 6 § 1 of the Convention. This lack of independence was in fact expressly acknowledged in the very text of Article S14 of the Code of Arbitration, as applicable at the relevant time, which emphasised that only "1/5th of the arbitrators [were to be] chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article", and constitutes a fundamental problem for this institution. In our view, the Court should have carried out a more in-depth analysis as to the legitimate fear of the athletes to be bound by the jurisdiction of a body which has no appearance of independence. As the Court has previously found in other cases, "the standpoint of the applicant is important but not decisive. What is decisive is whether this fear can be held to be objectively justified" (see *Pescador Valero v. Spain*, 17 June 2003, no. 62435/00, § 23, *Report* 2003-VII, and, in the same vein, *De Cubber v. Belgian*, 26 October 1984, no. 9186/80, § 30, Series A no. 86). Having regard to the foregoing, the second applicant's fears appear "objectively justifiable". Accordingly, she should not have been required to prove that the arbitrators who decided her case were biased and lacked independence.

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16. Having regard to the structural problems of the CAS, we voted in favour of finding a violation of Article 6 § 1 of the Convention in the case of Ms Pechstein, not only on account of the lack of a public hearing but also in view of the lack of impartiality and independence of the CAS.

17. We share the opinion of our colleagues in the case of Mr Mutu since he, unlike Ms Pechstein, did not raise this complaint before the national authorities or before this Court. In addition, we agreed with the majority in its rejection of the first applicant's complaint as to alleged bias on the part of two of the three arbitrators who ruled on his case (see paragraphs 160-68 of the judgment).

## II. The CAS, a tribunal "established by law"?

18. Where a body has as much power as the CAS and is able and prepared to determine the civil rights and obligations of its members (in the present case, the athletes), with the authority to give enforceable decisions, the Court must first ensure that such a body is a tribunal "established by law", within the meaning of Article 6 of the Convention, before determining whether or not it is impartial.

19. Consequently, the majority should have first examined the question whether the CAS was a tribunal "established by law" before concluding that it was in fact independent and impartial.

20. In numerous judgments and decisions the Court has acknowledged the lawfulness of *voluntary* arbitration for the purposes of Article 6 of the Convention. In those cases the question of the interpretation of the "established by law" criterion did not arise since the respective applicants had waived their right of access to a national court established by law (see, for example, *Deweer v. Belgium*, 27 February 1980, no. 6903/75, § 49, Series A no. 35; *Lithgow and Others v. the United Kingdom*, 8 July 1986, nos. 9006/80 and 6 others, §§ 29, 200 and 201, Series A no. 102; *Pastore v. Italy* (dec.), no. 46483/99, 25 May 1999; *Eiffage S.A. and Others v. Switzerland* (dec.), no. 1742/05, 15 September 2009; and *Tabbane v. Switzerland* (dec.), no. 41069/12, 1 March 2016, §§ 30-31).

21. However, in the case of *Suda v. the Czech Republic* (28 October 2010, no. 1643/06, § 53) the applicant had not freely agreed to have his dispute settled by arbitration. In that case, the Court took the view that the arbitral tribunal had not been "established by law" given that, first, it had been made up of arbitrators whose names appeared on a list drawn up by a limited company and, secondly, it had been based on an arbitration clause.

22. The CAS is an arbitral institution without legal personality (see paragraph 26 of the judgment) which is part of the ICAS, itself a Swiss private-law foundation (see paragraph 29 of the judgment). The CAS thus resembles the arbitral tribunal described in the above-mentioned *Suda* case.

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23. The Court has found that Article 6 of the Convention does not require "the legislature to regulate every detail in this area by a formal Act of Parliament if the legislature establishes at least the organisational framework for the judicial organisation" (see *Lindner v. Germany* (dec.), no. 32813/96, 9 March 1999). Even though that finding related to a discretionary executive power rather than to private-law bodies, a completely private tribunal is no more "established by law" than a tribunal set up by executive decree, even where there is less doubt about the independence and impartiality of the arbitral tribunal.

24. Moreover, the jurisdiction *ratione materiae* and *ratione loci* of tribunals must also be established by law (see the Commission Report of 12 October 1978 concerning the case of *Zand v. Austria*, Decisions and Reports 15, p. 70). In the case of *Coëme and Others v. Belgium* (22 June 2000, nos. 32492/96 and 4 others, *Reports* 2000-VII), for example, the Court found that even though it was a "tribunal established by law" within the general meaning of the term (ibid., § 99), the Belgian Court of Cassation was not so established in that case, given that the rule on which it based its impugned jurisdiction was not enshrined in any law (ibid., §§ 107 and 108).

25. Even though the Court has never carried out an in-depth analysis of the "established by law" criterion in Article 6 of the Convention in respect of private-law entities exercising an adjudicative function (in the present case, the determination of civil rights and obligations) without the parties' consent, we are of the view that, while we find that there has been no violation of Article 6 § 1 here, the Court should have given some indications about the conditions in which private entities may be regarded as "tribunals established by law".

## III. Mr Mutu's "voluntary" waiver used against him

26. We are unable to follow the majority in their reasoning to the effect that the complaints raised by Mr Mutu as to the lack of impartiality of the CAS must be rejected on account of the fact that he voluntary gave his consent to the jurisdiction of the CAS rather than to that of an ordinary court (see paragraph 160 of the judgment). The majority have acknowledged that Mr Mutu did not "unequivocally" waive his rights under Article 6 § 1 of the Convention. To take into account his voluntary waiver when analysing his allegations thus seems to contradict that finding.

27. More generally, when a procedure does not provide minimum safeguards of impartiality and independence, the Court should more strictly analyse whether the applicant's waiver was really "free, lawful and unequivocal". In our opinion, it is conceivable that a procedure could be fair even in the absence of a public hearing or even where the parties did not have access to all the documents. It is difficult to conceive, however, that an individual could waive his right to an independent and impartial tribunal

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and yet still have the benefit of a "fair hearing" within the meaning of Article 6 § 1 of the Convention.

**Conclusion**

28. While we agree with the majority that the lack of a public hearing in the case of Ms Pechstein constituted a violation of Article 6 § 1 of the Convention, we take the view that the structural problems of this arbitration body should have led the Court to find a violation of Article 6 § 1 under the head of the tribunal's independence and impartiality.

29. We share the majority's opinion as regards Mr Mutu. The first applicant was not a victim of a violation of Article 6 § 1 of the Convention, first because the evidence as to the alleged lack of impartiality and independence of the arbitrators individually was insufficient, and secondly because he had not raised any complaint about a structural lack of independence of the arbitral tribunal. Even though Mr Mutu had not raised that complaint and the Court was not therefore able to examine it in this case, we submit that once the majority had found that he had not waived his rights "unequivocally" that argument should not have been used against him.

30. For the reasons given above, we take the view that the independence and impartiality of the CAS raise "serious question[s] affecting the interpretation or the application of the Convention" within the meaning of Article 43 § 2 of the Convention. The structural problems of that arbitral body, together with the questions surrounding the scope of the Court's jurisdiction, should have been subjected to a stricter examination, especially as the CAS constitutes, for a considerable number of professional athletes, the only appellate body with jurisdiction to review such cases as to both facts and law.

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