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DUE PROCESS IN SPORTS ARBITRATION: THE APPLICABILITY OF ARTICLE 6 ECHR TO CAS PROCEEDINGS

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ABSTRACT

Objective: The objective of this study is to investigate the applicability and enforceability of Article 6 of the European Convention on Human Rights (ECHR) in the context of arbitration before the Court of Arbitration for Sport (CAS), with the aim of assessing whether CAS proceedings comply with the procedural guarantees of a fair trial, particularly in light of their quasi-mandatory nature for professional athletes.

Theoretical Framework: This research is grounded in the legal theory of human rights enforcement, international arbitration law, and the principle of procedural fairness. The work draws upon jurisprudence of the European Court of Human Rights, Swiss arbitration doctrine, and scholarly contributions regarding binding arbitration and access to justice. Jan Paulsson's theory on the state's role in legitimizing arbitral authority, as well as the European Court's evolving interpretation of Article 6, provides a foundation for analyzing the legal status of CAS.

Method: The methodology adopted for this research comprises a qualitative, doctrinal legal analysis of primary legal sources (e.g., ECHR, CAS Code, Swiss arbitration laws) and case law (ECtHR and Swiss Federal Tribunal rulings). Data collection was conducted through legal document review, including academic commentary, international arbitration jurisprudence, and comparative legal frameworks. The approach is analytical and interpretive, aiming to identify how procedural rights are conceptualized and applied within CAS proceedings.

Results and Discussion: The results revealed that CAS, although structured as a private arbitral body, performs a quasi-judicial function and is bound to uphold the guarantees of Article 6 of the ECHR. The discussion contextualizes this finding by comparing sports arbitration with traditional voluntary arbitration, highlighting the structural imbalance between athletes and sports federations. The Mutu and Pechstein judgment is examined as a turning point in recognizing CAS's obligations under human rights law. The study also acknowledges limitations related to the limited scope of judicial review available under Swiss law.

Research Implication: The practical and theoretical implications of this research suggest that procedural safeguards in sports arbitration must be reinforced through further reforms of CAS rules and closer judicial scrutiny by the Swiss Federal Tribunal. These insights are relevant for international sports law, human rights compliance in private legal orders, and institutional governance of dispute resolution in global athletics.

Originality/Value: This study contributes to the literature by offering a focused legal analysis of CAS's compatibility with Article 6 ECHR, emphasizing its unique status as a de facto mandatory arbitral body. The originality lies in synthesizing ECtHR and Swiss jurisprudence to assess how fundamental rights operate within a specialized, non-state adjudicative mechanism. The relevance of this research is demonstrated by its implications for athlete protections and the legitimacy of international sports governance.

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DEVIDO PROCESSO LEGAL NA ARBITRAGEM ESPORTIVA: A APLICABILIDADE DO ARTIGO 6 ECHR AOS PROCEDIMENTOS DO CAS

RESUMO

Objetivo: O objetivo deste estudo é investigar a aplicabilidade e a execução do Artigo 6 da Convenção Europeia de Direitos Humanos (CEDH) no contexto da arbitragem perante o Tribunal Arbitral do Esporte (CAS), com o intuito de avaliar se os procedimentos do CAS cumprem as garantias processuais de um julgamento justo, especialmente à luz de sua natureza quase obrigatória para atletas profissionais.

Estrutura Teórica: Esta pesquisa está fundamentada na teoria jurídica da aplicação dos direitos humanos, na lei de arbitragem internacional e no princípio da imparcialidade processual. O trabalho se baseia na jurisprudência da Corte Europeia de Direitos Humanos, na doutrina de arbitragem suíça e em contribuições acadêmicas sobre arbitragem vinculante e acesso à justiça. A teoria de Jan Paulsson sobre o papel do Estado na legitimação da autoridade arbitral, bem como a interpretação evolutiva do Artigo 6 da Corte Europeia, fornece uma base para a análise do status legal do CAS.

Método: A metodologia adotada para esta pesquisa compreende uma análise jurídica qualitativa e doutrinária de fontes jurídicas primárias (por exemplo, CEDH, Código CAS, leis de arbitragem suíças) e jurisprudência (decisões do ECtHR e do Tribunal Federal Suíço). A coleta de dados foi realizada por meio da análise de documentos jurídicos, incluindo comentários acadêmicos, jurisprudência de arbitragem internacional e estruturas jurídicas comparativas. A abordagem é analítica e interpretativa, com o objetivo de identificar como os direitos processuais são conceituados e aplicados nos procedimentos do CAS.

Resultados e Discussão: Os resultados revelaram que o CAS, embora estruturado como um órgão arbitral privado, desempenha uma função quase judicial e é obrigado a defender as garantias do Artigo 6 da CEDH. A discussão contextualiza essa descoberta comparando a arbitragem esportiva com a arbitragem voluntária tradicional, destacando o desequilíbrio estrutural entre atletas e federações esportivas. O julgamento de Mutu e Pechstein é examinado como um ponto de inflexão no reconhecimento das obrigações do CAS sob a lei de direitos humanos. O estudo também reconhece as limitações relacionadas ao escopo limitado da revisão judicial disponível de acordo com a legislação suíça.

Implicações da Pesquisa: As implicações práticas e teóricas desta pesquisa sugerem que as salvaguardas processuais na arbitragem esportiva devem ser reforçadas por meio de novas reformas das regras do CAS e de um escrutínio judicial mais rigoroso por parte do Tribunal Federal Suíço. Essas percepções são relevantes para o direito esportivo internacional, o cumprimento dos direitos humanos em ordens jurídicas privadas e a governança institucional da resolução de disputas no atletismo global.

Originalidade/Valor: Este estudo contribui para a literatura ao oferecer uma análise jurídica focada na compatibilidade do CAS com o Artigo 6 da CEDH, enfatizando seu status único como um órgão arbitral obrigatório de fato. A originalidade está em sintetizar a jurisprudência do TEDH e da Suíça para avaliar como os direitos fundamentais operam em um mecanismo adjudicativo especializado e não estatal. A relevância desta pesquisa é demonstrada por suas implicações para a proteção dos atletas e a legitimidade da governança esportiva internacional.

Palavras-chave: Tribunal Arbitral do Esporte (CAS), Convenção Europeia de Direitos Humanos (ECHR), Julgamento Justo, Arbitragem Esportiva, Tribunal Federal Suíço, Garantias Processuais.

GARANTÍAS PROCESALES EN EL ARBITRAJE DEPORTIVO: APLICABILIDAD DEL ARTÍCULO 6 DEL REGLAMENTO DE EQUIDAD A LOS PROCEDIMIENTOS DE CAS

RESUMEN

Objetivo: El objetivo de este estudio es investigar la aplicabilidad y exigibilidad del artículo 6 del Convenio Europeo de Derechos Humanos (CEDH) en el contexto del arbitraje ante el Tribunal de Arbitraje Deportivo (TAS), con el fin de evaluar si los procedimientos del TAS cumplen con las garantías procesales de un juicio justo, especialmente a la luz de su carácter cuasi obligatorio para los deportistas profesionales.

Marco Teórico: Esta investigación se fundamenta en la teoría jurídica de la aplicación de los derechos humanos, el derecho internacional del arbitraje y el principio de equidad procesal. El trabajo se inspira en la jurisprudencia del Tribunal Europeo de Derechos Humanos, en la doctrina suiza sobre arbitraje y en las aportaciones de los estudiosos sobre el arbitraje vinculante y el acceso a la justicia. La teoría de Jan Paulsson sobre el papel del Estado en la legitimación de la autoridad arbitral, así como la interpretación evolutiva del artículo 6 por parte del Tribunal Europeo, proporcionan una base para analizar el estatus legal del CAS.

Metodología: La metodología adoptada para esta investigación comprende un análisis jurídico cualitativo y doctrinal de fuentes jurídicas primarias (por ejemplo, CEDH, Código de la CAS, leyes suizas de arbitraje) y jurisprudencia (sentencias del TEDH y del Tribunal Federal Suizo). La recopilación de datos se llevó a cabo

mediante la revisión de documentos jurídicos, incluidos comentarios académicos, jurisprudencia de arbitraje internacional y marcos jurídicos comparados. El enfoque es analítico e interpretativo, con el objetivo de identificar cómo se conceptualizan y aplican los derechos procesales en los procedimientos del TAS.
Resultados y Discusión: Los resultados revelan que el TAS, aunque estructurado como un órgano arbitral privado, desempeña una función cuasi judicial y está obligado a respetar las garantías del artículo 6 del CEDH. La discusión contextualiza esta conclusión comparando el arbitraje deportivo con el arbitraje voluntario tradicional, destacando el desequilibrio estructural entre los atletas y las federaciones deportivas. La sentencia Mutu y Pechstein se examina como un punto de inflexión en el reconocimiento de las obligaciones del TAS en virtud de la legislación sobre derechos humanos. El estudio también reconoce las limitaciones relacionadas con el limitado alcance de la revisión judicial disponible en la legislación suiza.
Implicaciones de la Investigación: Las implicaciones prácticas y teóricas de esta investigación sugieren que las garantías procesales en el arbitraje deportivo deben reforzarse mediante nuevas reformas de las normas del TAS y un control judicial más estrecho por parte del Tribunal Federal Suizo. Estas ideas son relevantes para el derecho deportivo internacional, el cumplimiento de los derechos humanos en los ordenamientos jurídicos privados y la gobernanza institucional de la resolución de conflictos en el atletismo mundial.
Originalidad/Valor: Este estudio contribuye a la literatura al ofrecer un análisis jurídico centrado en la compatibilidad del TAD con el artículo 6 del CEDH, haciendo hincapié en su estatus único como órgano arbitral obligatorio de facto. La originalidad reside en sintetizar la jurisprudencia del TEDH y de Suiza para evaluar cómo operan los derechos fundamentales dentro de un mecanismo de adjudicación especializado y no estatal. La relevancia de esta investigación queda demostrada por sus implicaciones para la protección de los atletas y la legitimidad de la gobernanza deportiva internacional.

Palabras clave: Tribunal de Arbitraje Deportivo (TAS), Convenio Europeo de Derechos Humanos (CEDH), Juicio Justo, Arbitraje Deportivo, Tribunal Federal Suizo, Garantías Procesales.

1 UNDERSTANDING ARTICLE 6 ECHR: SCOPE, GUARANTEES, AND INTERPRETATIVE EVOLUTION

Human rights, or as they are referred to in national legal orders, fundamental rights, are a quasi-universal system of values recognized by nations. National constitutions have been primarily concerned with the development and guarantee of human rights, but after the Second World War there has been a particular interest in fundamental rights and freedoms at the international level.

The Convention regulates, in principle, rights with "material" (substantive) content that can be invoked directly in the domestic legal order of the States Parties as a result of the obligations assumed by the States to ensure respect for these rights for all persons "under their jurisdiction". In addition to the substantive rights: such as the right to life, liberty and security, the right to freedom of thought, conscience and religion, etc., the Convention also enshrines two procedural rights, which do not represent freedoms of a person, but constitute guarantees for the enforcement, before national courts, of the material rights and freedoms enshrined in the Convention.

Article 6 of the Convention, entitled "*Right to a fair trial* ", designates, on the one hand, all the procedural guarantees expressly stated in this provision, and, on the other hand, the right to a fair trial, a guarantee with its own content.

The text of Article 6 has its origins in Articles 10 and 11, paragraph 1, of the Universal Declaration of Human Rights. According to Article 10 of the Declaration, "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11, paragraph 1, provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law in a public trial at which he has had full guarantees of his defence."

The right established by the text of Article 6, in relation to its content, is a procedural right, but, viewed as an obligation incumbent on states, it is also a true substantive right, with a specific sanction in the event of violation - the engagement of the international responsibility of the states in question.

Of all the rights enshrined in the Convention, the right to a fair trial is of particular importance, occupying a central place. Obviously, the idea of a fair trial refers to the idea of the rule of law, whose first and essential characteristic is the elimination of arbitrariness and the supremacy of the law.

Article 6 is organised into 3 distinct paragraphs. The guarantees in the first paragraph apply to both *civil and* criminal proceedings, while paragraphs 2 and 3 are relevant only in criminal proceedings, enshrining procedural rights for the benefit of defendants.

The Convention guarantees the right to a fair trial in relation to all the rights and obligations that national law confers and recognizes on individuals. The right to a fair trial applies regardless of the status of the parties, the nature of the legislation governing the establishment of the "dispute" (civil, commercial, administrative law, etc.) and the authority competent to resolve it.In determining the scope of the guarantees of paragraph (1), the Court used the distinction between public law and private law and established that the notion of *civil rights and obligations* covers those rights and obligations which fall within the scope of private law. Based on this distinction, rights and obligations arising from relationships between private individuals naturally fall within the scope of Article 6(1), while those rights and obligations arising from the relationship between an individual and the State (for example, the obligation of a citizen to pay taxes) do not fall within this scope. As a result, it is necessary to establish the line of demarcation between those rights and obligations classified as having a civil nature and those which are excluded from this category. The incomplete wording of the text of Article 6 (1) has been significantly improved as a result of the Court's interpretation of this provision.

Article 6, paragraph 1, of the Convention provides that:

> In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The main difference between the *fairness requirement* and all the other elements of Article 6 is that it covers the process as a whole. In order to determine whether a person has had a *fair trial*, a cumulative analysis must be made of all the procedural stages, and the procedure must be viewed as a whole and not only in terms of a particular incident or procedural error.

The notion of "*fairness*" has its own meaning, the meaning of which is irrelevant in the national legal systems of the Member States. Therefore, there may be situations in which, although there is a violation of the domestic procedure - even a flagrant one - the trial remains fair from the perspective of the Convention [1]and *vice versa.*

In the European Convention system, the right to a fair trial can be viewed in a broad sense, but if we limit ourselves strictly to the first paragraph, we notice that it includes a list of general guarantees - the right of the person to be tried fairly, the right to have the case tried by an independent and impartial court, the speed and publicity of the trial and access to justice. These procedural guarantees can be grouped into two categories, namely, express guarantees and implicit guarantees.

The first category includes: the trial of the case within a reasonable time; the right to be tried by an independent and impartial court established by law; the publicity of the proceedings (except in situations where access to the courtroom is prohibited to the press, the public or a party to the trial, in the interests of morality, public order or national security, to protect the interests of minors or the private life of the parties involved in the trial, or when publicity could harm the interests of justice). These guarantees explicitly stated in the content of art. 6 can be considered absolute in the sense that depriving a person of such rights would inevitably lead to an unfair trial.

The guarantees that are not found *in terminis* in the text of art. 6 are deduced from its interpretation and also developed in the case law of the European Court of Human Rights (hereinafter *the Court*). These are: access to justice, adversarial procedure, the principle of equality of arms, the right to a reasoned judgment, the obligation to ensure the execution of the judgment. These guarantees are not absolute, so that their non-compliance or limitation in some situations does not automatically lead to an unfair trial. Moreover, the Court has emphasized in many of its decisions that its role is to establish whether the procedure as a whole was fair,

[1] Case 22978/05, Gafgen v. Germany, §§ 162-188;

including the manner in which evidence was administered. It does not replace a national court in order to re-examine the merits of the case, it does not become a fourth instance of jurisdiction but relates strictly to procedural aspects.

2 THE CAS FRAMEWORK: JURISDICTION, PROCEDURE, AND LEGAL STATUS

The complexity of sport at a global level is due to the presence of the International Olympic Committee (hereinafter *IOC*), a hierarchical organizational structure with a significant role in the world of sports.

The idea of creating an arbitral jurisdiction dedicated to resolving disputes directly or indirectly related to sport was firmly launched in the early 1980s as a result of the increase in the number of disputes related to sport and the absence of any independent authority specialized in such matters endowed with the competence to pronounce binding decisions. Another reason for the establishment of the institution was the need to create a specialized authority, capable of resolving sports disputes, which would offer a flexible, fast and inexpensive procedure.

Therefore, in 1982, *the IOC President* – Juan Antonio Samaranch together with the judge of the International Court of Justice at that time, Kéba Mbaye (also a member of the IOC) chaired a working group tasked with preparing the statute of what became, in 1984, the Court of Arbitration for Sport. Since then, it has been recognized as the highest independent authority for resolving disputes arising within sports competitions.

The Olympic Charter provides in art. 6 para. (2) that "Any dispute arising on the occasion of or in connection with the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Arbitration for Sport."

Initially, the CAS statute and regulations provided for a single type of contentious proceedings which were initiated following the filing of a request by the claimant regardless of the nature of the dispute and an advisory procedure, open to any interested body or athlete. CAS could give an Opinion on legal questions relating to any activity related to sport in general. Now, although this procedure still exists, access to it is restricted. In 1991, CAS published an Arbitration Guide which included several model arbitration clauses. Among these was a clause that was intended to be included in the statutes or regulations of sports federations or clubs:

> Any dispute arising from these Statutes and Regulations of the Federation (...) which cannot be settled amicably shall be finally settled by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport, to the exclusion

> of any appeal to the ordinary courts. The parties undertake to respect the said Statute and Regulations, to accept in good faith the decision rendered and not to obstruct its execution in any way.

This clause foreshadowed the later creation of special rules for the settlement of disputes relating to decisions taken by sports federations or associations. This is the appeal procedure. This was the starting point for several "appeal" procedures, even if, formally, such a procedure did not yet exist.

A first substantial reform of the CAS took place in 1994 with the entry into force of the "Code of Arbitration relating to Sport." The reform was triggered by a ruling by the Swiss Federal Court in an appeal against the CAS decision in case 92/63 G. v. FEI [2]. The Federal Court recognized the CAS as a genuine arbitration body but also emphasized that there were sufficient links between the CAS and the IOC that could have called into question the independence of the CAS if the IOC had been a party to the proceedings before it. The CAS was financed almost exclusively by the IOC. The IOC had the power to amend the CAS statutes, and the IOC and its President had the power to appoint the members of the CAS.

The impact of this reform was materialized by the creation of an "International Council of Arbitration for Sport" (ICAS), which was to deal with the functioning and financing of the CAS, thus taking the place of the IOC, and also by the establishment of two arbitration sections - the Ordinary Arbitration Division and the Appeal Arbitration Section - to make a clear distinction between disputes judged in the first instance and those arising from the exercise of an appeal against a decision taken by a sports body.

Article S2 of the Code of Arbitration for Sport states that "The task of ICAS is to facilitate the resolution of disputes relating to sport through arbitration or mediation and to protect the independence of CAS and the rights of the parties."

The Preamble to the "Agreement Establishing the International Council of Arbitration for Sport" adopted on 22 June 1994 in Paris states: "With the aim of facilitating the settlement of disputes in the field of sport, an arbitration institution entitled the "Court of Arbitration for Sport" has been created and that, in order to ensure the protection of the rights and parties before the CAS and the absolute independence of this institution, the parties have jointly decided to create a foundation for international arbitration in sport called the "International Council of Arbitration for Sport" under the aegis of which the CAS will be placed from now on."

[2] https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=atf%3a%2f%2f119-ii-271%3ade&lang=de&type=show_document&zoom=yes&.

Since 22 November 1994, the Code of Arbitration for Sport has governed the organization and procedures of the CAS. The Code was revised in 2003 to incorporate certain principles frequently encountered in CAS case law or practices consistently followed by arbitrators and the Tribunal Office. The most recent version of the Code of Arbitration for Sport entered into force on 1 February 2023. The Code contains 70 articles and is composed of two parts: the Statute of the Bodies competent to settle disputes relating to sport (Articles S1 to S26), and the Rules of Procedure (Articles R27 to R70). Since 1999, the Code has also contained a set of mediation rules establishing a non-binding, informal procedure that offers the parties the option of negotiating, with the help of a mediator, an agreement to resolve their dispute.

In general, a dispute can only be submitted to CAS if there is an arbitration agreement concluded to that effect. Article R27 of the Rules of Procedure enshrines its exclusive jurisdiction to rule on disputes relating to sport. Code of Arbitration for Sport, in force since 1 February 2023, R27: "These procedural rules apply whenever the parties have agreed to refer a dispute relating to sport to CAS. Such a referral may result from an arbitration clause contained in a contract or regulation or as a result of a subsequent arbitration agreement (ordinary arbitration procedures) or may involve an appeal against a decision rendered by a federation, association or sports body, where the statutes or regulations of these bodies or a specific agreement provide for an appeal to CAS (appeal arbitration procedures). Such provisions may concern questions of principle relating to sport or questions of pecuniary or other interest relating to the practice or development of sport and may include, in general, any activity or matter relating to or connected with sport.

Since its establishment, CAS has never declared itself lacking jurisdiction on the grounds that a dispute was unrelated to sport.[3] Thus, in recent decades it has proven to be a highly successful forum for resolving sports-related disputes.[4]

The world sports system is structured in a network of interconnected entities, from athletes and their clubs to national and international federations. Each athlete becomes a member of a sports club, and the grouping of several clubs gives rise to a national federation, which, in turn, joins international federations, thus participating in the organization and development of sport on a global scale. The athlete's membership in a club gives him the right

[3] See in this regard the Decision rendered in the CAS arbitration 92/81 in the Summary of CAS Judgments 1986-1998.
[4] Mark Megan, The Court of Arbitration for Sport: Current Practice, Emerging Trends and Future Hurdles, Arbitration International, (2009), p. 591-602.

to receive a license from the corresponding federation, a document that allows him access to official competitions. The entire system operates on the basis of contractual relationships, either between the athlete and the club, or between clubs and federations, or between national and international federations.

The resolution of disputes relating to the validity, performance and termination of such contracts falls under the exclusive jurisdiction of the Court. Its scope of jurisdiction depends to a large extent on the existence of an arbitration clause effective between the parties. This may be incorporated either in the contract or in the statutes of the sports federation, in accordance with art. R27 and art. R47 of the CAS Code. [5]The jurisdiction of the Tribunal is therefore drawn from the arbitration clause which defines (a) whether CAS has jurisdiction and (b) the scope of such jurisdiction.

3 RECONCILING PRIVATE ARBITRATION WITH PUBLIC LAW: CAS UNDER THE LENS OF THE ECHR

The European Court of Rights has frequently held that Article 6(1) of the Convention does not prevent individuals from submitting disputes to arbitration. Individuals may thus choose private dispute resolution and waive some of the guarantees of a fair trial, including the right to be tried by a court of the national court system, if the consent to the waiver is free and unequivocal.[6]

In short, the legal relationships between the entities involved in sports relations are contractual in nature. The Court of Arbitration for Sport has general exclusive jurisdiction to resolve disputes between the parties. The Court is a private judicial body, outside the domestic judicial system. Its jurisdiction is attracted by the existence of an arbitration clause or an arbitration agreement. The arbitration clause and/or the arbitration agreement represent a waiver of the right to refer the matter to the ordinary national courts, a waiver permitted by the Convention on the condition that it is free and unequivocal.

Consequently, the following legitimate question arises: is the Court of Arbitration for Sport obliged to respect the rights and guarantees provided for by the Convention? Is the Convention relevant in the matter of sports arbitration?

[5]Despina Mavromati, CAS Through the Lens of the European Court of Human Rights and Other Tribunals in Nafziger / Ross (eds.), International Handbook on Sports Law, Edward Elgar Publishing, (2022) p. 196.
[6]Pfeifer and Plankl v. Austria, Case A No. 227, Judgment of the Court of 25 February 1992, Para. 37.

We consider that the answer to both questions is affirmative. The European Convention on Human Rights is relevant to sports arbitration and binding on the CAS. We base our position on two reasons: A) the CAS is based in Switzerland, and B) From the Court's perspective, sports arbitration is a species of binding arbitration.

3.1 THE RELEVANCE OF THE CONVENTION BY VIRTUE OF THE FACT THAT THE TRIBUNAL IS LOCATED IN SWITZERLAND

Jan Paulsson distinguishes between the rules applicable to the arbitral dispute (i.e. the substantive rules) and the rules applicable to the arbitration. The first category represents the basis of the arbitral decision. The second category concerns the source of the authority of arbitration: the legal order that governs arbitration. According to the jurisdictional theory, the foundation of arbitration is found exclusively in the legal order of the state in which the arbitration takes place. In other words, according to this thesis, the legitimacy and authority of arbitration derive exclusively from the legal system of the host state of the arbitration.[7]

Despite the autonomy and "international" character of international arbitration, arbitral proceedings are merely a component of the legal system of the place where the arbitration takes place and, by extension, the arbitrator is an entity applying that law. In doctrine, the majority takes the position that arbitral tribunals apply the law of the place of arbitration in the same manner as domestic courts and that the freedom to choose substantive and procedural rules, a characteristic so inherent in arbitration, is always subject to its compatibility with *the lex arbitri.* In this sense, *the lex arbitri* is the equivalent of the *lex fori* in civil proceedings.[8] By establishing the place of arbitration in the territory of a particular State, the parties choose to subject the arbitration to the law of that State.

The Code of Arbitration for Sport contains two provisions concerning the rules governing sports arbitration. On the one hand, it states that the procedural rules laid down in the Code of Arbitration for Sport apply whenever the parties decide to refer to the dispute to the CAS. On the other hand, as regards the substantive rules, R45 states that "The Panel shall decide the dispute in accordance with the rules of law chosen by the parties or, in the

[7]Jan Paulsson, Arbitration in Three Dimensions, in International Comparative Law Quarterly, Cambridge University Press, 2011, vol. 60, p. 291.
[8]Ilias Bantekas, Equal Treatment of Parties in International Commercial Arbitration, in International and Comparative Law Quarterly, Cambridge University Press, (2020) vol. 69, p. 992-993.

absence of such a choice, in accordance with Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*".

Switzerland became a member state of the Council of Europe on 6 May 1963. Under Swiss law, international treaties such as the European Convention are self-executing, meaning they are part of the Swiss legal system and are directly applicable in the national legal order from the moment they enter into force.

As an arbitration institution based in Lausanne, the CAS must comply with the Swiss legal order and the legislation governing international arbitration or domestic arbitration. International arbitration is governed by the Swiss Private International Law Act (*Loi sur le Droit International Privé,* hereinafter *LDIP)* and domestic arbitration by the Swiss Code of Civil Procedure (CPC).

The domestic or international nature of the arbitration depends on the parties at the time of stipulation of the arbitration clause. According to art. 176 (1) of the LDIP:

> The provisions of this chapter (chapter 12: international arbitration – *emphasis added)* apply to arbitrations where the seat of the arbitral tribunal is in Switzerland and at least one of the parties, at the time of the conclusion of the arbitration agreement, had neither his domicile nor his habitual residence in Switzerland.

CAS decisions are final and binding from the moment they are communicated to the parties. The only possible appeal is an appeal for annulment filed before the Swiss Federal Court.

In the case of international arbitration, the grounds for which a challenge may be filed are limited to those provided for in art. 190 (2) of the IPLA:

(The decision) can only be appealed:

a) if a sole arbitrator was improperly appointed or the arbitral tribunal was improperly constituted;
b) whether the arbitral tribunal erroneously assessed whether or not it had jurisdiction;
c) if the arbitral tribunal ruled on issues not requested by the parties or if it failed to rule on one of the claims;
d) if the equality of the parties or their right to be tried according to an adversarial procedure has not been respected;
e) if the judgment is incompatible with Swiss public policy.

Over the years, the Swiss Federal Tribunal (hereinafter referred to *as the SFT)* has been a catalyst in the functioning and development of the CAS as an arbitration institution, drawing

some boundaries regarding the validity of arbitration agreements, the right of the parties to be heard, the independence or impartiality of arbitrators, and public order.[9]

The TFE held that the CAS is independent and impartial, that its arbitral awards have the same legal force and effect as decisions rendered by national courts. In 1993, in the case of G. v. Federation Equestre Internationale (*Gundel*), the TFE established that the CAS is an independent arbitral tribunal, at least in proceedings to which the IOC is not a party.

In 2003, in the case of A. and B. v. IOC and FIS (*Lazutina*) [10], the TFE rejected the claims of the two athletes that the structure and functioning of the CAS do not provide "*sufficient guarantees of impartiality and independence"* in disputes to which the IOC is a party. Due to the prominent role that some members of the CAS and the ICAS have in the Olympic Movement, the ICAS establishes the list of CAS arbitrators and resolves issues related to their recusal and dismissal, supervises the budget and functioning of the CAS, appoints the Secretary General and the CAS Division, and promulgates the CAS Code. The ICAS is not controlled by the IOC and is not obliged to comply with IOC decisions. ICAS members cannot serve as CAS arbitrators, nor do they represent any party in the arbitration proceedings. Although the IOC finances one third of the annual budgets of the ICAS and the CAS, the remainder is financed by other international sports organizations independent of the IOC.[11]

The Swiss Federal Court has affirmed in several cases the importance of fair trial guarantees in arbitration proceedings before the CAS. For example, the Swiss Federal Court noted that:

> The substantive review of an international arbitral award by the Federal Court is limited to verifying whether the arbitral award is in accordance with public policy. The resolution of the merits of a dispute only violates public policy when fundamental legal principles are violated and is therefore clearly at odds with the widely recognized fundamental value system which, according to the prevailing views in Switzerland, should underlie any legal order. Such principles include: the principle of *pacta sunt servanda*, the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without prior compensation, the prohibition of discrimination. The contested award may be set aside only if it is contrary to public policy in its outcome and not merely in the light of the reasoning behind the decision.[12]

[9] Despina Mavromati, (2022) p. 197.
[10] Case 4A_198/2012, Judgment of the Swiss Federal Court of December 14, 2012.
[11] Matthew J. Mitten, Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations, Pepperdine Dispute Resolution Law Journal, (2010), vol. 10, no. 1, p. 52.
[12] Case 4a_612/2009, Arbitration Tribunal Decision of February 10, 2010, point 6.1 p. 18.

De novo review of decisions of the IOC (and other international governing bodies) and has "full freedom to issue a new decision," the Federal Court determined that "CAS is more akin to a judicial authority independent of the parties." It also recognized that there was "no viable alternative" to CAS "that could resolve international disputes related to sport quickly and cheaply." The TFE considered that "CAS is sufficiently independent of the IOC, as well as of all other parties who have recourse to its services, for its decisions in cases involving the IOC to be considered true judgments, equivalent to decisions of national courts."[13]

In the case of Canas v. ATP Tour, the TFE observed that:

> Sports competition is characterized by a hierarchical structure, both at international and national level. Vertically integrated, the relationships between athletes and the organizations responsible for the various sports disciplines are distinct from the horizontal relationship represented by a contractual relationship between two parties. This structural difference between the two types of relationship is not without influence on volitional behavior, the process leading to the formation of each agreement. The precedent has shown that, in general, athletes will often not have the necessary bargaining power and will therefore have to submit to the demands of the federation, whether they like it or not. Consequently, any athlete wishing to participate in competitions organised under the control of a sports federation whose rules provide for recourse to arbitration will have no other option than to accept the arbitration clause, in particular by acceding to the constitutive act of the sports federation in which the arbitration clause has been introduced (...)[14]

Thus, in order to counterbalance and remedy violations of fundamental principles, an athlete must be granted the right to have a CAS decision rendered in adversarial conditions which is subsequently subject to judicial review before the TFE.

A CAS decision may be annulled if it is incompatible with procedural public order which "guarantees the parties the right to a decision rendered by an independent tribunal in accordance with the applicable procedural law; procedural public order is violated when commonly recognized fundamental principles are violated which make the decision appear incompatible with the values recognized in a state governed by the rule of law."[15]

Explaining that "not every violation, even arbitrary, of a procedural rule constitutes a violation of procedural public order*"* the TFE stated that "only a violation of a rule that is essential to ensuring the fairness of the proceedings can be taken into account*"*. For example,

[13] Matthew J. Mitten, (2010), vol. 10, no. 1, p. 53.
[14] Matthew J. Mitten, Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations, Pepperdine Dispute Resolution Law Journal, (2010), vol. 10, no. 1, p. 53.
[15] A. and B. versus IOC and FIS, in Digest of CAS Awards III 2001-2003, p. 620.

the following two reasons, although both difficult to prove, provide a basis for the TFE to overturn a CAS decision.

The TFE considers that a violation of Article 6(1) of the Convention falls within the broader scope of procedural public policy under Article 190(2)(e) of the IPPC and does not constitute an "autonomous" violation or a separate ground for setting aside a judgment. This view makes sense insofar as the grounds for setting aside by the TFE are exhaustively listed in Article 190(2) of the IPPC.[16]

TFE goes even further, arguing that such a breach must fall within the scope of procedural public policy in order to lead to the annulment of the judgment. Although this also seems a logical deduction (in accordance with the grounds of appeal listed exhaustively), it is to be expected that TFE will somehow "broaden" its scope of procedural public policy in its post - *Pechstein judgments* by the Court to already include all fundamental and generally recognized procedural principles not covered by Article 190(2)(d) of the LDIP insofar as their breach would be intolerably contrary to the sense of justice.

The substantive guarantees of the Convention fall in any event within the scope of substantive public policy under Article 190(2)(e) of the LDIP. The Court accords a certain level of discretion in determining substantive guarantees in accordance with the doctrine of the "margin of appreciation".

The Swiss Federal Court has stated in several cases the importance of fair trial guarantees in arbitration proceedings before the CAS. The fact that the fundamental guarantees of a fair trial also apply to the CAS was also explicitly confirmed by the Swiss Federal Court in the Marc Biolley case [17]concerning the composition of the CAS panel and Canas/ATP [18]concerning the right to a fair trial. The Swiss Federal Court considers that the guarantees of a fair trial must also be respected before the CAS in its arbitration proceedings. Most of the guarantees of a fair trial certainly fall within the category of '*generally recognized fundamental principles*'. In conclusion, the Federal Court considers that the guarantees laid down in Article 6(1) also apply to arbitration proceedings. It therefore monitors the extent to which the fundamental guarantees of a fair trial relating to public order have been respected in the proceedings before the CAS. However, the Federal Court can only examine *ex post facto* whether the arbitral tribunal complied with the procedural guarantees of public order, including

[16] Despina Mavromati, op.cit p. 203.
[17] Case 4a_506/2007, Marc Biolley [Representative of Al A. Sport]/Association Y &CAS, Judgment of (2008).
[18] Case 4p.172/2006, Canas/ATP, Decision of 2007.

the guarantees of a fair trial, and find that one of the parties has challenged the arbitral award under Article 190(2) of the LDIP.[19]

The Court's decisions are of major importance for CAS arbitration primarily because it is based in Switzerland, a state that has ratified the Convention and, therefore, must comply with the Court's decisions.[20]

An important judgment delivered by the European Court is that in the joined cases of *Mutu and Pechstein*.[21] These cases concerned complaints by two professional athletes concerning the legality of the proceedings before the Court of Arbitration for Sport (CAS). The applicants, a footballer and a speed skater, argued in particular that the CAS could not be considered an independent and impartial court. The applicant also complained that she had not been granted a hearing before the Disciplinary Commission of the International Skating Union, either at the CAS or at the Swiss Federal Supreme Court, despite her express requests to do so.[22]

As regards the applicability *ratione materiae* of Article 6(1), the Court contradicted the case-law of the Swiss Federal Tribunal according to which Article 6(1) ECHR is only "indirectly applicable" in arbitration (that is to say, to the extent that some of the guarantees provided for in Article 6(1) are incidental to the stage of the appeal for annulment of the judgment). According to the Court, Article 6(1) is directly applicable to all judicial proceedings, including arbitration, where they concern the determination of "civil rights and obligations or of any criminal charge". The Court considered that the case clearly concerned civil rights and obligations, the dispute involving "disciplinary proceedings before professional bodies and in the context of which the right to pursue a profession is at stake".[23]

The Court recognized that it also has jurisdiction *ratione persone* to rule on the complaint based on Article 6 of the Convention, despite the fact that the CAS is a private entity and not a court of the national judicial system or another institution of Swiss public law, since CAS decisions have the effect of res judicata in Switzerland under Chapter 12 of the LDIP.

As regards the lack of independence of the CAS, the Court held that there had been no violation of Article 6 § 1 of the Convention. The Court found that the arbitration proceedings in which the applicants were involved required compliance with all the guarantees of a fair trial

[19] Cernic, Jernej Letnar. "Fair Trial Guarantees before the Court of Arbitration for Sport." Human Rights & International Legal Discourse, vol. 6, no. 2, 2012, p. 266.
[20] Despina Mavromati, (2022) p. 202.
[21] Cases 40575/10, 67474/10, Mutu and Pechstein v. Switzerland, Judgment of the Court of 2 October 2018.
[22] European Institute of Romania – Council of Europe, Sport and the European Convention on Human Rights. Fact Sheet, October 2019, p. 3.
[23] Antonio Rigozzi, Sports Arbitration & Echr – Pechstein & Beyond, Ch. Müller/S. Besson/A. Rigozzi (Eds), New Developments in International Commercial Arbitration 2020, Stämpfli 2020, p. 82.

and that the applicant's allegations concerning the lack of structural independence and impartiality of the CAS, as well as the applicant's criticisms concerning the impartiality of certain arbitrators, had to be rejected.

The Court, however, found a violation of Article 6 § 1 of the Convention in the applicant's case in respect of the lack of a public hearing before the CAS, finding that the issues relating to the merits of her doping sanction, discussed within the CAS, required a hearing subject to public scrutiny. On the same point, the TFE had previously found that such a public hearing would be "*desirable*" but not necessary, wrongly categorizing the CAS arbitration as voluntary arbitration.[24]

In the context of this case, the Court emphasized that the Swiss Federal Tribunal had dismissed the appeals lodged by both applicants, giving the arbitral awards legal force in the Swiss legal order. Furthermore, it reiterated that the rejection by the TFE of an appeal against a CAS decision was clearly capable of engaging Switzerland's responsibility under the Convention in if the decision infringes its procedural or substantive rules. This conclusion of the Court strengthened the relevance of the Convention before the CAS because it confirmed the liability of Switzerland in the event that the TFE does not properly verify the conformity of CAS decisions with the Convention. It can thus be anticipated that the TFE will pay increased attention to criticisms of CAS decisions based on the provisions of the Convention and, as a result, CAS arbitrators will be increasingly open to assessing the conformity of decisions and regulations of sports bodies with the ECHR.[25]

Moreover, following the Court's judgment, the CAS quickly adapted and amended Article R57 which allows individuals to request a public hearing of the case, with some exceptions taken from Article 6(1) of the Convention. As regards the exceptions provided for in Article R57 of the CAS Code, it seems clear that the CAS should apply the same strict interpretation "adopted by the Court", so as to restrict public access to some hearings/terms if necessary and appropriate.[26]

ICAS also subsequently amended some of its rules, including the public holding of hearings/sessions, without the need for the consent of both parties (as was the case before 2019). During the nine years that the *Pechstein case* was pending, CAS also amended its rules on the appointment of arbitrators under Article S14 of the CAS Code. ICAS also created a "Members'

[24] Despina Mavromati, op.cit, p. 205.
[25] This assessment is shared *by Rigozzi* (2020) at 128 ["At the end of this discussion on the relevance of human rights in sports arbitration, it can easily be anticipated that the ECHR will be increasingly invoked by parties both before the CAS and before the Swiss Federal Tribunal."].
[26] Despina Mavromati, p. 205-206.

Committee" tasked with the appointment of CAS arbitrators. Some authors have suggested that ICAS issue additional information on the necessary conditions that a candidate must meet under Article S14, as well as the reasoning for the decision to reject the candidacy.

A final point worth mentioning is the third criticism raised by Pechstein but which, surprisingly, was not examined by the Court. The applicant alleged a separate violation of the right to a fair trial on the grounds that Swiss law does not provide for any possibility of reviewing the assessment of the facts by the CAS and that the Swiss Federal Court has a very limited scope of review. Although the Court did not rule on this point, the issue was addressed in a subsequent case, Bakker v. Switzerland [27]. The Court considered that the complaint based on the limited scope of jurisdiction of the Federal Court under Article 190 of the IACHR was unfounded because the athlete benefits from a *de novo hearing* before the CAS, with a full review of both the facts and the law, for which reasons the CAS was considered an independent tribunal by the (majority) Court in the *Pechstein case*.[28]

3.2 SPORTS ARBITRATION - A TYPE OF COMPULSORY ARBITRATION

In his critical analysis of the sports arbitration system, Jan Paulsson offers a revealing insight into the consensual nature of this type of arbitration, calling it an "abuse of language." By comparing sports participants in sports proceedings to a tourist experiencing a hurricane in Fiji, Paulsson highlights their sense of isolation and unpreparedness in the face of a complex and often foreign system.

In this context, sports federations, which confer jurisdiction on sports authorities and grant licenses for competitions, appear to have an inherent advantage due to their long experience and well-established procedures. These organizations have developed dispute resolution systems that are described as "more or less complex and completely closed." Thus, the supposed consent of athletes within this dispute resolution system is, according to Paulsson, completely fictitious.

Contrasting this scenario with the practice of ordinary litigation, where the defendants' lawyers have extensive experience and are considered equals before the court, a clear discrepancy is observed. Paulsson argues that the procedures of sports federations are so closely

[27] Case 7198/07, Erwin Bakker v. Switzerland, Judgment of the Court of 3 September 2019.
[28] Antonio Rigozzi, (2020) p. 81.

tied to the structure of the organization that " *outsiders* " have no chance of being on an equal footing with their opponent, i.e. the federation itself.

This analysis highlights a fundamental problem in sports arbitration: the lack of a balance of power between participants and sports organizations. This dynamic can undermine the fundamental principle of due process.

Terms such as “binding arbitration” or “forced arbitration” accurately describe arbitration imposed on the parties by law, without their consent or expression. Sometimes, however, these terms are used by judges or other actors in the context of consensual arbitration. This often occurs when the person using the term is concerned about the circumstances that gave rise to the consent or the authenticity of the expressed consent, such as in the case of adhesion contracts. These concerns are perfectly legitimate, as is the recognition of the coercive nature of consent to be bound by contracts. However, to call arbitration “binding” or “forced” is to respond on the basis of the label, not on the basis of attention to the facts.

In binding arbitration, the parties have no other option but to resort to an arbitral tribunal to resolve their cases. In such a case, arbitration is just another name for “court proceedings/court”.

Forced arbitration, on the other hand, gives the impression that it would be based on the consent of the parties but is, in fact, a species of compulsory arbitration. For example, we are in the presence of forced arbitration if the arbitration agreement was concluded by the parties “freely”, but under some form of coercion, such as the case of sports arbitration. With regard to sports arbitration, the Court concluded that, although this procedure was not imposed by law, but by the ISU regulations, the acceptance of the CAS jurisdiction by the athletes must be considered as “compulsory” arbitration.[29]

In the field of sports arbitration, the Court made some essential additions. Thus, in the *Pechstein case*[30], the Court distinguished between commercial and sports arbitration. It held that in commercial arbitration the parties enjoy freedom regarding the commercial relationships in which they wish to participate. In contrast, high-performance athletes do not have the same freedom as the parties in commercial relationships. In the field of sports, athletes have two options: first, to accept the arbitration clause and thus earn their living by practicing professional sports, or, second, not to accept the arbitration clause and thus not earn their living by practicing sports at a high level. Finally, the Court concluded that, although in this case, the

[29] Wei Gao, The ECHR In Action: Its Applicability And Relevance For Arbitration, The International Journal Of Human Rights, (2002), p. 1661.
[30] Cases 40575/10, 67474/10, Mutu and Pechstein v. Switzerland, Judgment of the Court of 2 October 2018.

clause had not been imposed by law but by the ISU regulations, the athletes' acceptance of the CAS jurisdiction makes sports arbitration "mandatory" and not voluntary.[31]

4 CONCLUSIONS

The analysis demonstrates that the Court of Arbitration for Sport, while functioning as a private arbitral tribunal, exercises jurisdiction in matters that deeply affect athletes' civil rights. Despite being formally independent, CAS proceedings cannot be regarded as entirely voluntary given the power asymmetry between individual athletes and powerful sports federations. Consequently, the guarantees enshrined in Article 6 of the ECHR—particularly the right to an independent and impartial tribunal, to a reasoned judgment, and to a public hearing—must apply to CAS procedures. The jurisprudence of both the ECtHR and the Swiss Federal Tribunal supports this position. Notably, the Mutu and Pechstein ruling brought clarity regarding the mandatory character of CAS arbitration and Switzerland's duty to uphold Convention standards. The gradual alignment of CAS procedures with ECHR requirements, including the right to request public hearings and enhanced arbitrator appointment mechanisms, reflects a positive evolution. However, as long as the CAS remains a structurally necessary forum for athletes, further reforms and consistent judicial oversight remain essential to guarantee procedural fairness and safeguard athletes' fundamental rights.

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[31] Wei Gao, (2002), p.1661.

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