

# European Court of Human Rights Rules That, If So Requested, CAS Hearings Must Be Public



On 2 October 2018, the European Court of Human Rights (the **ECtHR**) held in the case of [Mutu and Pechstein v. Switzerland](#) that arbitration proceedings before the Court of Arbitration for Sport (the **CAS**) violated the right to a fair trial enshrined in Article 6, paragraph 1 of the European Convention on Human Rights (the **ECHR**) if those proceedings were not conducted publicly despite the express request of one of the parties.

## **The facts and the applicants**

The first applicant, Mr. Adrian Mutu, was a former professional football player who played for Chelsea Football Club (**Chelsea**). In 2004, in the context of an anti-doping check carried out by the English Football Association, traces of cocaine were found in the sample collected from Mr. Mutu. As a result, Chelsea terminated Mr. Mutu's contract.

Mr. Mutu appealed that decision before the *Football*

*Association Premier League Appeals Committee* (the **FAPLAC**) which dismissed his claim and found that, through his behaviour, Mr. Mutu had committed a unilateral breach of the contract without reasonable cause. Mr. Mutu then lodged an appeal against that decision before the CAS, which entirely upheld the FAPLAC's decision.

In parallel, Chelsea also filed an action for damages against Mr. Mutu before the Disputes Division of the FIFA (the **FIFA's Disputes Division**), which ordered Mr. Mutu to pay Chelsea over EUR 17 million in damages. This decision was also upheld by the CAS in 2009. Mr. Mutu subsequently lodged an appeal before the Federal Supreme Court of Switzerland (since that court had jurisdiction to set aside CAS decisions). The Swiss Federal Supreme Court, however, dismissed Mr. Mutu's appeal. Mr. Mutu subsequently initiated proceedings before the ECtHR alleging that the CAS proceedings had violated Article 6, paragraph 1 ECHR on the ground that the panel had been neither independent, nor impartial. To substantiate this claim, Mr. Mutu relied on an anonymous email reporting that one of the arbitrators on the panel had been a partner in a law firm which represented the owner of Chelsea. In addition, Mr. Mutu asserted that another arbitrator on the panel had previously sat on the bench which had upheld FAPLAC's initial ruling.

The second applicant, Ms. Claudia Pechstein, was a German speed skater and nine-time Olympic medalist. In February 2009, Ms. Pechstein was subject to an anti-doping check in the context of an international speed skating championship. Having been tested positive, she was suspended for two years by the disciplinary committee of the *International Skating Union* (**ISU**). Later that year, Ms. Pechstein appealed that suspension before the CAS and expressly requested a public hearing. The CAS nonetheless upheld ISU's decision and denied Ms. Pechstein's request. Consequently, Ms. Pechstein also lodged an action before the Federal Supreme Court of Switzerland to set aside the CAS's award. However, the Swiss court dismissed

her claim and Ms. Pechstein turned to the ECtHR alleging that the proceedings before the CAS had been neither independent nor impartial. To substantiate her claim she argued, in particular, that (i) the method of appointment of the arbitrators was vitiated since she could only select an arbitrator from a pre-established list of adjudicators; (ii) the president of the panel had already adopted a very “hard line” on doping issues; and (iii) the panel had refused to hold a public hearing despite her request.

### **Findings of the ECtHR**

The ECtHR dismissed all of Mr. Mutu’s claims as nothing showed that the proceedings before the CAS had been partial. According to the ECtHR, in order to successfully challenge the partiality of an arbitrator, one needs to demonstrate that one arbitrator previously ruled on similar facts and identical legal issues. In the case at hand, however, although the challenged arbitrator had indeed examined the same facts in both proceedings (*i.e.*, both appeals against the decisions of FAPLAC and FIFA’s Disputes Division), the legal issues differed (the first proceeding concerned a contractual breach, while the second proceeding concerned the amount of damages to be paid to Chelsea as a result of that breach). In addition, the ECtHR found that it had no compelling reason to substitute its own view with those of the Federal Supreme Court of Switzerland, which had ruled on the impartiality of the second challenged arbitrator in a lengthy judgment which contained no hint of impartiality.

With respect to Ms. Pechstein’s claims, the ECtHR found:

- That the method of appointment of the CAS arbitrators had certainly been limited by the obligation to select a person from a list drawn up by the International Council of Arbitration for Sport. However, the list contained 300 names. Although the ECtHR acknowledged that international sport associations were in a position to exert genuine

influence on the selection process of the arbitrators, mere influence was insufficient to establish that the arbitrators on the list were not independent or impartial *vis-à-vis* those organisations.

– That Ms. Pechstein did not sufficiently substantiate her allegations regarding the impartiality of the arbitrators.

– However, the ECtHR found that, since Ms. Pechstein had expressly requested that a public hearing be held before the CAS, there had been a violation of Article 6, paragraph 1 of the ECHR on account of the non-public nature of the proceedings before the CAS.

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