



## Q&A on the judgment *Mutu and Pechstein v. Switzerland*<sup>1</sup>

*This document is a tool for the press, issued in the context of notification of the above judgment. It does not bind the Court.*

### ***Is this the first time that the European Court of Human Rights has examined the composition of the CAS and the procedure followed before it?***

A case concerning the Court of Arbitration for Sport (CAS) was brought before the Court as a result of an application lodged on 26 November 2003 by Ms Lazutina and Ms Danilova against Switzerland. The applicants complained that the CAS did not offer sufficient guarantees of impartiality and independence vis-à-vis the International Olympic Committee. However, the Court did not examine the case further as by a letter of 12 October 2007 the applicants informed the Registry that they no longer wished to pursue their application. By a letter of 1 November 2007, the respondent Government invited the Court to strike the case off its list. The Court considered that no circumstances involving compliance with the rights guaranteed by the Convention or the Protocols thereto required that it continue to examine this application, and consequently struck the case off its list. (See decision of 3 July 2008, *Lazutina and Danilova v. Switzerland*, application no. 38250/03.) This is therefore the first time that the Court has ruled on this issue.

### ***Why does this case concern Switzerland?***

At first sight, the complaints in these applications essentially concern, in both cases, the composition of the CAS and the procedures followed before that body. However, the CAS is neither a State court nor another institution of Swiss public law, but a private-law foundation.

Nonetheless, **Swiss law provides that the Federal Supreme Court has jurisdiction to determine the validity of the decisions issued by the CAS**, particularly with regard to the lawfulness of the composition of the arbitration panel (sections 190 and 191 of the Federal Act on Private International Law of 18 December 1987). In addition, **the Swiss Federal Supreme Court dismissed the applicants' appeals**, thus attributing *res iudicata* effect in the Swiss legal order to the arbitration decisions in question.

The contested acts and omissions are thus capable of engaging the respondent State's responsibility under the Convention. It follows that the Court has jurisdiction to examine the applicants' complaints concerning acts or omissions by the CAS that have been validated by the Federal Supreme Court.

### ***Does the ECHR accept the use of arbitration?***

Article 6 § 1 of the Convention guarantees to everyone the "right to a court". The right of access to the courts is not, however, absolute. It may be subject to implicit limitations. Nonetheless, it is for the Court to determine in the last resort whether the Convention has been complied with. It has laid down two fundamental requirements: 1. The limitations must not restrict the access offered to the individual in such a way that **the very essence of the right is impaired**, and 2. The restrictions must pursue a legitimate aim and there must be a **reasonable relationship of proportionality** between the means employed and the aim pursued.

<sup>1</sup> See press release.

This right of access to a court does not necessarily imply the right to be able to bring proceedings before a court of the classic kind. **Article 6 does not therefore preclude the creation of arbitration courts in order to judge certain disputes of a pecuniary nature between private persons.** The Court, aware that arbitration clauses in contracts offer undeniable advantages both for the parties concerned and for the administration of justice, considers that they do not in principle offend against the Convention.

***Can individuals waive the benefit of Article 6 by resorting to arbitration?***

A distinction must be drawn between voluntary arbitration and compulsory arbitration. Where arbitration is imposed by law, we speak of **compulsory arbitration**. In this scenario, as the parties have no choice but to submit their dispute to the decision of an arbitration court, that body must provide all of the safeguards set out in Article 6 § 1 of the Convention.

Where the use of arbitration is willingly entered into, we speak of **voluntary arbitration**. In this scenario, the parties may voluntarily waive certain rights guaranteed by the Convention when they accept an arbitration clause. Such a waiver does not conflict with the Convention provided that it is entered into **willingly, lawfully and unequivocally**. In addition, a waiver of certain rights protected by the Convention must be attended by minimum safeguards commensurate to its importance.

***Is this judgment final?***

Once a Chamber judgment has been delivered, the parties may request that the case be referred to the **Grand Chamber**. Such requests, which have to be made within three months of delivery of the judgment, are accepted on an exceptional basis. A panel of judges of the Grand Chamber decides whether or not it is appropriate to refer the case to the Grand Chamber for re-examination.