CHAPTER 9

The Right to a Public Hearing in Arbitration in Light of ECtHR Judgments

Daria Kozlowska-Rautiainen[*]

§9.01 INTRODUCTION

On 2 October 2018, the European Court of Human Rights (ECtHR) issued a decision in *Mutu and Pechstein*[1] (hereinafter referred to as '*Pechstein*') in which it found, *inter alia*, that the German speed skater Claudia Pechstein had the right to a public hearing based on Article 6(1) of the European Convention on Human Rights (ECHR)[2] in relation to an arbitration before the Court of Arbitration for Sport (CAS).

The CAS arbitration was based on an arbitration agreement signed by Pechstein during her registration for the 2009 World Speed Skating Championships.[3] The rules of the CAS applicable at the time provided that a hearing is private unless both parties agree otherwise.[4] Yet, Pechstein explicitly requested for a public hearing. When the request was not fulfilled and the award rendered after a hearing held in camera,

* This chapter has been written within the framework of the Employment Arbitration Research Network. Particular thanks are due to Erik Sinander and other members and persons affiliated with the Research Network for their comments and support.

1. *Mutu and Pechstein v. Switzerland*, Nos 40575/10 and 67474/10 (ECtHR 2 Oct. 2018). Pechstein's application was joined with an application by a Romanian football player Adrian Mutu, who also complained about a violation of the Art. 6(1) ECHR by Switzerland, but with regard to the lack of independence and impartiality of the tribunal in his CAS arbitration.
2. Article 6(1) of the ECHR provides 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 within a reasonable time by an independent and impartial tribunal established by law. …'.
3. *Pechstein v. DESG and ISU*, KRZ 6/15, 2 (BGH 7 Jun. 2016), English translation available on https://www.tas-cas.org/fileadmin/user_upload/Pechstein___ISU_translation_ENG_final.pdf (accessed 15 Jun. 2020).
4. Rule R57 CAS Code C. Special Provisions Applicable to the Appeal Arbitration Procedure, which has been changed after the decision of the ECtHR in *Pechstein*.

Pechstein applied to set aside the CAS award in the Swiss Federal Supreme Court. After an unsuccessful challenge of the CAS award, Pechstein then filed an application to the ECtHR against Switzerland on the basis of a violation of Article 6(1) ECHR.

According to the ECtHR case law, the right to a public hearing as enshrined in Article 6(1) ECHR is waived in a voluntary arbitration, but applies in a compulsory arbitration.[5] With regard to Pechstein, the ECtHR found that, even though the arbitration was not de jure compulsory, it was nonetheless 'compulsory' to her, because her only choice was either to enter into the arbitration agreement or to be unable to compete and earn a living.[6] Consequently, according to the ECtHR, Pechstein had not waived the right to a public hearing.[7]

What should an arbitral tribunal do when faced with a unilateral request for a public hearing? Is the privacy of arbitration threatened? Can the ruling regarding Pechstein be relevant beyond sports arbitration? Or can the arbitration community disregard the possible applicability of Article 6(1) ECHR to arbitrations not involving athletes?

In this chapter I argue that the reasoning presented by the ECtHR in *Pechstein* could in certain specific circumstances be applied also beyond sports arbitrations, e.g., to employment or consumer arbitration, or even to commercial arbitration. However, in my view, the effect of the decision should not be exaggerated.

What is important in this context is to acknowledge the need for sensitivity towards the potential application of Article 6(1) ECHR to arbitration even where the arbitration is not de jure compulsory. A party's request for a public hearing should not be disregarded without conducting an analysis or providing reasons which could exempt the otherwise possibly applicable right to a public hearing.

The aim of this chapter is to analyse the issue of applicability, relevance and fulfilment of the right to a public hearing in arbitration in order to dispel some of the uncertainty that can derive from the decision in *Pechstein*.

This chapter is addressed primarily to arbitrators, and secondarily to arbitration users, court judges and academics. It adds a new perspective regarding the specific issue of the right to a public hearing to the already existing discussion on the broader theme of human rights and arbitration.[8] The right to a public hearing in investment

5. *Mutu and Pechstein*, *supra* n. 1, at 95–96. *See also Bramelid and Malmström v. Sweden*, Nos 8588/79 and 8589/79, 30 (Report of the Commission 12 Dec. 1983) where the ECtHR provided 'normally Article 6 poses no problem where arbitration is entered into voluntarily', and *Tabbane v. Switzerland (dec.)*, No. 41069/12, 29 (ECtHR 1 Mar. 2016), where the ECtHR provided that the applicant freely waived the protections enshrined in Art. 6(1) ECHR as he entered into the arbitration agreement freely. If an arbitration is compulsory, the protections are not effectively waived. *See Suda v. Czech Republic*, No. 1643/06 (ECtHR 28 Oct. 2010).
6. In French – the original language of the decision, the word used is *forcé. Mutu and Pechstein*, *supra* n. 1, at 115.
7. *Mutu and Pechstein*, *supra* n. 1, at 147.
8. *See*, e.g., M.V. Benedettelli, *The European Convention on Human Rights and Arbitration: The EU Law Perspective*, 463–518, in Ferrari (ed.) The Impact of EU Law on International Commercial Arbitration (Juris Publishing 2017); S. Besson, *Arbitration and Human Rights*, ASA Bulletin, Vol. 24, Issue 3, 395–416 (September 2006); R. Briner and F. von Schlabrendorff, *Article 6 of the European Convention on Human Rights and Its Bearing upon International Arbitration*, 89–109, in R. Briner, L.Y. Fortier, K.P. Berger & J. Bredow (eds) Law of international business and dispute

arbitration is not discussed in this chapter and neither is the issue of the validity of arbitration agreements.

After providing background information regarding *Pechstein* and other relevant recent developments (*see* §9.02), I consider three main questions:

(1) *When is the right to a public hearing enshrined in Article 6(1) ECHR applicable in arbitration and when is it waived based on the jurisprudence of the ECtHR?* (*see* §9.03)

First, the general exceptions to the applicability of Article 6(1) ECHR are considered. Then, the focus shifts to an analysis of the conditions for the waiver of the right to the public hearing: the waiver being free, unequivocal and lawful, the waiver being accompanied by appropriate guarantees, and the tribunal being established by law. If any of the above conditions are not fulfilled, the rights deriving from Article 6(1) ECHR apply.[9]

(2) *What is the relevance of the ruling of the ECtHR in Pechstein for arbitration?* (*see* §9.04)

In this section, I first show that a de facto compulsory arbitration could be found beyond the very specific circumstances of *Pechstein* and that the impact goes beyond sports arbitration. I then explain why arbitrators should take into account rulings of the ECtHR. Finally, I consider the importance of privacy in arbitration in order to help examine the risk of organizing a public hearing in arbitration.

(3) *How does one go about fulfilling the right to a public hearing in arbitration?* (*see* §9.05)

As the final question I consider the practical challenges an arbitrator could face when organizing a public hearing in an arbitration.

§9.02 THE PECHSTEIN SAGA AND RECENT DEVELOPMENTS

Before commencing the analysis, it is pertinent to provide some background information about *Pechstein* as well as to mention some other relevant recent developments.

Pechstein is more appropriately referred to as the Pechstein saga, as cases were brought to courts not only in Switzerland but also in Germany. The divergent decisions of the national courts and the ECtHR emphasize the controversy surrounding the question that is at the centre of this chapter.

---

settlement in the 21st century, Liber Amicorum Karl-Heinz Böckstiegel (Carl Heymanns Verlag 2001); A. Jaksic, *Arbitration and Human Rights* (Peter Lang 2002); J.C. Landrove, *European Convention on Human Rights' Impact on Consensual Arbitration An état des lieux of Strasbourg Case-Law and of a Problematic Swiss Law Feature*, 73–101, in Besson, Hottelier and Werro (eds) Human Rights at the Center (Schulthess 2006).

9. The aim is not to provide an exhaustive analysis of the above issues as this would be impossible to achieve in a short article. Instead, the objective is to shed light on this topic, to provide guidance regarding possible interpretation of future borderline cases, and to provoke discussion.

[A] The Pechstein Saga

Claudia Pechstein – a German five-time Olympic gold medalist in speed skating – entered into an arbitration agreement with the International Skating Union (ISU) when signing a registration form for the World Speed Skating Championships that took place in 2009 in Norway.[10]

Following the anti-doping blood tests performed during the 2009 Championships, the ISU filed a complaint to its Disciplinary Commission against Pechstein.[11] The Disciplinary Commission imposed a two-year-long ban on Pechstein for illegal doping and took away the medal she won in the 2009 Championships.[12] Based on the arbitration agreement, Pechstein appealed the decision to the CAS. After holding a hearing in camera, despite Pechstein's request for a public hearing, the arbitral tribunal confirmed the ban.[13] Pechstein challenged the CAS award before the Swiss Federal Supreme Court, *inter alia*, on the ground that she was not afforded a public hearing. The challenge was dismissed.[14] With regard to Article 6(1) of the ECHR, the Swiss Federal Supreme Court found that the provision was invoked incorrectly because it is not applicable to voluntary arbitration.[15]

Pechstein also started proceedings before German courts against the ISU and the German Speedskating Union with which she was affiliated, i.e., Deutsche Eisschnelllauf-Gemeinschaft (DESG). After her claim was dismissed in the Regional Court in Munich, Pechstein appealed to the Higher Regional Court of Munich, which found that the arbitration agreement was invalid due to the abuse of market position by the ISU and that, because the arbitration agreement constituted a violation of anti-trust law, the recognition of the CAS award constituted a violation of public policy.[16] However, the German Federal Court of Justice, after balancing the rights and interests of the parties,[17] disagreed with the finding of Higher Regional Court of Munich that the ISU abused its dominant position. Moreover, the German Federal Court of Justice did not find a violation of Article 6(1) of the ECHR and stated that Pechstein was party to voluntary arbitration.[18]

10. *Pechstein v. DESG and ISU*, BGH 7 Jun. 2016, *supra* n. 3, at 2. For an in-depth comment on this case *see* B. Ehle and I. Guaia, *Bundesgerichtshof, Az. KZR 6/15, Pechstein v. International Skating Union (ISU), 7 June 2016*, 415–427, in Duval and Rigozzi (eds) Yearbook of International Sports Arbitration 2016 (Springer 2016).
11. *Mutu and Pechstein*, *supra* n. 1, at 19.
12. *Pechstein v. DESG and ISU*, BGH 7 Jun. 2016, *supra* n. 3, at 3.
13. *Mutu and Pechstein*, *supra* n. 1, at 20–21.
14. *Pechstein v. ISU and DESG*, 4A_612/2009 (TF 10 Feb. 2010). Subsequent motion for revision has also been rejected. *See* 4A_144/2010 (TF 28 Sep. 2010).
15. *Ibid*., at 4.1.
16. *Pechstein v. DESG and ISU*, U 1110/14 (OLG Munich 15 Jan. 2015) and *Pechstein v. DESG and ISU*, BGH 7 Jun. 2016, *supra* n. 3, at 10.
17. *See*, e.g., *Pechstein v. DESG and ISU*, BGH 7 Jun. 2016, *supra* n. 3, at 57–61.
18. The BGH stated as follows: '… the jurisdiction of ordinary courts may be excluded in arbitration agreements if the arbitration agreement has been entered into voluntarily, is lawful and clearly worded, if further the arbitration procedure has been designed in accordance with the guarantees given in Art. 6 ECHR and if the arbitral awards can be set aside by a court of law in case of procedural errors … these requirements have been fulfilled. According to the case law of the European Court of Human Rights, the fact that the Plaintiff is obliged, to be able to exercise her

On 11 November 2010 Pechstein filed an application to the ECtHR against Switzerland.[19] Her application was joined with an application by a Romanian football player Adrian Mutu,[20] who had also complained against a violation of Article 6(1) ECHR by Switzerland, but with regard to a CAS tribunal lacking independence and impartiality.

With regard to Pechstein, the ECtHR found that based on the circumstances of the case Pechstein was a party to compulsory arbitration and, hence, that she had not waived the protections provided in Article 6(1) of the Convention.[21] The ECtHR, therefore, reached a different conclusion to those of the Swiss Federal Supreme Court and the German Federal Court of Justice. This finding underlines the controversy regarding the question of whether a party to an arbitration that is not de jure mandatory can have a right to a public hearing on the basis of Article 6(1) ECHR.

[B] Recent Developments That Followed the Decision in *Pechstein*

In the recent judgment in the case of *Ali Riza and others v. Turkey* from 28 January 2020, the ECtHR was faced with similar questions to those in *Pechstein*. The ECtHR reiterated the principles spelled out in *Pechstein*, including *inter alia* that, where an arbitration is compulsory, the safeguards of Article 6.1 have to be provided.[22]

Following the decision in *Pechstein*, CAS has amended Rule 57 of its Code which provided that a hearing is held in private unless both parties agree otherwise. The rule was supplemented with the following text:

> At the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Such request may however be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public.[23]

Finally, on 15 November 2019, a public hearing was held for the second time in the history of CAS in the case of a Chinese swimmer Sun Yang.[24] The practical solutions

---

profession, to sign the registration form imposed by the Second Defendant does not mean that the arbitration agreement has not been voluntarily signed and therefore infringes the Convention …' *Ibid.*, at 65.

19. *Mutu and Pechstein, supra* n. 1, at 1.
20. *Ibid.*, at 8.
21. *Ibid.*, at 115.
22. *Ali Riza and others v. Turkey*, Nos 30226/10, 17880/11, 17887/11, 17891/11 and 5506/16, 175–177, 181 (ECtHR 28 Jan. 2020).
23. *See* CAS Code C. Special Provisions Applicable to the Appeal Arbitration Procedure, R57 https://www.tas-cas.org/en/arbitration/code-procedural-rules.html (accessed 15 Jun. 2020).
24. The first one being a hearing in a case of an Irish swimmer Michelle Smith de Bruin in 1999. *See* the information provided by the CAS itself in the release regarding Yang's hearing https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_Hearing_15.11.19.pdf (accessed 15 Jun. 2020). Although, in this case both parties agreed to have a public hearing, it is my contention that Pechstein's quest for a public hearing in the CAS arbitration in one way or another paved the way to the public hearing in Sun Yang's arbitration.

regarding the organization of a public hearing are relevant for the third question considered in this chapter, i.e., how to fulfil the right to a public hearing in arbitration.

§9.03 LIMITATIONS AND CONDITIONS FOR WAIVER OF THE RIGHT TO A PUBLIC HEARING ENSHRINED IN ARTICLE 6(1) ECHR

This section sheds light on the question of when the ECtHR could consider if a party has a right to a public hearing. The discussion commences with Article 6(1) ECHR and its limitations and then the attention turns to the conditions under which the right to a public hearing can be waived in arbitration.[25] As part of the latter analysis, I first consider the question of when a waiver is made freely. I then discuss the issue of an unequivocal and lawful waiver. I conclude by considering what guarantees might have to be given for the waiver to be effective and when a tribunal is considered to be established by law.

[A] Article 6(1) ECHR and Its Limitations

Article 6(1) of the ECHR, which contains the right to a public hearing, has been described as an 'omnibus provision'[26] and 'a pithy epitome of what constitutes a fair administration of justice'.[27] According to paragraph 1 of Article 6:

> 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* within a reasonable time by an independent and impartial tribunal established by law. … (author's emphasis)

From the perspective of the ECHR, a public hearing provides an element of public scrutiny intended to protect a party from administration of justice taking place behind closed doors. As such, a public hearing is an important element of the right to a fair trial, which is enshrined in Article 6(1). This in turn helps to achieve the goal of Article 6(1), which is a fair hearing.[28]

25. In Pechstein's case it was lack of free waiver, but there could be also other conditions of waiver which when unfulfilled that could result in Art. 6(1) being applicable to arbitration.
26. B. Rainey, E. Wicks and C. Ovey, *The European Convention on Human Rights*, 274 (Oxford University Press 2017).
27. N. Mole and C. Harby, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Human Rights Handbooks, No. 3* (Council of Europe Publishing, 2006).
28. *See*, e.g., *Pretto and others v. Italy*, No. 7984/77 (ECtHR 8 Dec. 1983); *Malhous v. the Czech Republic*, No. 33071/96, 55–56 (ECtHR 12 Jul. 2001); *B and P v. UK*, Nos 36337/97 and 35974/97, 36 (ECtHR 24 Apr. 2001); *Ramos Nunes De Carvalho e Sá v. Portugal*, No. 55391/13 (ECtHR 21 Jun. 2016). *See also* Guide to Art. 6 of the Convention, 72 (CoE, ECHR 2019) https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (accessed 15 Jun. 2020); K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 226 (Sweet and Maxwell 2012); Rainey et al., *supra* n. 26, at 300.

However, the right to a public hearing is not absolute. Article 6(1) enumerates the following limitations of the right:

> 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.

Moreover, the ECtHR has found in some cases that holding no hearing at all is permissible. A case can be decided on documentary evidence and written submissions where, e.g., (i) no facts are contested,[29] (ii) the dispute is not complex,[30] (iii) the dispute is of a technical nature,[31] or (iv) the dispute concerns an unambiguous question of law.[32]

According to the case law of the ECtHR, the parties waive some protections of Article 6(1) ECHR when they enter into an arbitration agreement,[33] but the waiver has to be given in a *free, lawful and unequivocal* manner.[34] Moreover, with regard to some rights, 'minimum guarantees commensurate to its importance' have to be provided for the waiver to be effective.[35] The waiver of the right to a public hearing in arbitration is considered uncontroversial.[36] This part of the rights protected in Article 6(1) ECHR can be considered to conflict with the privacy of arbitral proceedings.[37] As noted in *Nordström-Janzon and Nordström-Lehtinen v. Netherlands*:

> In some respects – in particular as regards publicity – it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6. …[38]

The sections below provide an analysis of the conditions that are required for the waiver of Article 6(1) rights in arbitration, and in particular for the waiver of the right to a public hearing.

29. *See*, e.g., *Döry v. Sweden*, No. 28394/95, 37 (ECtHR 12 Nov. 2002); *Saccoccia v. Austria*, No. 69917/01, 73 (ECtHR 5 Jul. 2007) and *Speil v. Austria,* No. 42057/98, 29 (ECtHR 5 Sep. 2002).
30. *See*, e.g., *Speil, supra* n. 29, at 29.
31. *See*, e.g., *Döry, supra* n. 29, at 41–43.
32. *See*, e.g., *Allan Jacobsson v. Sweden* (No. 2), No. 16970/90, 49 (ECtHR 19 Feb. 1998).
33. *Albert and Le Compte v. Belgium*, Nos 7288/75 and 7496/76 (ECtHR 10 Feb. 1983). Some protections like the right to submit claims to an adjudicator, be it an arbitral tribunal or a national court cannot be waived. *See*, e.g., Landrove, *supra* n. 8, at 78–79. For more on the topic *see also* Benedettelli, *supra* n. 8, at 508–510.
34. *Mutu and Pechstein*, *supra* n. 1, at 96, relying on cases of *Eiffage S.A. and Others v. Switzerland*, No. 1742/05 (ECtHR 15 Sep. 2009); *Suda, supra* n. 5; *R. v. Switzerland*, No. 10881/84 (Commission decision of 4 Mar. 1987), *Suovaniemi and others v. Finland*, No. 31737/96 (ECtHR 23 Feb. 1999) and *Tabbane*, *supra* n. 5, at 25–27.
35. *Mutu and Pechstein*, *supra* n. 1, where para. 96 is essentially a copy of para. 27 from the decision in *Tabbane*, *supra* n. 5.
36. *See*, e.g., Briner and von Schlabrendorff, *supra* n. 8, at 98 and Benedettelli, *supra* n. 8, at 509.
37. More on the importance of privacy in arbitration under §9.04[C].
38. *Nordström-Janzon and Nordström-Lehtinen v. Netherlands,* No. 28101/95 (ECtHR 27 Nov. 1996).

[B] Free Waiver

A waiver is considered to be made freely when a party voluntarily enters into an arbitration agreement.[39] As the ECtHR reasoned in *Tabbane v. Switzerland*, the applicant freely waived the protections enshrined in Article 6(1) of the Convention as he entered freely into the arbitration agreement, not acting under duress:

> On the contrary, by exercising his contractual freedom, he signed an arbitration agreement with the Colgate company containing an arbitration clause to resolve disputes that could arise between them … In concluding this arbitration agreement, the claimant expressly and freely renounced the possibility of submitting disputes potentially arising in the future to an ordinary court, which would have offered all the guarantees of Article 6 of the Convention. There is no indication that the applicant acted under duress in signing the arbitration agreement.[40]

According to the above, it could be concluded that a waiver is given freely when a party enters into an arbitration agreement based on contractual freedom and not under duress.

In *Pechstein*, the ECtHR expressly drew a distinction between voluntary arbitration and compulsory arbitration. When the arbitration is voluntary, the waiver is considered to be given freely. The ECtHR found this to be the case with regard to the first applicant – Mutu. On the subject of arbitration that is compulsory by law, however, the ECtHR stated that:

> [i]f 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.[41]

The ECtHR then argued that arbitration can also be deemed to be compulsory, even though it is not compulsory under the law, if the circumstances of the case nevertheless oblige a party to arbitrate:

> even though it had not been imposed by law but by the ISU [International Skating Union] regulations, the acceptance of CAS [Court of Arbitration for Sport] jurisdiction by the second applicant [Pechstein] must be regarded as 'compulsory' arbitration within the meaning of its case-law (contrast Tabbane …). The arbitration proceedings therefore had to afford the safeguards secured by Article 6 § 1 of the Convention.[42]

To differentiate this arbitration from arbitration mandated by law, I refer to this type of arbitration, as de facto *compulsory arbitration*.[43]

The distinction between de jure compulsory arbitration and de facto compulsory arbitration is useful because, while it is not difficult to determine when an arbitration

39. *See*, e.g., *Tabbane*, *supra* n. 5, at 29. *See also Bramelid and Malmström*, *supra* n. 5, at 30.
40. *Tabbane*, *supra* n. 5, at 29 (own translation from French).
41. *Mutu and Pechstein*, *supra* n. 1, at 95.
42. *Ibid.*, at 115.
43. For instance, Besson used the term *forced*, probably borrowed from the French *forcé* to make the distinction. *See* Besson, *supra* n. 8, at 398–399. However, in the Mutu and Pechstein decision, the ECtHR used the term *forcé* to refer to both de jure and de facto compulsory arbitration. *See*

is de jure compulsory (i.e., compulsory by law), determining when an arbitration is de facto compulsory (i.e., compulsory in fact) is not as easy. For example, as stated above, the Swiss Federal Supreme Court and the German Federal Court of Justice came to a different conclusion than the ECtHR on this very issue in the circumstances that applied to Pechstein.

A distinction also needs to be made between arbitration agreements that are entered into under duress and de facto compulsory arbitration. The common factor between arbitration agreements entered into under duress and de facto compulsory arbitration is that the party in question has no choice but to enter into the arbitration agreement. However, the difference is that in the case of duress there is an unlawful threat[44] and the arbitration agreement would be unenforceable.[45] In de facto compulsory arbitration, however, the party is not unlawfully threatened.

I will proceed to discuss the reasoning of the ECtHR in *Pechstein*, in which Mutu was found to be party to voluntary arbitration whereas Pechstein was found to be party to compulsory arbitration.

[1] Cases of Mutu and Pechstein

Pechstein (formally referred to as the *Mutu and Pechstein* case) comprised of two applications regarding the violation of Article 6(1) ECHR by Switzerland – that of Romanian football player Adrian Mutu and that of German speed skater Claudia Pechstein. The first applicant in the case – the Romanian football player Adrian Mutu – complained about the violation of Article 6(1) ECHR by Switzerland on the basis that the Swiss Federal Supreme Court did not annul the CAS award against him on grounds of a lack of independence and impartiality of the tribunal.[46] Mutu did not complain about the lack of a public hearing, but his case is relevant because he argued that the CAS arbitration was compulsory for him and hence that the protections from Article 6(1) ECHR – in his case to an independent and impartial tribunal – applied.

The ECtHR found that Mutu entered into the arbitration agreement voluntarily and that he had waived the rights deriving from Article 6(1) ECHR freely. The main reason for this conclusion was that, based on the applicable regulations for football players at the time, Mutu had the option of going to court in case of a dispute with his football club, and hence he was not obliged to go to arbitration. According to Article 42 of the 5 July 2001 FIFA (fr: Fédération Internationale de Football Association, en: International Federation of Association Football) Regulations for the Status and Transfer of Players (2001 FIFA Regulations) the arbitration was to be established

Mutu and Pechstein, *supra* n. 1, at 95 and 115 (original, French language version). Therefore, I have decided to follow the term de facto compulsory used previously by, e.g., Benedettelli. *See* Benedettelli, *supra* n. 8, at 507.

44. G. Born, *International Commercial Arbitration*, 812 (2nd ed., Kluwer Law International 2014).
45. *Ibid*. *See*, e.g., Art. II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
46. Mutu's case is further discussed under §9.03[C].

'[w]ithout prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players …'.[47]

The above would have sufficed to establish that Mutu freely waived rights enshrined under Article 6(1), but the ECtHR also considered the circumstances of the case more generally. It started by stating that a player, even a famous one, is a weaker party in negotiations with a football club. However, the ECtHR went on to note that Mutu did not show that all players in his club were forced to enter into an arbitration agreement, nor did he show that he tried finding employment with a different club or that a different club refused to hire him because he did not want to be bound by an arbitration agreement. Neither did Mutu show that he was not able to rely on the above-mentioned Article 42 and bring the case to court.

The ECtHR concluded that Mutu was not party to compulsory arbitration, because he did not show 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 [Mutu's] case.[48]

How, then, was the situation of Pechstein different? The main difference was that there were no regulations in place which would have provided her with the option to go to a national court. But why was the arbitration in her case compulsory? In assessing whether Pechstein's waiver was free, the ECtHR took into account the decision of the Swiss Federal Supreme Court which admitted that where a sports federation provides for arbitration in its regulations, the athletes have the choice either to agree to arbitration or to practice sports at a non-professional level.[49] The ECtHR also noted that the ISU has been suspected by the European Commission of holding a dominant position. [50] In order to take part in the competitions organized by the ISU, athletes were obliged to accept the applicable ISU rules that provided for CAS arbitration in case of a dispute.

The ECtHR differentiated Pechstein's case from those where a party would have a choice between entering into an agreement with one party or another.[51] It concluded that:

> 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.

47. *See* the 2001 FIFA Regulations under https://resources.fifa.com/image/upload/fifa-rstp-2001.pdf?cloudid=maqzja40s2b90xdxik0k (accessed 15 Jun. 2020).
48. *Mutu and Pechstein*, *supra* n. 1, at 120.
49. *Ibid.*, at 111.
50. *Ibid.*, at 112. Interestingly, the German Federal Court of Justice admitted that ISU had a dominant position, but found that it did not abuse its position with regard to Pechstein's case. *See Pechstein v. DESG and ISU*, BGH 7 Jun. 2016, *supra* n. 3.
51. As was the case in *Tabbane*, *supra* n. 5, *Eiffage*, *supra* n. 34.

> 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.[52]

In its decision, the ECtHR therefore found that Article 6(1) applied, i.e., Pechstein had the right to a public hearing because the arbitration was de facto compulsory and none of the exceptions to the right was met.[53]

In its subsequent decision in *Ali Riza and others v. Turkey*, the ECtHR reiterated the principles spelled out in *Pechstein*, including *inter alia* that where an arbitration is deemed to be compulsory, the safeguards from Article 6(1) ECHR have to be provided.[54]

[C] Unequivocal Waiver

The mere existence of an arbitration agreement that has been freely entered into does not suffice in order to ensure that the waiver is unequivocal (i.e., unambiguous). The ruling in *Suovaniemi and others v. Finland* sheds light on what is meant by an unequivocal waiver.

In *Suovaniemi* the ECtHR found that the waiver was unequivocal, because the applicants 'had not sought the withdrawal, during the arbitral proceedings, of the arbitrator whose independence and impartiality they were challenging'.[55] In the arbitration, Suovaniemi and others first raised an issue of potential partiality of the arbitrator that they appointed, but after the arbitrator assured them that he had no tasks that would compromise his impartiality and offered to resign, the party explicitly approved the arbitrator. When later in the proceedings a letter was allegedly found that could call into question the impartiality of the arbitrator, Suovaniemi and others did not raise this issue. Instead, they only brought up the concerns about the independence and impartiality of the arbitrator after they lost the arbitration proceedings and moved to challenge the award in a Finnish court.

Similarly, in *Pechstein*, the ECtHR found that Mutu's waiver was given freely, but that Mutu did not unequivocally waive his right to challenge the independence and impartiality of the arbitrators.[56] The circumstances of the case can be summarized as

52. *Mutu and Pechstein*, *supra* n. 1, at 113–114.
53. *Ibid.*, at 181–182.
54. In this case, Ali Riza and Serkan Akal, complained that the members of the Arbitration Committee lacked independence and impartiality and additionally Akal's application concerned three other alleged violations of Art. 6(1), one of which was lack of a hearing. The arbitration proceedings before the Arbitration Committee were compulsory. And this issue was not contested. It would have been very interesting to read the decision regarding this complaint, but the ECtHR found that the members of the Arbitration Committee lacked the required independence and impartiality and hence, the other complaints do not need to be examined. *See Ali Riza, supra* n. 22, at 175–177, 226. *Ali Riza v. Switzerland* No. 74989/11 regarding a breach of Art. 6(1) is pending before the ECtHR.
55. *Suovaniemi, supra* n. 34.
56. However, *see* the Dissenting Opinion putting into question the possibility of the waiver not being unequivocal, but being free. The dissenting judges argued that: '[i]t is difficult to conceive, however, that an individual could waive his right to an independent and impartial tribunal and yet still have benefit of a "fair hearing" within the meaning of Article 6§1 of the Convention'.

follows. Mutu tested positive for cocaine which led to his employer – Chelsea FC – terminating his employment. On 20 April 2005 a Football Association Premier League Appeals Committee (FAPLAC) decided that Mutu unilaterally breached his employment contract within the meaning of the 2001 FIFA Regulations.[57] Mutu appealed against this decision to the CAS and a tribunal presided by Dirk-Reiner Martens upheld the decision of the FAPLAC.

Thereafter, the FIFA Dispute Resolution Chamber (DRC) ordered Mutu to pay compensation to Chelsea based on the breach established by the FAPLAC, and upheld by the CAS tribunal. Mutu then appealed this decision to the CAS. In the further CAS arbitration Chelsea appointed Dirk-Reiner Martens as a party-appointed arbitrator. Mutu unsuccessfully challenged this appointment. Mutu's appeal from the DRC decision was dismissed by the CAS tribunal consisting of, the arbitrator appointed by Mutu, the challenged arbitrator appointed by Chelsea and the presiding arbitrator Luigi Fumagalli. Mutu then challenged the award in the Swiss Federal Supreme Court on the basis of lack of independence and impartiality of Martens as well as the presiding arbitrator whose law firm Mutu suspected to have represented Chelsea FC's owner. On 10 June 2010 the Swiss Federal Supreme Court rejected the challenge.[58]

The difference between the case of Suovaniemi and that of Mutu was that Mutu brought a challenge against the arbitrator during the arbitral proceedings. As a result, despite the waiver being established freely, it was not found to be unequivocal in Mutu's case.[59] Consequently, the safeguards provided under Article 6(1) ECHR should have been provided.

With regard to Pechstein, the Court found that '[h]aving 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'.[60] It seems that the compulsory character of the arbitration was seen by the Court as resulting in the waiver being neither free nor unequivocal. It should be noted that Pechstein explicitly requested a public hearing in front of the CAS tribunal and was not afforded one.[61]

What, then, would the ECtHR have decided if Pechstein had had an option to go to a court but freely chose to go to arbitration? Let us consider a situation where the remainder of the facts of the case are same, i.e., Pechstein requested a public hearing and was not afforded it, and the Swiss Federal Supreme Court dismissed her appeal. The decisions regarding Mutu and Suovaniemi and others concern impartiality and independence of the arbitrators. Is there a difference between the right to an independent and impartial tribunal and the right to a public hearing? Could the ECtHR consider that a party who has voluntarily entered into an arbitration agreement, i.e., waived the right freely, still has the right to a public hearing?

Joint Partly Dissenting, Partly Concurring Opinion of Judges Kelle and Serhides in *Mutu and Pechstein, supra* n. 1, at 26 and 27.

57. Articles 21–23 of the 5 Jul. 2001 FIFA Regulations for the Status and Transfer of Players.
58. *Mutu v. Chelsea FC Ltd.* 4A_458/2009 (TF 10 Jun. 2010).
59. *Mutu and Pechstein*, *supra* n. 1, at 15 and 122.
60. *Ibid*., at 114.
61. *Ibid*., at 181.

I believe that the decision of the Court in *Suovaniemi and others v. Finland* can be the key to this question. The Court stressed that there is a difference between the various rights protected by Article 6(1) of the ECHR and held that the right to a public hearing was less crucial than the right to an impartial and independent tribunal. The Court also emphasized the private character of arbitration as being one of the main features legitimizing arbitration. It stated the following:

> Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6. Thus, in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings … The same applies, a fortiori, to arbitration proceedings, one of the very purposes of which is often to avoid publicity. On the other hand, the question whether the fundamental right to an impartial judge can be waived at all, was left open in the *Pfeifer and Plankl v. Austria* case, as in any case in the circumstances of that case there was no unequivocal waiver.[62]

The Dissenting Opinion in *Pechstein* is also revealing with regard to the views of the judges concerning the hierarchy of the rights protected by Article 6(1) of the Convention. Judges Keller and Serghides argued that:

> 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 and yet still have the benefit of a 'fair hearing' within the meaning of Article 6 § 1 of the Convention.[63]

It is my contention that, in the above hypothetical scenario, if the ECtHR found that Pechstein waived her rights freely, the waiver of the right to a public hearing would also be considered unequivocal.

[D] Lawful Waiver

The waiver should also be lawful.[64] The ECtHR does not provide extensive guidance regarding this condition for waiver. In the context of arbitration, it could be argued that an arbitration agreement that would not be enforceable in the first place should not be considered as resulting in a lawful waiver. For instance, arbitration agreements entered into under duress,[65] by fraud, by a party who does not have legal capacity, or with regard to matters that are non-arbitrable should not be considered as lawfully waiving protections under the ECHR.

62. *Suovaniemi, supra* n. 34.
63. Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides in *Mutu and Pechstein, supra* n. 1, at 27.
64. *Mutu and Pechstein, supra* n. 1, at 96.
65. *See*, e.g., *Tabbane, supra* n. 5, at 29.

According to Article 35(1) ECHR, matters with regard to which the national remedies have not been exhausted are inadmissible.[66] Considering that a party can apply to the ECtHR only after the national remedies have been exhausted, cases where the waiver was unlawful should – in principle – not even be decided by the ECtHR. A national court should already have found, e.g., an arbitration agreement entered into under duress or by a party without legal capacity to be invalid, and a national court should already have set aside the arbitral award based on such an agreement.

[1] Lawful Waiver Should Not Be Confused with the Requirement of a Waiver to Be Permissible

In the older decisions, the ECtHR referred to the requirement that the waiver must be deemed to be permissible. In the recent decisions, the ECtHR refers to the criterion of lawfulness. It can be questioned whether permissibility and lawfulness are used by the ECtHR as synonyms.

In *Plankl v. Austria* the Court stated that the waiver has to be first, *permissible* and second, given in an unequivocal manner. As provided above, in the *Suovaniemi and others v. Finland* judgment, the Court provided that the '[w]aiver may be permissible with regard to certain rights but not with regard to certain others'.[67] The Court decided in this case that the applicant's waiver of the right to an impartial tribunal was considered to be unequivocal and it could be validly made in so far as domestic law afforded sufficient protection, i.e., the waiver was considered permissible. The requirement for the waiver to be *permissible* seems to have been understood in a different way than the requirement of a lawful waiver.

[E] Appropriate Guarantees

The Court has indicated in its case law that it is not enough that the waiver is given freely, unequivocally and lawfully, but that certain rights require *guarantees that are commensurate to the importance of that waiver*.[68] A court will assess which rights require guarantees and what guarantees are appropriate with regard to the individual circumstances of each case. Hence, it is difficult to provide a general answer to those questions.

In the *Pfeifer and Plankl v. Austria* decision from 1992, the Court stated that the rights that require guarantees for the waiver to be effective are the procedural rights.[69] In *Tabbane v. Switzerland,* the Court provided that the guarantees commensurate to the waiver of the right to appeal an arbitral award were that Tabbane was able to select an arbitrator, that the procedure was governed by Swiss law, that the Federal Court

66. *See also* Practical Guide on Admissibility Criteria, 22 (CoE, ECHR 2019) https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (accessed 25 Mar. 2020).
67. *Ibid.*
68. *See Tabbane*, *supra* n. 5, *Pfeifer and Plankl v. Austria*, No. 10802/84 (ECtHR 25 Feb. 1992), *Suovaniemi, supra* n. 34, *Mutu and Pechstein*, *supra* n. 1.
69. *See Pfeifer and Plankl, supra* n. 68, at 37.

heard Tabbane's arguments and took into account relevant facts and provisions, and that the decision was reasoned and did not appear arbitrary.[70]

In *Suovaniemi and others v. Finland*, the Court considered the guarantees commensurate to the importance of the waiver and emphasized that the 'relevant Finnish legislation does not appear arbitrary or unreasonable …, the applicants were represented by counsel'.[71]

The above cases refer to the decision being reasoned, the legislation not being arbitrary or unreasonable, and the party being represented by counsel.

The following view of the ECtHR expressed *inter alia* in *Pechstein* is also of importance: '[a]rbitration 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'.[72]

Thus, from the point of view of the ECHR, voluntary arbitration is allowed in principle. Modern arbitration acts provide sufficient protections to the parties, including the right of a party to present its case, the right to an independent and impartial tribunal, the right to choose an arbitrator or have an arbitrator chosen for the party, and the right to challenge the award before a national court.

[F] Tribunal Established by Law

One additional important requirement under Article 6(1) of the ECHR is that the tribunal must be established by law.[73] This does not mean that each arbitral tribunal must be established by legislation, but that it should be established 'in accordance with the will of the legislature'.[74]

In *Pechstein*, the ECtHR found that CAS had the appearance of a tribunal established by law.[75] The dissenting opinion in the case questions this view and points out that a deeper analysis should have been provided.[76]

[G] Concluding Remarks

The above analysis of the limitations of the right to a public hearing and the conditions for the waiver of the right to a public hearing in arbitration shows that this issue does not only revolve around the question of whether an arbitration is compulsory or voluntary. It is a much more complex matter and it is important – especially for

70. Tabbane, *supra* n. 5. *See also* Information Note on the Court's case-law, No. 194, 22 Mar. 2016 https://www.echr.coe.int/Documents/CLIN_2016_03_194_ENG.pdf (accessed 15 Jun. 2020).
71. *Suovaniemi, supra* n. 34.
72. *Mutu and Pechstein, supra* n. 1, at 94 referring to *Tabbane, supra* n. 5, at 25.
73. *See*, e.g., *Mutu and Pechstein, supra* n. 1, at 138.
74. *Ibid.*, at 138.
75. *Ibid.*, at 149.
76. Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides in *Mutu and Pechstein, supra* n. 1, at 21–22. A more extensive discussion on this question has been since then conducted in *Ali Riza and Others v. Turkey. See Ali Riza, supra* n. 22, at 194–195 and 201–204.

arbitrators – to know all the conditions for waiver and the limitations to the rights protected by Article 6(1) ECHR.

§9.04 POTENTIAL RELEVANCE OF *PECHSTEIN* BEYOND SPORTS ARBITRATION

In this section I aim to answer the question of the relevance and potential future impact of the decision of the ECtHR in *Pechstein* for arbitration, beyond the context of CAS and sports arbitration. To consider the potential relevance of *Pechstein* on arbitration I will focus on three questions: (1) in what circumstances can one be a party to a de facto compulsory arbitration? (2) why should the arbitration community care about the decisions of the ECtHR? and (3) how important is privacy in arbitration?

[A] De Facto Compulsory Arbitration Beyond the Pechstein Example

The circumstances in which Pechstein entered into the arbitration agreement were quite special. With regard to Pechstein the ECtHR stated that she had a binary choice of either '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'.[77] The criterion here was not the level of earnings, but rather the right to practice her profession – which was competing on a professional level and not, e.g., working for ice skating shows or coaching.

The case has already had an impact on CAS arbitration, since Rule 57 of the CAS Code now provides that a public hearing should be held at a request of a party. The provision is not limited solely to compulsory arbitrations. However, it is very narrow in scope, referring only to physical parties and the disciplinary nature of the dispute and additionally limiting it by adding express exceptions, most of which are also provided in Article 6(1) of the ECHR.

In 2006 Besson argued as follows:

> Article 6 (1) is fully applicable to compulsory arbitration, that is to say arbitration imposed on the parties by law … This principle is only apparently clear because the boundaries of compulsory arbitration may be uncertain in some cases. Typically, in sports-related disputes, arbitration is normally not imposed by law, but it is very often imposed on the athletes by their Federation or by the International Olympic Committee. It is not 'compulsory' but 'forced' arbitration. In his recent book, Antonio Rigozzi has submitted that arbitration remains valid and desirable to resolve sports-related disputes, but that the procedural guarantees, notably the independence and impartiality of the arbitral tribunal, should be subject to strict standards. I find that this approach is sensible and is to be approved.[78]

Is Pechstein's case only relevant to athletes? For what other parties could an arbitration be de facto compulsory? As one author has pointed out, an arbitration

77. *Mutu and Pechstein*, *supra* n. 1, at 113.
78. Besson, *supra* n. 8, at 398–399.

agreement could be considered to be de facto forced on a weaker party, such as an employee, consumer, or financial investor, but the same author subsequently challenges this view by arguing that modern arbitration legislation provides guarantees equivalent to those of the national courts and that arbitration with weaker parties only creates an issue when the stronger party abuses its power.[79]

Laws protect weaker parties: for instance, (a) by removing certain cases from the scope of arbitrable disputes; (b) by requiring that terms of contracts with consumers are individually negotiated, as required by Article 3(1) of the Directive on Unfair Terms in Consumer Contracts; and (c) in the Nordic context, by allowing an unreasonable term to be set aside, as provided in Article 36(1) of both the Swedish and Finnish Contract Acts. Finally, there are also protections against abuse of dominant position that could come into play. It is not the goal of this chapter to discuss the above protections in relation to the enforceability of the arbitration agreement, but they are nevertheless relevant to the question of whether a public hearing might be required. As part of the Council of Europe system the ECHR has forty-seven contracting states, including Russia. The reach of the ECHR goes far beyond the European Union and hence, the analysis of protections of weaker parties in all the contracting states does not fit into the scope of this chapter. Therefore, the below sections consider hypothetical scenarios where the enforceability of the arbitration agreement is not at issue, but the question is solely of whether a party has the right to a public hearing.

One group of persons that could potentially be in a situation comparable to Pechstein are highly specialized workers who can only be employed by a limited number of entities and where those entities all require that an arbitration agreement is included in the employment contract.[80] For example, if universities in the whole country required arbitration agreements, then for an academic who is focused on a specialized and national issue this could lead in the eyes of the ECtHR to a de facto compulsory arbitration for that individual. According to the argumentation of the ECtHR in *Pechstein*, the party should have no other choice for earning in its profession. It is quite a strict test, but not the strictest. The ECtHR did not consider Pechstein's possibility to earn a living outside of her profession. Therefore, an argument that a highly specialized employee could have changed careers should not be persuasive in determination of whether an arbitration is de facto compulsory.

Arbitration could be considered to be de facto compulsory for parties who entered into agreements for the sales of goods or services that are essential for them and are provided by limited entities who all require an arbitration clause in the contract. Those goods could be prosthetics, hearing aids and other goods or services influencing the quality of life.

79. *See* Benedettelli, *supra* n. 8, at 506–508. For more on the issue of arbitration with weaker parties *see*, e.g., Tilman Niedermaier, *Arbitration Agreements Between Parties of Unequal Bargaining Power: Balancing Exrciseson Either Side of the Atlantic*, 1 ZDAR, 12–21 (2014).

80. A presentation on the influence of the Pechstein case on Swedish employment arbitration titled: *Reasonable arbitration clauses in employment contracts – Does the Pechstein case have any impact for employment arbitration in Sweden?* was held by Erik Sinander within the framework of the Employment Arbitration Research Network at the Stockholm Centre for Commercial Law in Stockholm on 13 Nov. 2019 (unpublished).

A de facto compulsory arbitration could potentially also be found to exist between business parties. In *Pechstein* the ECtHR recalled *Eiffage,* where the party was not party to a compulsory arbitration, because it could have chosen another business partner. The ECtHR stated:

> 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.[81]

What if a company does not have a choice and can either enter into an arbitration agreement or be forced to cease its operations? This could be the case for a company whose business relies on having access to a rare type of goods that only one supplier delivers, or to facilities such as harbours, airports, or railways. If the entity that controls the rare goods or facilities requires an arbitration agreement in its contracts, then this could potentially be considered as a de facto compulsory arbitration for the other party.

Based on the argumentation presented in *Pechstein*, the ECtHR could find not only athletes and other specialized employees, but in very specific circumstances also certain consumers, or even parties in commercial arbitrations to be in a de facto compulsory arbitration. For an arbitration to be considered compulsory, it is not enough for the choice to be a 'Hobson's choice', i.e., *a take it or leave it* situation,[82] where it is nevertheless possible to go to another place and get employment or the necessary goods or services. For instance, in case of employment arbitration, it should not suffice that one of many potential employers required an arbitration clause in the employment contract, if there were other potential employers that did not have this requirement. A party should have *no other choice* but to enter into an arbitration agreement in order to work in its profession, get the essential goods or keep its business operating.

[1] The Need for a Public Hearing

The ECtHR did not simply end its analysis upon establishing that the arbitration in *Pechstein* was de facto compulsory. The ECtHR went on to list circumstances which emphasized the need for a public hearing in this particular case. The ECtHR added 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

81. *Mutu and Pechstein, supra* n. 1, at 107.
82. On the *take it or leave it* arbitration agreements and their validity in sports arbitration *see*, e.g., A. Rigozzi and F. Robert-Tissot *'Consent' in Sports Arbitration: Its multiple Aspects. Lessons from the Canas Decision, in Particular with Regard to Interim Measures*, 59–94, in Elliot Geisinger and Elena Trabaldo – de Mestral, ASA Special Series No. 41 'Sports Arbitration: A Coach for Other Players?' (Juris Net LLC 2015).

> of which the CAS heard testimony from numerous experts – *rendered it necessary to hold a hearing under public scrutiny*.[83] (emphasis added)

Furthermore, the following circumstances were also noted as supporting the need for a public hearing in *Pechstein*:

- The sanction imposed (a two-year ban from competing) 'carried a degree of stigma'.[84]
- The sanction 'was likely to adversely affect her professional honour and reputation'.[85]
- The Swiss Federal Court noted that, considering the role of CAS in sports arbitration, holding a public hearing would have been 'desirable'.[86]

A question arises as to whether these circumstances were decisive – for example, would the ECtHR have taken a different decision if the dispute was simply a matter of damages and did not affect the party's reputation? In principle, the answer should be in the negative.

Based on the ECtHR case law, where an arbitration is compulsory, the right to a public hearing[87] should be afforded, unless any of the exceptions apply. However, it is my contention that based on the argumentation by the ECtHR in *Pechstein*, one could argue that providing reasons for a refusal of a party's request for a public hearing is likely to make a difference in the subsequent examination of the issue by a national court or the ECtHR.

In a hypothetical case of a potentially de facto compulsory arbitration with, e.g., a highly specialized employee there could be no need for a public hearing. Moreover, it is important to return to the cases where the ECtHR found that no hearing was necessary, as, e.g., (i) no facts were contested,[88] (ii) the dispute was not complex,[89] (iii) the dispute was of technical nature,[90] or (iv) the dispute concerned an unambiguous question of law.[91] *A fortiori*, where a hearing is not necessary, a public hearing is not necessary either.

[B] Why Should Arbitrators Be Concerned with a Ruling of the ECtHR?

What is the relevance of the decision of the ECtHR for arbitration? Should an arbitral tribunal care about the decision in *Pechstein*?

According to the *principle of the fourth instance*, the ECtHR is not a next instance of the national courts.[92] Therefore, the ECtHR does not overturn the judgment of the

83. *Mutu and Pechstein, supra* n. 1, at 182.
84. *Ibid*.
85. *Ibid*.
86. *Ibid*., at 178 and 182.
87. Among the other protections of Art. 6(1) ECHR.
88. *See*, e.g., *Döry, supra* n. 29, at 37; *Saccoccia, supra* n. 29 at 73, and *Speil, supra* n. 29, at 29.
89. *See*, e.g., *Speil, supra* n. 29, at 29.
90. *See*, e.g., *Döry, supra* n. 29, at 41–43.
91. *See*, e.g., *Allan Jacobsson, supra* n. 32, at 49.
92. Rainey et al., *supra* n. 26, at 275.

national court or the arbitral award.[93] The role of the ECtHR is to assess whether the state's legislation or the protections given by the state or the state bodies in the particular proceedings fulfil the aims of, e.g., Article 6 ECHR. This subsidiary and supervisory role of the ECtHR was emphasized by the ECtHR in *Pechstein*.[94] It is the role of the forty-seven contracting states to 'ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level'.[95]

As follows from the above, a state can be responsible under the ECHR, e.g., when its legislation offends against the rights of the Convention or the state did not provide protections it should have provided.[96] Courts in the contracting states are, therefore, bound by the ECHR in, e.g., proceedings regarding setting aside or enforcement of arbitral awards.[97]

In *Pechstein*, the ECtHR found that Switzerland had breached the ECHR, as the Swiss Federal Supreme Court failed to set aside the CAS award on the basis of a lack of a public hearing as requested by Pechstein. Therefore, in order to avoid the ECtHR finding a contracting state to be in violation of the ECHR, the national courts in the applicable jurisdictions should set an award aside, or refuse to enforce an award, in circumstances where there is the right to a public hearing which has not been fulfilled.

The vague category of de facto compulsory arbitration brings uncertainty to an area where certainty is a pivotal feature – i.e., enforceability of arbitral awards. Essentially it could be said that the decision of the ECtHR adds to an unclear scope of cases an additional ground – based on Article 6(1) ECHR – for challenging and resisting enforcement of arbitral awards in the contracting states of the ECHR.

Does the above mean that in the efforts to render an enforceable award, the tribunal should organize a public hearing every time a party requests it, where the circumstances of the case even to the smallest extent suggest that the arbitration could de facto be compulsory? The answer is not straightforward.

In the previous section the discussion was centred around the ECtHR perspective – the right to a public hearing and the interests it protects as well as around the unclear line between party autonomy and the human rights guarantees, i.e., the waiver of the rights in arbitration. It is now time to consider the arbitral tribunal's perspective.

When faced with a request for a public hearing in a rare borderline case, the arbitral tribunal would have to choose between either (a) organizing a public hearing in a possibly voluntary arbitration, likely going against arbitration rules providing for a private hearing, which would mean not respecting the parties' agreement on the procedure, or (b) denying a public hearing in a potentially compulsory arbitration – both of which options could risk the enforceability of the award. In order to weigh the above risks, it is important to consider the significance of privacy in arbitration.

93. *Ibid*.
94. *Mutu and Pechstein*, *supra* n. 1, at 70.
95. *Ibid.*, at 66–67.
96. *Ibid.* Applications can be brought against contracting states, public officials or bodies for which the state may be responsible, in other words where alleged violation can be attributed to the state. *See*, e.g., Practical Guide on Admissibility Criteria, *supra* n. 66, at 47.
97. *See*, e.g., Landrove, *supra* n. 8, at 99 referring to Swiss courts.

[C] Importance of Privacy in Arbitration

Privacy is one of the key features, or the hallmarks, of arbitration, as Born puts it.[98] It is said to aim at not only protecting confidential information from third parties but also preventing third parties from intervening in the administration of justice.[99] Privacy refers to keeping third parties out of the hearing room and confidentiality has to do with information that requires protection.[100]

Unlike confidentiality, the principle of privacy of the hearing in arbitration has been considered rather uncontroversial. Most of the modern arbitration rules provide for the privacy of the arbitral hearing.[101] For instance, the UNCITRAL Arbitration Rules provide in Article 28(3) that hearings are held in camera unless the parties agree otherwise. The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules) provide the same in Article 32(3) and the Arbitration Rules of the London Court of International Arbitration (LCIA Rules) are similar, but they explicitly require the parties' agreement to be in writing.[102] The Arbitration Rules of the International Chamber of Commerce International Court of Arbitration (ICC Rules) require not only parties' agreement, but also tribunal's approval, to open the door to the hearing room for persons that are not involved in the proceedings.[103]

Arbitration laws are often silent on the issue of privacy.[104] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law), the Swiss, US and Swedish arbitration laws are all silent regarding this question. What is then the basis of privacy? The argument of protecting confidential information shared in the arbitration, as raised by Born, is not very persuasive, because privacy does not equal confidentiality. The reason should rather be traced back to what arbitration is: 'a private and consensual system of dispute resolution',[105] the private nature of arbitration, and the fact that arbitration is an out-of-court dispute resolution method.

In their treatise on arbitration, Lew, Mistelis and Kröll noted the following about the privacy of arbitration, as opposed to the public nature of the courts:

> Just as national courts are public, arbitration is generally private. In the same way as every contract between parties is a private matter between them, so too the arbitration agreement is private between the parties. Accordingly, when a dispute arises it is to be resolved in the private dispute resolution system agreed between the parties, subject to certain safeguards.[106]

98. Born, *supra* n. 44, at 2235, *see also Ibid.*, at 89–90.
99. *Ibid.*, at 2781–2782.
100. I. Smeureanu, *Confidentiality in International Commercial Arbitration*, International Arbitration Law Library, Volume 22, 4–5 (Kluwer Law International 2011).
101. Born, *supra* n. 44, at 2811.
102. Article 19.4 of the LCIA Arbitration Rules.
103. *See* Art. 26.3 *in fine* of the ICC Arbitration Rules.
104. Born, *supra* n. 44, at 2811–2812.
105. N. Blackaby and C. Partasides et al., *Redfern and Hunter on International Arbitration*, 2 (Oxford University Press 2015).
106. J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration*, 4 (Kluwer Law International 2003).

The above reflects the argumentation in *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha*where the English High Court stated that:

> [t]he concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing. …[107]

In the Swedish context, despite the lack of an explicit provision on the privacy of the hearing, it is considered clear that arbitration hearings are private.[108] In *Bulbank*, the Supreme Court of Sweden provided that '[f]rom the private nature of arbitration proceedings follows that third parties do not have the right to be present at the proceedings or access written documents of the file'.[109]

The Supreme Court further provided that:

> [a] general starting point for deciding the confidentiality issue is that arbitration proceedings are based on an agreement. (Arbitration proceedings prescribed by law are ignored herein.) It follows from this that arbitration proceedings are of a private nature, which is not changed by the fact that certain aspects thereof are regulated by law.[110]

From the above, it can be argued that the Supreme Court of Sweden connects the private nature of arbitration to the arbitration agreement. *A contrario*, in relation to arbitrations mandated by law, privacy should not be assumed in the same way. This is in line with the ECtHR case law, considering that in compulsory arbitration the protections of Article 6(1) ECHR are not waived.[111]

Privacy is not only based on the arbitration agreement; privacy can also be seen as legitimizing the agreement. The Swedish Labour Court has found an arbitration clause in an employment contract of a personal assistant to be fair according to section 36 of the Contract Act for the very reason of privacy of arbitral proceedings.[112] The Labour Court stated that the reasonableness has to be assessed by considering the circumstances of the case. Here, the Association of Healthcare Providers and the Swedish Municipal Workers' Association had decided when drafting the standard-form employment contract that disputes should be settled by arbitration and not in court in order to prevent circumstances of a personal nature from becoming public.[113]

---

107. *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha* [1984] QBD (Comm) 2 Lloyd's Rep 373, 378 (26 Jun. 1984).
108. *See*, e.g., Bo G.H. Nilsson and B. Rundblom Andersson *Fundamental Principles of International Arbitration in Sweden,* 6, in Franke et al. (eds) International Arbitration in Sweden: A Practitioner's Guide (Wolters Kluwer 2013).
109. *Bulgarian Foreign Trade Bank Ltd (Bulbank) v. A.I. Trade Finance Inc*, T 1881-99/ NJA 2000 section 538, 6 (HD 27 Oct. 2000) English translation available on https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId = 89&docId = 1083535&propId = 1578 (accessed 15 Jun. 2020).
110. *Bulbank, supra* n. 109.
111. *Mutu and Pechstein, supra* n. 1, at 95. *See also Suovaniemi, supra* n. 34, *Suda, supra* n. 5, at 49.
112. As noted by Sinander in his presentation, *supra* n. 80. *AD 2018 no. 30,* A 99/17 (AD 16 May 2018).
113. *AD 2018 no. 30,* at 10 (own translation).

The Labour Court further emphasized that whether sensitive information is disclosed or not in the particular proceedings does not influence the assessment of the reasonableness of the arbitration clause.[114] Hence, it could be concluded that according to the Swedish Labour Court, privacy of arbitration is important on an abstract level, not merely to protect sensitive information in the particular proceedings.

Also, the ECtHR recognizes the importance of privacy of the hearing in arbitration. In its decision from 1999 in *Suovaniemi*, where the ECtHR stated that:

> in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings. … The same applies, a fortiori, to arbitration proceedings, one of the very purposes of which is often to avoid publicity.[115]

Here, the privacy of arbitration is raised to a level of being one of the main characteristics that motivates the parties' choice of this dispute resolution method.

Based on the above, it could be argued that privacy in arbitration is derived from the private nature of arbitration and is such an important feature that it can even legitimize the choice of arbitration as a dispute resolution method. In voluntary arbitration it is a legitimate expectation that a hearing is private. The right to a private hearing becomes part of parties' agreement where arbitration rules providing for the privacy of the hearing are chosen to govern the arbitration.

In *Pechstein*, the ECtHR stated that Pechstein could *at best* had hoped for an *indirect* application of Article 6(1) ECHR, when she gave consent to CAS jurisdiction.[116] The ECtHR has decided to 'thus proceed from the assumption … that acceptance of the arbitration clause could constitute a waiver of all or part of the Article 6 § 1 safeguards'.[117]

In case of a compulsory arbitration the parties should not have the same expectations regarding the privacy of the hearing.[118] This is not controversial with regard to de jure compulsory arbitration, as in such an arbitration, the parties are well aware that their arbitration is mandated by law.

An example of compulsory arbitration can be seen in respect of redemption of minority shares disputes under the Finnish Companies Act. In this type of proceeding many aspects are public. The names of the arbitrators are announced publicly, a trustee is appointed by a national court and that appointment is made public, and importantly, the award is registered in the trade register. Despite the hearing not being public as a starting point, the Finnish legislation provides a number of protections that are not available in voluntary commercial arbitrations. It could be argued that the protections provided by law suffice to guarantee the rights enshrined in Article 6(1) ECHR.

From the point of view of legal certainty, it seems problematic to simply equate de facto compulsory arbitration with de jure compulsory arbitration. In case of de jure compulsory arbitration, it is clear that the arbitration is not voluntary, and privacy should not be assumed. However, it might not be clear whether an arbitration is de

114. *Ibid.*, at 11.
115. *Suovaniemi, supra* n. 34.
116. *Mutu and Pechstein*, *supra* n. 1, at 102.
117. *Ibid.*, at 103.
118. *Ibid.*, at 95. *See also Suovaniemi, supra* n. 34, *Suda, supra* n. 5, at 49 and *Bulbank, supra* n. 109.

facto compulsory. One could say that with regards to athletes and CAS arbitration, there is some level of certainty achieved, partly due to the change in the CAS Rules providing explicitly for a possibility of a public hearing in matters of disciplinary nature. However, with regards to other specialized employees and, in some specific circumstances, consumers and companies, the situation is less evident. Therefore, when examining whether a party has a right to request for a public hearing unilaterally, the *starting point* for such determination should be an assumption that the arbitration is voluntary and the hearing is private.

[D] Concluding Remarks

What is the potential relevance of the recent ECtHR decisions for arbitration? For the parties to CAS arbitrations the relevance is manifested in the change of the CAS Rules providing a possibility of a public hearing in a narrow scope of cases. Even though the amended provision limits the right to request for a hearing unilaterally to physical persons in disciplinary matters,[119] a public hearing in CAS arbitration is a possibility.

What about cases other than sports arbitration? As discussed in the first part of this section, in principle the argumentation from *Pechstein* could apply to disputes with employees,[120] consumers or even companies. However, the determination that an arbitration is de facto compulsory is case specific and the threshold is high. A decision to organize a public hearing based on a unilateral request should not be taken lightly considering the importance of the privacy of arbitral proceedings. Allowing the public to attend a hearing in an arbitration which is not compulsory could potentially risk the enforceability of the arbitral award.

§9.05 FULFILLING THE RIGHT TO A PUBLIC HEARING IN ARBITRATION

Despite the narrow scope of cases where a tribunal would decide that a public hearing should be organized, it is pertinent to examine how one goes about organizing the public hearing. Issues include: where to announce the hearing, where to hold it, how to allow the public in – in person or through a broadcast, how to protect the confidential information and avoid abuses, who bears the cost of all of that, etc. Those are only some of the questions that one should consider in the post-Pechstein era.

Two recent developments aid in answering the above questions. The first one is the already-mentioned public hearing organized in a CAS arbitration concerning a disciplinary case brought by the World Anti-Doping Agency against a Chinese swimmer Sun Yang and Fédération Internationale de Natation. This was only the second

119. *See* Rule R57 CAS Code C. Special Provisions Applicable to the Appeal Arbitration Procedure.
120. As argued by Sinander, *supra* n. 80.

public hearing in the history of CAS and it was organized on 15 November 2019, twenty years after the first one.[121] In this case, both parties asked for the public hearing.

The second development is more of a theoretical character. In December 2019, an organization called the Center for International Legal Cooperation released the Hague Rules on Business and Human Rights Arbitration (Hague Rules). This soft law aims to be 'a set of procedures for the arbitration of disputes related to the human rights impacts of business activities'[122] Even though the Hague Rules are still very new and time will show if they are going to be used in practice, they are of interest in the following discussion, because they provide that as a rule the hearing will be public, subject to exceptions. The solutions provided in the Hague Rules regarding organization of a public hearing are also considered below.

[A] Announcement

Simply opening the door to the hearing room does not make the hearing public. The public should be duly notified of the hearing. In one case, the ECtHR considered a hearing not to fulfil the requirement of being public when it was held in prison and the public was not adequately notified of the hearing and of access to the hearing.[123]

How does one inform the public about the hearing? In institutional arbitrations, the announcement could be given on the institution's webpage. Would this be enough? To some extent one could argue that such an announcement would not be sufficient, because if it was not known that a dispute existed in the first place, the interested persons would not search for an announcement on that institution's website. In the context of international commercial arbitration, various aspects make it questionable whether an announcement in itself would be sufficient, including (a) the large number of institutions, (b) the fact that there are ad hoc arbitrations, and (c) the lack of one leading information channel.

When should the announcement be made? The Hague Rules prescribe that the tribunal should provide the public with the information about the date, time and place of the hearing sufficiently in advance. In the case of the hearing of Sun Yang, the media release was given one month before the hearing.[124]

[B] Public Access

Announcing the time and place of the hearing might not be enough, if the hearing is held in a remote place and the cost of attending the hearing creates an obstacle for the interested persons to attend the hearing. In an international arbitration, the hearing

121. *See* the information provided by the CAS itself in the release regarding Yang's hearing https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_Hearing_15.11.19.pdf (accessed 15 Jun. 2020).
122. Preamble to the Hague Rules on Business and Human Rights Arbitration.
123. *Riepan v. Austria*, No. 35115/97 (ECtHR 14 Feb. 2001).
124. The release can be found, e.g., here https://cdn.swimswam.com/wp-content/uploads/2019/10/CAS_Media_Release_6148_Hearing_15.11.19.pdf (accessed 15 Jun. 2020).

may often be said to be in a remote place for at least some of the interested persons. However, from the point of view of Article 6(1) of the ECHR, the right to a public hearing is a human right of the party to the dispute, rather than the right of the interested person to get access to the hearing. Giving an opportunity for the hearing to be publicly scrutinized should be deemed to be sufficient in this context, even if not all interested members of the public will in practice be able to attend.

Apart from, or even instead of, providing access in person to the hearing, a live broadcast could be organized. In the hearing in the Sun Yang case, previously registered persons had access to a public viewing area. The hearing was also broadcasted in a live stream and the links to the video recordings of the hearing were available online.[125] Although this chapter focuses on commercial arbitration, it is also worth mentioning that the International Center for Settlement of Investment Disputes, which has already gained experience in organizing public hearings, broadcasts such hearings in a separate room which is open to the public, or if parties so agree, online.[126] The Permanent Court of Arbitration (PCA) has also organized public access to the hearings in some cases through video broadcasting. For instance, in *The Renco Group, Inc. v. Republic of Peru* and *The Renco Group, Inc. & Doe Run Resources, Corp. v. Republic of Peru & Activos Mineros, S.A.C.* where the PCA acts as registry, a public hearing regarding preliminary objections and bifurcation was held in the form of a video conference which was streamed live on 12 and 13 June 2020.[127]

The Hague Rules provide the tribunal with broad powers to arrange the hearing so that the access of the public is facilitated in an appropriate way.[128] The commentary to the Hague Rules gives examples of video and other technological solutions that could allow the public to gain access to the hearing.

Does it suffice that the public is given access to the hearing, or should it also get access to the evidence referred to at the hearing: the written witness statements, expert reports, documents? What about parties' written submissions? The scope of the information that should be made public is not obvious.

The Hague Rules approach this question broadly. According to the transparency objectives enshrined in the Hague Rules, the key documents in arbitration proceedings are to be made public. This covers not only the parties' briefs and the tribunal's decisions and awards but also expert reports and witness statements.[129] The tribunal is

125. The hearing is available in parts under the following links https://vimeo.com/373204016; https://vimeo.com/373351335; https://vimeo.com/373377323; https://vimeo.com/373416320. (accessed 15 Jun. 2020).
126. *See* Access to the proceedings explained on https://icsid.worldbank.org/en/Pages/process/Oral-Procedure-Convention-Arbitration.aspx (accessed 15 Jun. 2020).
127. *See* the announcement regarding the public hearing on https://pca-cpa.org/en/news/pca-case-no-2019-46-47-public-hearing-on-bifurcation-and-preliminary-objections/ (accessed 28 Sep. 2020). Regarding earlier practice, see a press release regarding a public hearing in *Professor Christian Doutremepuich and Antoine Doutremepuich (France) v. The Republic of Mauritius* held at the Peace Palace, The Hague on 12 and 13 Jun. 2019 and streamed live on https://pcacases.com/web/sendAttach/2639 (accessed 28 Sep. 2020).
128. Article 41.3 of the Hague Rules.
129. *See* Art. 40.1 of the Hague Rules. Exhibits and other documents not covered in Art. 40.1 could be published on tribunal's own initiative or a request of any party (Art. 40.2).

to send the documents to the repository which will make them available to the public.[130]

The above approach of the Hague Rules is very far reaching. However, from the point of view of the right to a public hearing as provided in Article 6(1), such a wide scope of transparency is not necessary.

[C] Protection of Confidential Information

During a public hearing it can be challenging to protect confidential information from being disclosed. When the access to the hearing is provided in person and the access requires registration, one could have some control over the information being revealed during the hearing. A video recording could be edited before providing it to the broader public.

For instance, the ECtHR has considered that a hearing held at a military base, where the public had to sign in order to attend it, constituted a public hearing.[131] The restriction of access was legitimized by the security requirements.

The uncertainty about the protection of confidential information during a public hearing can influence case strategy, choice of arguments, evidence used, etc., which in turn can influence party's due process rights negatively.

[D] Costs

Transparency is expensive. The costs could include: a bigger hearing room, public announcements, broadcasting, translation, costs connected to the protection of confidential information to name a few. Who should bear the cost of the hearing being public? Should it be the party who requests the hearing to be public, the stronger party, the losing party, or should some of the costs be borne by the institution or even by the state where the arbitration is seated?

In the Sun Yang arbitration, both parties requested the hearing to be public. The award in the Sun Yang case does not distinguish the costs of the public hearing. However, under the CAS Code, the costs of the arbitration (including arbitrators' fees and costs) are borne by the CAS[132] and own costs of representation, witnesses, translation are carried by the parties.[133] Hence, the costs of a public hearing are split between the CAS and the parties.

In a compulsory arbitration, it could be assumed that there is often an imbalance between the parties. It would seem unreasonable and would limit the opportunity to rely on the right to a public hearing if it was the party requesting the hearing to be public who would have to bear the costs of the public nature of the hearing. In some arbitrations with weaker parties, the stronger party might need to bear the costs of the arbitration for the arbitration agreement not be considered unreasonable or incapable

130. Article 40.3 of the Hague Rules.
131. *Hood v. UK*, No. 27267/95, 120 (ECtHR 28 May 1998).
132. Rule 65.2 of the CAS Code.
133. Rule 65.3 of the CAS Code.

of being performed.[134] Hence, potentially, the stronger party would also need to cover the costs of a public hearing. The question of who bears the costs of a public hearing needs to be answered from case to case, taking into consideration specific circumstances of each arbitration.

[E] Concluding Remarks

Arbitration is based on the principle of privacy of the proceedings. Hence, organizing a public hearing may pose practical challenges. There is a myriad of questions that an arbitral tribunal should be ready to answer, including for instance: how to provide the access of the public to the hearing? What information should be made public and how to protect confidential information? And last but not least who will pay for all the additional costs connected with organizing a public hearing?

§9.06 CONCLUSIONS

The right to a public hearing can be applicable to arbitration when some of the conditions for waiver are not fulfilled or when limitations to the right to a public hearing, or the right to a hearing in general, apply in a case. The condition for waiver that raises the most controversy in the context of this chapter is that the waiver is to be given freely. It is this requirement that influences whether an arbitration is voluntary or compulsory.

With regard to Pechstein, the ECtHR found that the arbitration was de facto compulsory for Pechstein as her choice was only between entering into the arbitration agreement and not earning a living in her profession, i.e., competing in speed-skating.

De facto compulsory arbitration could potentially be found not only in the context of sports and employment arbitration but also in some rare instances of consumer or even commercial arbitration. Whether an arbitration is de facto compulsory needs to be established based on the circumstances of each case and the threshold for the determination should be high. The test applied in *Pechstein* was much stricter than just a 'take it or leave it' choice. If a party could find comparable employment somewhere else or if a party could find a different business partner than the one that required entering into an arbitration agreement, the arbitration should not be considered compulsory.

Where an arbitral tribunal determines that the right to a public hearing applies, organizing public access to the hearing in an arbitration, especially in an ad hoc arbitration, can cause practical difficulties. The arbitral tribunal will need to consider, *inter alia*, where to hold the hearing, where to announce it, who pays for it what exactly should be made public, and how to protect confidential information.

However, where the compulsory character of an arbitration is not clear, it is difficult to argue that the tribunal should organize a public hearing based on a

134. *See* Niedermaier, *supra* n. 79, 18–19 (2014) referring to the judgment of the German Federal Court of Justice, III ZR 33/00 (BGH 14 Sep. 2000).

unilateral request of a party. Considering the importance of privacy of the hearing in arbitration, erring on the side of a public hearing potentially puts the award at risk.

In the efforts to render an enforceable award, the arbitral tribunal should be sensitive to the possibility of Article 6(1) ECHR applying to the arbitration at hand. When denying the request of a party for a public hearing in a borderline case, it is advisable that the tribunal gives reasons for its decision taking into consideration the circumstances of the case, the conditions for waiver, as well as limitations to the right to a public hearing under Article 6(1) ECHR.

It is important that arbitral tribunals are aware of the potential applicability of the right to a public hearing enshrined in Article 6(1) ECHR to arbitrations that are de facto compulsory. However, providing the right in practice is not without challenges, including: (1) the complexity of the conditions for waiver of the right to a public hearing, (2) the vagueness of the category of de facto compulsory arbitration and its exceptional character, (3) privacy being an important principle of arbitration, and (4) practical issues with organizing public hearings.