



# SPORTS AND COMMERCIAL ARBITRATION: A TALE OF TWO CITIES

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Sports and commercial arbitration remain, to a relevant extent, worlds apart. However, both stand to gain from each other's lessons and development. Within the realm of sports arbitration, and manly due to recent and very relevant jurisprudence of the European Court of Human Rights ("ECHR"), there is an increasing pressure to uphold

and abide by the right to a fair trial, enshrined in Article 6 of the European Convention on Human Rights, as well as to raise the standards regarding the independence and impartiality of arbitrators. The landmark case of *Pechstein/Mutu v. Switzerland* has paved the way for raising the standards as regards transparency in arbitration proceedings, strongly questioning the "dogma" of confidentiality in arbitration and affirming that the right to a public hearing is intrinsic to the right to a fair trial. This decision lead the Court of Arbitration for Sport

("CAS") in Lausanne to revise its Code and include a provision setting forth the right to a public hearing in arbitrations of a disciplinary nature in certain specific circumstances. Likewise, in the *Al Riza et al v. Turkey* case, the ECHR delved into the issue of arbitrator independence and impartiality and, in light of the case's circumstances, concluded that, because athletes and sports governing bodies were not operating from a level playing field when it came to selecting the arbitrators, the arbitrators were not



free from external pressures and were arguably a greater liability in terms of conflicts of interest due to the source of their fees, which amounts to a breach of the right to a fair trial.

These two cases, which deal with the right to a fair trial and its dimensions illustrate a very interesting paradox. On the one hand, the *Al Riza et al v. Turkey* case shows that sports arbitration still has a long way to go to reach commercial arbitration's current independence and impartiality standards. On the other hand, the *Pechstein/Mutu v. Switzerland* case demonstrates that, in other aspects such as transparency, sports arbitration might be leading the development of jurisdictional guarantees within arbitration proceedings. By comparison, commercial arbitration is at the forefront of the development of rules and mechanisms concerning the arbitrators' independence and impartiality requirements

and has come a long way to ensure that such requirements are strictly met thereby strengthening and legitimizing the arbitral tribunals and their awards. However, confidentiality remains very much a “dogma” as it is regarded as one of the chief advantages of arbitration when compared to judicial court litigation.

The takeaways are, therefore, mutual and reflexive. On one hand, sports arbitration should strive to implement a system that goes further to ensure arbitrators are independent and impartial, perhaps by following the example of commercial arbitration. It is crucial to establish a level playing field for the selection of arbitrators, ensuring equal representation of athletes and carefully scrutinizing the relations between arbitrators and arbitral institutions and the sports governing bodies. In this regard, reviewing the closed list system or, at least, establishing a broader

list of potential arbitrators could contribute to avoid the pathological issue of repeat arbitrator appointments in sports arbitration.

On the other hand, although with a caveat – the circumstances of the dispute should justify it –, commercial arbitration could evolve from the “dogma” of confidentiality, thereby contributing to transparency and to the advance of legal development. Especially the publication of arbitral awards – even if with sensitive information redacted – would be a major leap forward in the development of the credibility of arbitration and would provide the community with much needed ‘jurisprudence’ on matters which are usually subject to arbitration only. We end as we began, sports and commercial arbitration are a tale of two cities that stand to gain if they learn each other's lessons and continue to improve on their own.