ISSN 2384-9169
Fascicolo n. 1 - 2025
rivista.eurojus.it

SPORTS ARBITRATION AND EU LAW: WHAT IS AT STAKE?

Summary in the wake of the Opinion of the Advocate General Ćapeta in the *Seraing* case

by Stefano Bastianon[*]

Summary: 1. Introduction. - 2. EU law and arbitration. - 3. EU law, arbitration, and bilateral investment treaties. - 4. EU law ad sports arbitration. -5. EU law, sports arbitration, and the principle of res judicata. - 6. The Opinion of the Advocate General Ćapeta. – 7. Final remarks.

1. Introduction

On 16 January 2025, the Advocate General Ćapeta delivered her Opinion in the *Seraing* case (C-600/23) concerning whether Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union preclude an arbitral award (specifically, an award issued by the Court of Arbitration for Sport, CAS) from being given the force of *res judicata* and probative value *vis-à-vis* third parties, where the review of conformity with EU law has been carried out by a court of a State which is not a Member of the European Union (specifically, the Swiss Federal Tribunal, SFT)[1].

It is not the first time that the Court of Justice has been called upon to specify the conditions under which an arbitration system can be considered compatible with European Union law. However, with specific reference to international sports arbitration, the *Seraing* case represents an important occasion to test whether and to what extent the Court of Justice intends to confirm the principles laid down in its previous case-law.

---

[*] Stefano Bastianon is a Full Professor of European Union Law at the University of Bergamo (Italy), CAS Arbitrator and member of the "Collegio di Garanzia dello Sport del CONI" (Italian highest Sports Court of the Italian Olympic Committee). He is an Attorney-at-law and co-founder of the Law Firm Bastianon-Garavaglia in Busto Arsizio (Italy). He is a member of the Steering Committee of the *Rivista di Diritto Sportivo* and *Eurojus* and the Scientific Committee of the *Rivista di Diritto ed Economia dello Sport (RDES).* The views presented in this paper are those of the author and do not reflect the official position of either the CAS or the Collegio di Garanzia dello Sport.
The views presented in this article are those of the author and do not reflect the official position of either the CAS or the Collegio di Garanzia dello Sport.

[1] Opinion of The Advocate General Ćapeta delivered on 16 January 2025, Case C-600/23, *Royal Football Club Seraing v FIFA et a.*, ECLI:EU:C:2025:24

2. EU law and arbitration

The Court of Justice's case law on arbitration and EU law goes back to the 1982 *Nordsee* ruling where the EU judges stated that a German arbitration court, which must decide, not according to equity but according to law, and whose decision has the same effects as regards the parties as a definitive judgment of a court of law is not authorized to make a reference to the Court of Justice for a preliminary ruling pursuant to (now) Article 267 TFEU[2]. To substantiate its findings, the Court underlined that, in the case at issue, the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration and that the German public authorities were not involved in the decision to opt for arbitration nor are they called upon to intervene automatically in the proceedings before the arbitrator. Accordingly, the Court concluded that the link between the arbitration procedure and the organization of legal remedies through the courts in Germany was not sufficiently close for the arbitral tribunal to be considered as a «court or tribunal of a Member State» within the meaning of (now) Article 267 TFEU[3].

At the same time, the Court added that EU law must be observed in its entirety throughout the territory of all the Member States and therefore parties to a contract are not free to create exceptions to it. Despite this, the Court acknowledged that if questions of EU law are raised in an arbitration resorted to by agreement «the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award - which may be more or less extensive depending on the circumstances - and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation»[4].

Twelve years later, in the 1994 *Comune di Almelo* ruling, the Court of justice confirmed the *Nordsee* case law, clarifying that a national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of (now) Article 267 TFEU, even if under the terms of the arbitration agreement made between the parties that court must give judgment according to what appears fair and reasonable[5].

---

[2] Judgment of the Court of 23 March 1982, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG.*, Case 102/81, ECLI:EU:C:1982:107.

[3] *Ibid.,* para. 10.

[4] *Ibid*., para. 14.

[5] Judgment of the Court of 27 April 1994, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*, Case 393/92, ECLI:EU:C:1994:171.

In the following 1999 *Eco Swiss China* ruling, the Court dealt with two main issues[6].

On one hand, the Court was called upon to specify whether, where a national court considers that an arbitration award is contrary to Article 85 of the EC Treaty (now Art. 101 TFEU), it must allow a claim for annulment of that award. This would be the case notwithstanding national procedural law, which limits the grounds on which a party may seek annulment of an arbitration award only on a limited number of grounds: one ground being that an award is contrary to public policy, which generally does not cover the mere fact that through the terms or enforcement of an arbitration award no effect is given to a prohibition laid down by competition law.

On the other hand, the Court was asked to state whether EU law requires a national procedural law—under which an interim arbitration award acquires the force of res judicata and is open to appeal only within a period of three months following lodgement of the award—to be disapplied if this is necessary to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement previously upheld as valid by an interim arbitration award may nevertheless be void due to conflict with Article 85 of the EC Treaty.

As regard the first question, the Court admitted that it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of, or refusal to, recognise an award should be possible only in exceptional circumstances[7].

However, the Court also underlined that EU competition rules constitute a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Union and, in particular, for the functioning of the internal market. Accordingly, where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85. Moreover, the Court also specified that Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention[8].

As regard the second question, the EU judges recognized that a period of three months to appeal an award does not seem excessively short compared with those prescribed in the legal systems of the other Member States and does not render excessively difficult or virtually impossible the exercise of rights conferred by EU law[9]. Moreover, such a term is justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of res judicata, which is an

[6] Judgment of the Court of 1 June 1999, *Eco Swiss China Time Ltd v Benetton International NV*, Case 126/97, ECLI:EU:C:1999:269.
[7] *Ibid.,* para 35.
[8] *Ibid.,* para 38.
[9] *Ibid.,* para. 45.

expression of that principle[10]. Accordingly, the Court concluded that EU law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

3. EU law, arbitration, and bilateral investment treaties

In the context of the above-mentioned case law, the 2018 *Achmea* ruling represents a turning point[11]. The case concerned the dispute between the Dutch company Achmea and the Slovak Republic, under a bilateral investment treaty (BIT) between the Netherlands and Slovakia, which provided for arbitration before an ad hoc tribunal. On that occasion the Court was called upon to state whether EU law (in particular Articles 344, 267 and 18 TFEU) must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

By way of introduction, the Court first recalled that EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded. Such a premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. Accordingly, Article 19 TEU provides that it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law. In particular, the EU judicial system has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law[12].

That said, the Court went on to underline that, in case of a dispute between one contracting Member State and an investor of the other contracting Member State concerning an investment of the latter, the arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively (i) the law in force of the contracting Member State concerned, (ii) the provisions of the international agreement and other relevant agreements between the contracting Member States, (iv) the provisions of special agreements relating to the investment, and (v) the general principles of

[10] *Ibid*., para. 46.
[11] Judgment of the Court of 6 March 2018, *Slowakische Republik v Achmea BV*, Case 284/16, ECLI:EU:C:2018:158.
[12] *Ibid*., para. 34.

international law. Considering that EU law, by its very nature, must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States, it follows that, when ruling on possible infringements of the agreement, the arbitral tribunal may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital as an integral part of the law of the contracting Member States[13].

However, the Court considered that the arbitral tribunal did not have any links with the judicial systems of the Member States and therefore could not be classified as a court or tribunal of a Member State within the meaning of Article 267 TFEU. and was not entitled to make a reference to the Court for a preliminary ruling. Despite this, the Court did not *a priori* contest the legitimacy of the arbitral tribunal as such, focussing instead on whether an arbitral award made by such a tribunal was subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal would have to address could have been submitted to the Court by means of a reference for a preliminary ruling.

To this regard it is worth noting that, on one hand, according to the international agreement at issue in the *Achmea* case, the arbitral tribunal was entitled to determine its own procedure applying the UNCITRAL arbitration rules and, in particular, to choose its seat and consequently the law applicable to the procedure governing judicial review of the validity of the award by which it put an end to the dispute before it, on the other, the arbitral tribunal chose to sit in Frankfurt am Main, which made German law applicable to the procedure governing judicial review of the validity of the arbitral award, and thus allowing the parties to ask the German judges to refer the case to the Court of Justice pursuant to Art. 267 TFEU[14].

However, the Court also noted that, according to German law, the judicial review by the German judges could be exercised only for limited reasons, concerning, in particular, the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award. To this regard, the Court acknowledged that in the *Eco Swiss China* case, in relation to commercial arbitration, it had held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling[15]. Despite this, in the *Achmea* case the Court underlined the difference between commercial arbitration and arbitration established by international agreement concluded between

[13] *Ibid.,* para. 43.
[14] *Ibid.,* para. 52.
[15] *Ibid.,* para. 54.

Member States. In particular, the Court noted that commercial arbitration originates in the freely expressed wishes of the parties, whereas in *Achmea* the arbitration system derived from a treaty by which Member States agreed to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law[16].

Accordingly, the Court concluded that, in light of all the characteristics of the arbitral tribunal provided for by the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.

4. EU law ad sports arbitration

The *International Skating Union* (ISU) case represents the first case where the Court was called upon to analyse the CAS system under the lens of EU (competition) law[17].

To this regard it must be recalled that one of the aspects of the ISU eligibility system was represented by the exclusive jurisdiction of the CAS for decisions of the ISU declaring the ineligibility of a skater, official, office holder or other participant in ISU activities.

Having established that the ISU's eligibility rules restricted competition by object in the worldwide market for the organisation and commercial exploitation of international speed skating events under Article 101(1) TFEU, the Commission concluded that the arbitration rules, while they did not in themselves constitute an infringement of Article 101(1) TFEU, should however be regarded as reinforcing such restriction of competition as they made difficult to obtain effective judicial protection against ineligibility decisions of the ISU in breach of Art. 101 TFEU.

To support its conclusion the Commission pointed out that:

(i) judicial recourse against CAS awards is possible, but only before the SFT on a very limited number of grounds, such as lack of jurisdiction, violation of elementary procedural rules or incompatibility with public policy;

(ii) according to the case-law of the Swiss Federal Tribunal EU competition law does not pertain to international public policy in the sense of the Swiss legal order. The Swiss Federal Tribunal is

[16] *Ibid*., para. 55.

[17] Judgment of the Court of 21 December 2023, *International Skating Union v Commission*, Case C-124/21 P, ECLI:EU:C:2023:1012.

therefore not likely to annul a CAS arbitral award that confirms an ineligibility decision taken in violation of Art. 101 TFEU;

(iii) even if the Swiss Federal Tribunal were to apply the EU competition rules, it cannot refer a question for preliminary ruling to the Court of Justice in case of doubts about the interpretation of those rules;

(iv) although CAS awards are enforceable in any court, once an ineligibility decision is imposed by the ISU, there is generally no need for enforcement by national courts because the ISU has the disciplinary power to enforce the decision itself;

(v) a national court within the EEA has competence to review whether the recognition and enforcement of the CAS arbitral award (confirming an ineligibility decision) violates EU/EEA competition law only if an athlete brings a civil action triggering an enforcement dispute in a Member State where it is denied participation in an ISU skating event. However, even in such a case the national court of a Member State could under no circumstances annul an anticompetitive ineligibility decision by the ISU or a CAS arbitral award for violation of Art 101 and/or Art. 102 TFEU. A national court could merely refuse recognition or enforcement of the arbitral award for reasons of public policy in that specific Member State.

This conclusion was first overturned by the General Court, and then, definitively confirmed by the Court of Justice. In particular, the Court noted that the arbitration rules imposed by the ISU concerned two types of disputes which may arise in the context of economic activities consisting of (i) seeking to organise and market international speed skating events and (ii) seeking to take part in such competitions as a professional athlete.

Therefore, the arbitration rules apply to disputes concerning the exercise of a sport as an economic activity and, on that basis, come under EU competition law and must comply with EU competition law as far as they are implemented in the territory in which EU law applies. Accordingly, the Court underlined that its ruling is likely to affect only the implementation of such rules in the context of such disputes and in the territory of the European Union; by contrast, the Court made it clear that it did not intend to address the implementation of those rules in a territory other than the European Union, their implementation in other types of disputes, such as disputes concerning merely the sport as such and therefore not falling under EU law, or, a fortiori, the implementation of the arbitration rules in different areas. Moreover, the EU judges held that the question at issue is not the CAS review at first instance of decisions issued by the ISU, but only the review of the CAS arbitral awards by the SFT, that is to say, a court of a third State.

That said, the Court recalled its own case law according to which an individual may enter into an agreement that subjects, in clear and precise wording, all or part of any disputes relating to it to an

arbitration body in place of the national court that would have had jurisdiction to rule on those disputes under the applicable national law, and that the requirements relating to the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited. However, the Court also pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, which include Articles 101 and 102 TFEU, especially when such an arbitration mechanism must be regarded as being, in practice, imposed by a person governed by private law, such as an international sports association, on another, such as an athlete.

To be effective, the judicial review requires that, in the event of provisions conferring mandatory and exclusive jurisdiction on an arbitration body, the court having jurisdiction to review the arbitral awards (a) may confirm that those awards comply with Articles 101 and 102 TFEU; and (b) the court satisfies all the requirements under Article 267 TFEU to refer a question to the Court of Justice for a preliminary ruling.

As already observed, neither of these two requirements is currently met by the SFT.

It is important to underline that these requirements do not allow alternative remedies. In particular, the Court noted that as essential as it may be, the fact that a person is entitled to seek damages for harm caused by conduct liable to prevent, restrict or distort competition cannot compensate for the lack of a remedy entitling that person to bring an action before the relevant national court seeking the review and annulment of the arbitration award. Moreover, although at paragraph 191 the Court recognized that its analysis does concern the ISU rules that subject the review at first instance of decisions issued by the ISU to the CAS as an arbitration body, but only the rules that subject the review of the arbitral awards made by the CAS and the last-instance review of decisions of the ISU to the SFT, nevertheless at paragraph 194 the Court concluded that, in the absence of such judicial review, the use of an arbitration mechanism (such as the CAS arbitration) is such as to undermine the protection of rights that individuals derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured by the national rules relating to remedies.

According to ISU's Constitution and General Regulations approved by the 59th Ordinary Congress in June 2024, «any decision of the Council declaring ineligibility of a Skater, Official, Office Holder or other participant in ISU activities" must be appealed to the Appeals Arbitration Division of the CAS (Article 26). Moreover, Article 27 provides that "decisions of the CAS shall be final and binding to the exclusion of jurisdiction of any civil court. This is without prejudice to the right of appeal before the Swiss Federal Tribunal in accordance with Swiss law and the right to challenge the

enforcement or recognition of an award on grounds of public policy in accordance with any applicable national procedural laws».

As regard the right to challenge the enforcement or recognition of a CAS award on grounds of public policy in accordance with any applicable national procedural laws, it is worth noting both (i) that such a right is already provided for by the New York Convention on the recognition and enforcement of foreign arbitral awards[18], and (ii) that in sports disputes there is no guarantee that a national court will get involved as CAS awards tend to be self-executing and do not have to be formally recognized by a national court. Accordingly, the current ISU rules still do not appear to guarantee the power of a Member State court to review the compliance of a CAS award with EU competition law and to refer a preliminary ruling to the Court of justice.

By contrast, following the *Superleague* case[19], the 2024 UEFA Authorization Rules follow a different approach. Art. 16(1) states that "any dispute related to these rules, including without limitation final decisions relating to the authorisation procedure and final decisions imposing disciplinary measures, shall be finally resolved by arbitration before the CAS in accordance with the Code of Sports-related Arbitration (CAS Code)". Art. 16(2) provides that «the party filing the statement of appeal and/or a request for provisional measures, whichever is filed first with CAS, shall indicate in its first written submission to CAS whether the party accepts Lausanne, Switzerland, as seat of the arbitration or if the seat of the arbitration shall be in Dublin, Ireland, in derogation of Article R28 of the CAS Code[20]. In the latter case, UEFA is bound by the choice of Dublin, Ireland, as seat of the arbitration and UEFA shall confirm its agreement to such seat in its first written reply to CAS. In case no seat is indicated in the first written submission to CAS, Article R28 of the CAS Code shall apply». Lastly, Art. 16(4) reads as follows: «The decision of CAS shall be deemed to be made at the seat of the arbitration determined as per paragraph (3) above. The CAS award shall mention the seat of the arbitration. The decision of CAS shall be final and binding to the exclusion of jurisdiction of any ordinary court or any other court of arbitration. This is without prejudice to the right of appeal of any party in accordance with the applicable law of the seat of the arbitration as well as the right to challenge the enforcement or recognition of a CAS award on grounds of public policy (which may include European Union public policy laws) in accordance with any applicable national or European Union procedural laws».

---

[18] Article V, 2 provides that "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) ….; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

[19] Judgment of the Court, of 21 December 2023, *European Superleague Company*, Case C-333/21, ECLI:EU:C:2023:1011

[20] Art. R28 of the CAS Code provides that the seat of CAS and of each arbitration panel is fixed in Lausanne (Switzerland). However, should circumstances so warrant, and after consultation with all parties, the President of the panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing.

The new UEFA's rules seem to be intended to make the CAS arbitration clause compatible with the *ISU* ruling. However, it is worth noting that their compatibility with Art. R28 of the CAS Code does not appear to have yet been examined by CAS panels.

5. EU law, sports arbitration, and the principle of res judicata

To fully understand the *Seraing* case, it is important to briefly recall the FIFA's rules on Third party Ownership (TPO). In December 2014 the FIFA informed its members that, to protect the integrity of the game and the players, the Executive Committee took the decision that TPO of players' economic rights and third-party influence on clubs shall be banned effective 1 January 2015. Accordingly, FIFA amended its Regulations on the status and transfer of players (RSTP) as follows:

(a) new Article 18-bis RSTP provided that «No club shall enter into a contract which enables the counter club/counter clubs and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article»;

(b) new Article 18-ter RSTP provided that: «No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another or is being assigned any rights in relation to a future transfer or transfer compensation". (…) "The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article».

That said, on 30 January 2015 and 7 July 2015 Royal Football Club Seraing (RFC Seraing), a football club affiliated with the Belgian football association, and Doyen Sports Investments Ltd (Doyen Sports), a company under the law of Malta, entered into two TPO agreements, whereby the club transferred to Doyen a percentage of the economic rights of four players in exchange of 350.000 Euros.

In particular, on 4 September 2015 FIFA sanctioned the club for breaches of the FIFA's total ban of TPO. The appeal filed by the club against this decision was rejected by the FIFA Appeal Committee. Therefore, the club appealed this decision before the CAS. On 9 March 2017, the CAS dismissed the appeal arguing that TPO were legal under the EU provisions on freedom of movement and freedom of competition. Lastly, the club challenged the CAS award before the SFT arguing that it was contrary to public policy, but the SFT considered such argument inadmissible and, therefore, did not have to examine the question of the compatibility of TPO with EU law.

In parallel, the RFC Seraing and Doyen Sports started several legal actions against FIFA's TPO before the Belgian courts. One of those legal suits ended up before the Brussels Court of Appeal where, the club and Doyen Sports argued that TPO was contrary to EU law provisions on freedom of movement and freedom of competition; by contrast, FIFA argued that the Brussels Court of Appeal lacked jurisdiction on the basis of the arbitration clause provided for in the FIFA Statutes.

Regarding its jurisdiction, the Court of Appeal rejected the arbitration exception invoked by FIFA on the ground that the arbitration clause does not refer to a defined legal relationship and therefore cannot be recognized as an arbitration clause pursuant to Articles 1681 and 1682(1) of the Belgian Judicial Code[21]. On the merits, the Court of Appeal held that, pursuant to Belgian law, an arbitral award has the force of *res judicata* from the date on which it is delivered without the need for a prior exequatur procedure. Therefore, it considered that the CAS award was final and acquired the force of res judicata following the dismissal of the action for annulment by the Federal Supreme Court. Accordingly, it dismissed the grounds of appeal, alleging infringement of EU law. Following the appeal lodged by the club before the Belgian Cour de Cassation, the latter decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- does Article 19,1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union,

a) preclude the application of provisions of national law laying down the principle of res judicata, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted to refer a question to the Court of Justice of the European Union for a preliminary ruling?

b) preclude the application of a rule of national law according probative value vis-à-vis third parties, subject to evidence to the contrary which it is for them to adduce, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted to refer a question to the Court of Justice of the European Union for a preliminary ruling?

6. *The Opinion of the Advocate General Ćapeta*

After recalling that this is not the first time the Court has been asked to provide an interpretation of the relationship between arbitration and EU law and the extent of judicial review of arbitral awards, the Advocate General distinguishes between commercial arbitration and sports arbitration.

[21] In particular, the FIFA arbitration clause covers any dispute between a club and FIFA, regardless of the subject matter of such disputes, and prohibits submitting such disputes to state courts, unless specifically provided for by the FIFA Statutes.

In particular, she argues that an essential feature of commercial arbitration, which was at issue in the *Eco Swiss* line of case-law, is the free acceptance of the arbitration clause by both parties, whereas «sport actors cannot choose to submit their disputes, in which they challenge FIFA's rules or decisions, to any other adjudicatory system but to FIFA's internal disciplinary procedures and subsequently to CAS. A failure to accept CAS's mandatory jurisdiction prevents players from playing and clubs from competing. Thus, for players and clubs, CAS's jurisdiction is mandatory and not chosen of their own free will. It therefore does not reflect their own choice to exclude access to a court and to prevent the applicability of certain legal rules to the dispute between them».

Then, the Advocate General highlights the self-sufficiency of the FIFA disputes resolution system in terms of enforcement. According to the Advocate General, if a party refuses to implement a CAS award because it considers it to be in breach of EU law, it cannot simply refuse to comply with such an award, nor does FIFA need to initiate an enforcement procedure before the national court. FIFA can enforce the award on its own, as clearly shown by the *Seraing* case where FIFA it was able to enforce the penalties and the prohibition on the registration of players without recourse to a court. For those two reasons, the Advocate General considers that the rules developed for commercial arbitration in the *Nordsee* and *Eco Swiss* line of case-law are not fitting for FIFA's system of mandatory arbitration by CAS.

On the other hand, the Advocate General argues that not even the *Achmea* case-law can be usefully invoked in the present case for at least three reasons:

i) the *Seraing* case does not question the principled compliance of FIFA's arbitral system with EU law, whereas in *Achmea* the Court denied the possibility to submit to arbitration disputes involving Member

States based on bilateral investment treaties (BITs);

ii) the mandatory and exclusive jurisdiction of CAS, at issue in the Seraing case, does not result from an international agreement concluded by or between the Member States, nor from their exercise of public power. Rather, it results from the Statutes of FIFA, a private organisation. Accordingly, those statutes cannot bind or limit the Member States when it comes to ensuring effective judicial protection through their judicial systems;

iii) the *Achmea* ruling speaks to the Member States and requests that they remove the harmful consequences that arbitration clauses under BITs cause for the principle of mutual trust in their judiciaries. By contrast, any change to the arbitration system in football would inevitably depend on the willingness of FIFA.

In this context, echoing the *ISU* case, the Advocate General points out that «the principle of effective judicial protection (…) requires a direct judicial path to assess and, if necessary, to prevent the

application of FIFA's rules that are contrary to EU law. An arbitral award proclaiming the conformity of FIFA's rules with EU law cannot stand in the way of a national court's power to review such conformity on its own, referring the question of interpretation of EU law to the Court if necessary. Therefore, attaching the force of res judicata to an arbitral award in relation to its finding that EU law was not infringed is contrary to the principle of effective judicial protection».

As regard the scope of the review, the Advocate General draw another distinction between commercial and sports arbitration. In particular, in the wake of the *Eco Swiss* case-law, it is not disputed that in commercial arbitration the scope of judicial review may be limited to issues of public policy as it may be considered that the parties voluntarily excluded the application of some rules of a legal system but could not exclude those of public policy (i.e., rules of higher public importance). By contrast, «in mandatory arbitration, such as the CAS arbitration under the FIFA Statutes, the parties do not freely choose to exclude the application of some EU rules to their situation. Therefore, the reasons that justify a limited scope of judicial review in commercial arbitration cannot readily be applied to mandatory arbitration. A national court must, therefore, be able to conduct the review of FIFA rules against any and all rules of EU law, any CAS award notwithstanding».

Lastly, the Advocate General addresses the question of the application of the New York Convention to CAS awards. While acknowledging that all the parties at the hearing agreed that the New York Convention applies to CAS awards, she argues that the question is not self-evident, and it is possible to conclude that mandatory arbitration does not meet the requirement of Article II(1) of the New York Convention. According to The Advocate General, the parties did not undertake freely and consensually to submit any or all of their disagreements to arbitration. Therefore, such interpretation would allow national courts to interpret the New York Convention as not being applicable to mandatory arbitration of the same kind as FIFA sport arbitration. If, however, the New York Convention does apply, The Advocate General considers that its provisions do not clash with the interpretation of effective judicial protection proposed in respect of mandatory arbitration, given that:

i) Article V(2)(b) of the New York Convention limits judicial review of arbitral awards to public policy issues;

ii) hat provision does not have an autonomous meaning in the convention, but is, rather, subject to the laws of its signatories;

iii) accordingly, it is possible to interpret as part of public policy, for the purposes of that convention, the EU principle of effective judicial protection, which, in cases of mandatory arbitration, requires full judicial review.

In other words, the principle of limited judicial review of arbitral awards to public policy issues would serve as a gateway to a full review of the arbitral award in respect of the applicable EU law.

By its second question, the referring court asked, in essence, whether the principle of effective judicial protection, read in conjunction with Article 267 TFEU, precludes a rule of national law granting an arbitral award rebuttable probative value vis-à-vis third parties, where the review of conformity with EU law has been carried out by a court of a third country, given that it makes it excessively difficult to exercise the right to effective judicial protection, in particular by reversing the rules normally applicable to the burden of proof.

The Advocate General's answer to this question appears much simpler. She notes that a rebuttable presumption of probative value, does not prevent national courts from discharging their obligations under Article 19(1) TEU, given that they remain able to ensure the full application of EU law, if necessary, by submitting a preliminary reference to the Court of Justice.

7. *Final remarks*

The ball is now in the hands of the Court of Justice. Assuming that the Court follows the Advocate General's Opinion, the effects of such a ruling will need to be carefully considered. The Advocate General has already stated that the *Seraing* case does not question the compliance of FIFA's arbitral system with EU law. However, the *Seraing* case could potentially open the door to a general review of the merits of issues already decided by the CAS with the risk of divergent solutions. Moreover, in the *ISU* case the Court ruled that in the absence of an effective judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured by the national rules relating to remedies.

Accordingly, different scenarios may be possible:

a) a scenario where an individual bound by a CAS arbitration clause decides to appeal to a national court arguing that, based on the *ISU* ruling, the CAS arbitration mechanism does not comply with EU law as it does not ensure an effective judicial control;

b) a scenario in which, as in the *Seraing* case, the merits of a case already decided by the CAS could be completely re-discussed before the national judge.

Put it in a different way: according to the Advocate General, CAS awards addressing EU law are no longer binding in EU Member States. While this strengthens access to justice by making it more open and effective, it could also jeopardize legal certainty. In particular, imagine what could happen if the referring court in the *Seraing* case would conclude that FIFA's rules on TPO are in contrast with EU law.

To mitigate this risk, one could propose that a final CAS award affirming the compatibility of a sporting rule with EU law - although not carrying *res judicata* effect - might still, under national law,

serve as *prima facie* evidence of such compatibility. National courts could then consider this evidence along with any other evidence submitted by the parties. In such a case, the risk of divergent, although still possible could be less likely.

Despite this, the rigid distinction between commercial arbitration (non-mandatory) and sports arbitration (mandatory) appears excessively formalistic and not entirely in line with reality. In particular, in the 2020 *Uber Technologies Inc. v Heller* case, the Supreme Court of Canada decided that the arbitration clause in Uber's driver contract was unconscionable and hence not binding because there was an inequality of bargaining power between Uber and the driver and an improvident bargain, meaning it unduly disadvantaged the more vulnerable party[22]. Similarly, not all sports arbitrations are necessarily and intrinsically self-executive: imagine, for example, a CAS arbitration agreement between two clubs by which the parties choose to directly submit their commercial dispute to CAS. In this case, the mandatory nature and self-executive force of sports arbitration appear less obvious.

Similarly, pursuant to Art. 22(1) of the FIFA Regulations on the Status and Transfer of Players (RSTP), any player, coach, association, or club is entitled to seek redress before a civil court for employment-related disputes. Therefore, if despite this provision a player (coach, association, or club) decides to submit his/her/its dispute to the FIFA dispute resolution system, it is difficult to consider this choice as a forced choice. All the more so if one considers that in the *Mutu and Pechstein* judgment the European Court of Human Rights itself clearly distinguished between mandatory sports arbitration (Pechestein) and non-mandatory sports arbitration (Mutu)[23].

Put simply: the characterization of sports arbitration as a third *genus* of mandatory and self-executive arbitration (other than commercial arbitration and BITs arbitration) subject to full judicial review by national Tribunals may not be suitable for all circumstances, suggesting the desirability of a more tailored approach to sports arbitration.

[22] *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (CanLII), [2020] 2 SCR 118

[23] *Mutu and Pechstein v. Switzerland*, 2 October 2018, https://hudoc.echr.coe.int/fre?i=001-186828. As regard Pechstein, the Court noted that «even though it had not been im-posed by law but by the ISU regulations, the acceptance of CAS juris-diction by the second applicant must be regarded as "compulsory" arbi-tration within the meaning of its case-law»; by contrast, regarding Mutu the Court pointed out that the situation was clearly different, given that «the applicable rules of the sports federation concerned did not impose arbitration but left the choice of dispute settlement mechanism to the contractual freedom of clubs and players».