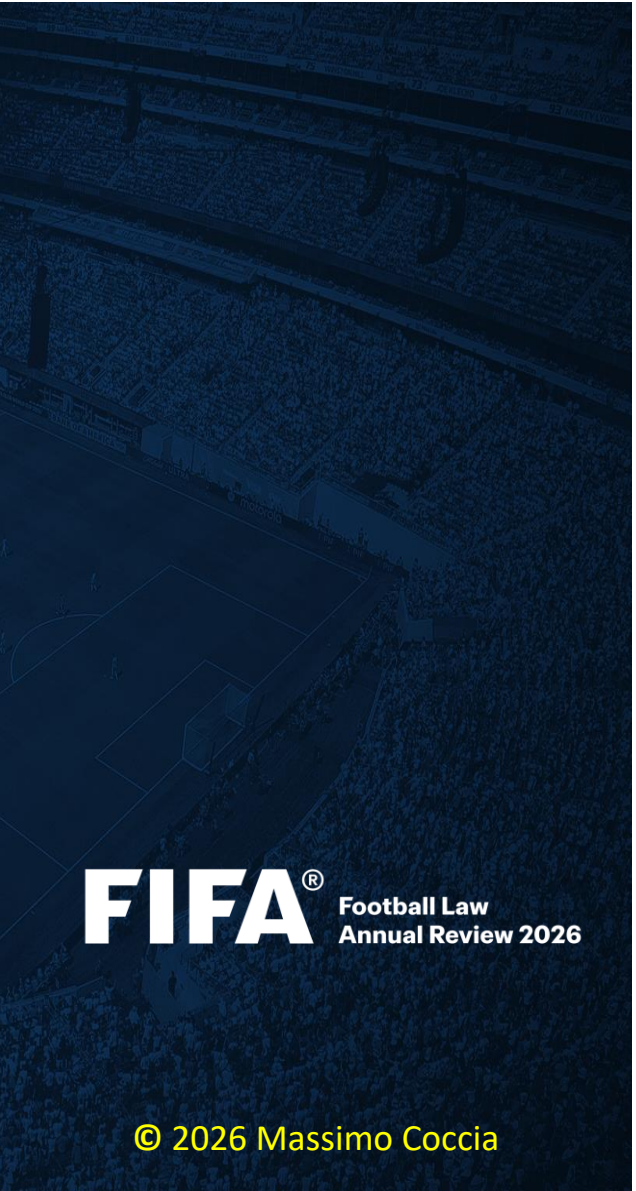


The CJEU ruling on Seraing and the practical implications for the CAS system

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1

As Time Goes By

Timeline of the RFC Seraing case

30 January 2015	RFC Seraing concludes a contract with Doyen Sports Investment Ltd (“Doyen”) selling portions of the economic rights to three players
3 April 2015	**Doyen starts a lawsuit** (and **RFC Seraing** later intervenes) **before the Brussels Commercial Court against FIFA, UEFA and URBSFA** claiming that the **FIFA rules on TPI and TPO** are incompatible with EU law (competition law and free movement) and requesting compensation for damages
4 September 2015	**FIFA Disciplinary Committee sanctions RFC Seraing** under Articles 18bis-18ter RSTP (TPI-TPO)
7 January 2016	FIFA Appeal Committee dismisses the appeal brought by RFC Seraing
17 November 2016	Brussels Commercial Court finds that it has no jurisdiction to examine the RFC Seraing’s case
9 March 2017	The appointed CAS panel issues an arbitral award holding that the FIFA rules on TPI and TPO do not breach EU law or Swiss law and rejects the RFC Seraing’s appeal
20 February 2018	**The Swiss Federal Tribunal dismisses the appeal** against the CAS award stating *inter alia* that competition law is not part of the Swiss substantive public policy (*ordre public*)
12 December 2019	Brussels Court of Appeal dismisses Seraing’s appeal due to *res judicata* force of CAS award
8 September 2023	Belgian Court of Cassation refers the case to the CJEU for a preliminary ruling (Art. 267 TFEU)
16 January 2025	Advocate General Ćapeta issues her opinion
1 August 2025	**The CJEU issues its judgment and now the case is back with the Belgian courts**

Fear and Loathing in Luxembourg

2

Advocate General Ćapeta's Opinion of 16 January 2025

- **Case C-600/23 *Royal Football Club Seraing SA v. FIFA, UEFA, URBSFA*** (the "**Seraing case**") starts with a reference from the Belgian Court of Cassation to the Court of Justice of the European Union (**CJEU**) for a preliminary ruling under **Article 267 TFEU**
- The **Advocate General distinguishes between sports arbitration and commercial arbitration**, characterizing the former as **"mandatory arbitration"** and the latter as **"voluntary arbitration"**, on two grounds:
  1) In a commercial context, arbitration clauses are freely and consensually accepted by the parties, while in a sports context **arbitration clauses are compulsory**, as those who are subject to FIFA rules have no option but to submit their disputes to the FIFA bodies and subsequently to CAS arbitration
  2) Unlike in commercial arbitration, where enforcement of awards must be sought before ordinary courts, **CAS arbitral awards are self-enforcing** and do not need State courts because FIFA (like any other sports governing body) can enforce such awards through its own disciplinary powers

Advocate General Ćapeta's Opinion of 16 January 2025

- Therefore, in the Advocate General's view, in all situations of mandatory CAS arbitration, **CAS awards should not be considered as true arbitral awards** under the 1958 New York Convention
- In any event, even considering CAS awards as true arbitral awards, the **EU principle of effective judicial protection** would require that the **review of CAS awards by the courts of EU Member States** is not limited to public policy, but becomes a **full judicial review** to ensure the compatibility of FIFA rules with **any and all rules of EU law**
- In other words, according to Ms. Ćapeta, in cases of "mandatory arbitration", CAS awards should be legally irrelevant in the territory of the European Union and the disputes submitted to the FIFA mechanisms of dispute settlement and then to the CAS involving issues of EU law could be **relitigated on the merits** all over again



3

Brilliant Disguise

The CJEU's Judgment of 1 August 2025

- **Operative Part of the CJEU's Judgment of 1 August 2025, Case C-600/23, *RFC Seraing v. FIFA, UEFA, URBSFA*:**

  *"The second subparagraph of Article 19(1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as **precluding**:*

  – *the **authority of res judicata from being conferred** within the territory of a Member State **on an award made by the Court of Arbitration for Sport (CAS)**, in the relations between the parties to the dispute in the context of which that award was made, **where** [1] that dispute is linked to the pursuit of a sport as an economic activity within the territory of the European Union and [2] **the consistency of that award with** the principles and provisions of EU law which form part of **EU public policy has not first been subject to effective review** by a court or tribunal of that Member State that is authorised to make a reference to the Court of Justice for a preliminary ruling;*

  – *probative value from being conferred, as a consequence of that authority of res judicata, on such an award within the territory of that Member State, in the relations between the parties to that dispute and third parties."*

Academic Reactions

- The **Operative Part** of the Seraing judgment must answer to the Belgian Court's queries; for this reason, it **disguises the true implications of the judgment**
- In fact, the Seraing judgment seems to be **written by several hands** (judges with different opinions); it is a bit confusing at first reading and **some language can be misleading**
- Many commentators have written on the Seraing judgment and some of them have given a somewhat **creative reading** of it; probably, they were influenced **(i)** by the **Opinion of Advocate General Ćapeta**, which, however, was **wholly disregarded by the CJEU**, and **(ii)** by the CJEU's Press Release, which said things that are not in the judgment and omitted others that are there…
- In fact, several commentators quoted the bits and pieces of the judgment that better suited their bias, inclination or ideas
- A correct understanding of the judgment needs to take into account elements of EU law, private and public international law, international arbitration law and sports law

Back to Basics

4

The New York Convention of 1958

- The **1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards** is the basis of international arbitration
- This international treaty has been ratified by **172 States** (essentially, the whole international community) and requires contracting States to uphold arbitration agreements and to recognize and enforce arbitral awards issued in other States, with very limited exceptions that can be raised
- The only substantive exception that can be raised by a party asking a national judge not to recognize and/or enforce a foreign arbitral award is the **incompatibility with the public policy (“*ordre public*”)** of the State of that judge (it’s the **“international public policy”**); the other exceptions are procedural (respect of right to be heard, etc.).
- It is **obvious** that a national court’s evaluation as to the recognition or not of a foreign arbitral award is done regardless of whether the award has become final and binding in the seat of the arbitration (i.e. **regardless of its *res judicata* status!**); actually, this is what happens most of the times as requests of non-recognition and non-enforcement are often submitted against awards that have become *res judicata* in their country of origin

Public Policy (*Ordre Public*)

- In this context, we are dealing with the so-called **"international public policy"** (not to be confused with internal public policy, which limits the contractual autonomy of parties)
- **International public policy** is a sort of "safety valve" that every State's legal system raises vis-à-vis any foreign legal deeds (foreign laws, judgments or other deeds)
- It's a notion encompassing the **core values and fundamental principles** of a given State and allows the courts of that State to refuse to apply, recognize and/or enforce foreign rules of laws, foreign judgments or foreign arbitral awards contradicting those core values and fundamental principles
- All national arbitration laws allow parties to challenge arbitral awards on that ground, either **directly**, i.e. asking the competent court of the State of the seat of the arbitration to **annul the award** (or part of it), or **indirectly**, i.e. asking a court of another State to **declare the non-recognition and/or non-enforceability of the award** in that State
- The **same** occurs with **judgments issued by ordinary courts** of other States

EU Public Policy

- The fundamental principles of EU law form the so-called **EU public policy**, which is **part of the international public policy of each Member State of the EU** and can limit the application, recognition and/or enforcement of foreign laws, foreign judgments or foreign arbitral awards
- There is no doubt, at least since 1999 (CJEU judgment in the *Eco Swiss* case), that the **principles of EU competition law** form part of the EU public policy
- Also, even before the Seraing ruling, nobody could harbor any serious doubt that the **four fundamental freedoms of movement** granted by the TFEU (free movement of workers, freedom to provide services, freedom of establishment and free movement of capitals) have always formed part of the EU public policy; see the *Walrave* judgment of 1974 (the first sports case brought before the Court of Justice), where the Court stated that the individuals' freedom of movement and the freedom to provide services "*are fundamental objectives of the Community contained in article 3(c) of the Treaty*"!



5

Thus Spoke the Court

Direct and Indirect Review of Arbitral Awards

- The **CJEU** explains that **arbitration is a legitimate tool to solve disputes** between private parties pursuing an economic activity within the EU territory, but **all arbitral awards** (not only CAS awards) must be subject to **effective judicial review**, so as to guarantee **effective judicial protection**, i.e. **review by a judge** of a Member State that can verify **compliance with EU public policy** and, if warranted, refer the matter to the CJEU under Article 267 TFEU
- The CJEU reminds that there can be a **"direct review"** or an **"indirect review" of an arbitral award**:
  - **Direct review**: an **action for annulment**, *i.e.* an appeal against the award asking the competent court of the arbitration seat (legal concept) to set aside the award or a part thereof
  - **Indirect review**: an **action for non-recognition**, *i.e.* the request not to recognize and enforce an arbitral award issued in a non-EU State (*e.g.* Switzerland)

Effective Judicial Review of Arbitral Awards

- **Effective judicial review** "*does not mean that there must necessarily exist, in the European Union, one or more courts or tribunals with the power to consider all questions of fact and of law*" (§ 84)
- It is legitimate to have arbitration mechanisms and **the judicial review of arbitral awards "*may legitimately be limited in nature*"** (§ 84), so as:
  - to allow private parties to have recourse to arbitration
  - to protect the **"effectiveness of the arbitration proceedings"**
- An **"effective judicial review"** can be ensured by the judges of EU Member States on the basis of the **"*legal classification* […] of *the facts as established and assessed by the arbitration body*"** (in French: "*qualification juridique […] des faits tels que constatés et appréciés par l'organe arbitral*") (§§ 86 and 101)

Review of CAS Awards

- The Seraing judgment does mention the fact that CAS arbitration can sometimes be "***mandatory***" (§ 93), in the sense that FIFA and other sports associations having "*extensive regulatory and oversight powers as well as the power to impose sanctions*" (§ 93) have the power to "***unilaterally impose***" such arbitration mechanism on individuals and clubs (§ 92)
- In fact, the **CJEU distinguishes between "*compulsory arbitration and voluntary arbitration*"** (§80) but **draws no consequences from such distinction** (§§92-94)
- ***En passant***, it is worth mentioning that the Seraing judgment **does not deal at all with the issue of the independence of the CAS**

CAS Mandatory Arbitration Justified by Legitimate Objectives

- The CJEU states that, for disputes related to sport pursued as an economic activity within the EU territory, in light of "*the legal autonomy enjoyed by international sports associations*" and of "*their responsibilities*", "***imposed recourse to arbitration may be warranted in principle***" (*"ce recours imposé à l'arbitrage peut se justifier dans son principe"*) (§ 94)
- The CJEU states that the imposition of CAS arbitration by sports governing bodies can be justified by the pursuit of **two *"legitimate objectives"***:
  - **Legitimate <u>procedural</u> objective**: "*ensuring the uniform handling of disputes*" within a given sport
  - **Legitimate <u>substantive</u> objective**: "*enabling the consistent interpretation and application of the rules*" of that sport

Effective Judicial Protection Through Indirect Review of CAS Awards

- However, "***effective judicial protection***", *i.e.* **compliance with EU public policy principles by sports organizations**, must be ensured by the courts of EU Member States, with the possibility of a reference to the CJEU under Article 267 TFEU
- A national court in the EU can do this through either **(a)** a **direct judicial review** of an arbitral award, if the seat of the arbitration is in its territory, or **(b)** an **indirect judicial review** (under the New York Convention of 1958 or national civil procedure rules) if the seat of the arbitration, and thus the nationality of the award, is outside of the EU
- **Indirect judicial review can occur either at a party's request or by the "*tribunal's own motion*"** (§§ 100, 115, 117)
- The CJEU implies that **this is what the Belgian courts should have done** instead of relying on *res judicata*; this is revealed by the detailed description of **(i)** the Belgian rules on the recognition and enforcement of arbitral awards (§ 10) and **(ii)** of the position of the Belgian Government (§§ 62-63)

Scope of Action by National Courts in the EU

- **National courts** (of EU Member States) reviewing a foreign arbitral award in the context of an indirect review **must not limit themselves to the non-recognition of the award** (*i.e.* prohibiting the legal effectiveness and enforcement of the award in that country)
- In case of an infringement of EU competition law or an EU fundamental freedom affecting the EU territory, **a national court in the EU must adopt a decision that can "*bring to an end the conduct amounting to that infringement*" and award damages** (§ 104)
- Moreover, a national court can grant **interim measures** to ensure the full effectiveness of the judgment later to be given on the merits, particularly if there is a request for a preliminary ruling to the CJEU, if needed disapplying the rules of national law which preclude that power or, *a fortiori*, any rules of sports organizations (§§ 105-106)

My My, Hey Hey
EU Law Is Here to Stay

6

Practical Implications for the CAS system

1) The seat of **CAS arbitration proceedings can remain in Switzerland** and need not move to a seat within the EU (so resolving the doubts that that were raised by the ISU judgment of 21.12.2023, case C-124/21, §§ 198 e 223-225), because compliance with EU public policy can be ensured by the civil courts of the EU Member States through the "indirect" judicial review of CAS awards

2) If a party starts a lawsuit before a national court within the EU in disregard of an arbitration clause or agreement attributing jurisdiction to the CAS, that **national court in the EU will have to decline jurisdiction and refer the parties to CAS arbitration pursuant to Article II of the 1958 New York Convention**, even if the plaintiff argues that EU public policy is at stake (*i.e.* the case is connected with the EU territory and presents relevant issues of EU competition law or freedom of movement)

Practical Implications for the CAS system

3) If a CAS case is connected with the EU territory and presents relevant issues of EU competition law (or free movement), **the party losing the case may try and ask a civil court of an EU Member State to declare the non-recognition and non-enforceability of the CAS award because of a breach of EU public policy and ask for damages**

   (if this reminds you of something, you're right; this is essentially what occurred in the judicial saga of Ms. Pechstein before the German courts, although that case concerned German public policy)

4) Moreover, a party can ask a national court in the EU to declare the invalidity and inapplicability of the pertinent rules or sanctions of a sports governing body (*e.g.* FIFA), even requesting an urgent interim measure against that organization

5) However, the courts of EU Member States must act "*within the framework of their respective powers and in accordance with the applicable national provisions*" (§ 103 of the Seraing ruling); in other words, those courts must have jurisdiction and the relevant powers in accordance with their national legal systems

Practical Implications for the CAS system

6) As the compliance of a CAS award with EU public policy might end up being scrutinized by an ordinary court in the EU territory (and by the CJEU through Article 267 TFEU), and given the duty of arbitrators to strive to issue valid and enforceable awards, **CAS arbitrators** must be aware that, **if relevant, they must carefully consider and address issues of EU competition law (and freedom of movement)**

7) If relevant issues of EU public policy are at stake in a given CAS case, the arbitrators should even bring them to the attention of the parties *ex officio*, even if the applicable *lex causae* is Swiss law (or another law of a non-EU country) as the dispute might involve the potential application of foreign "mandatory rules" ("*lois de police*"), in case making reference by analogy to Article 19 Swiss PILA

Practical Implications for the CAS system

8) Rather than for the CAS system *stricto sensu*, the most important practical implications of the Seraing ruling are for the **international sports federations (IF)**, because many of them act as regulators and gatekeepers of their sport and, at the same time, they are active on the market of the organization and commercial exploitation of sports events

9) Accordingly, pursuant to EU competition law, **the conduct, rules and sanctions adopted by an IF can be always scrutinized under Articles 101 TFEU** (because an IF is an association of undertakings) **and/or 102 TFEU** (because an IF often holds a dominant position on the market), even after a CAS award declaring that a given conduct, rule or sanction of an IF is legitimate has become *res judicata* in Switzerland

10) By the way, an **analogous situation can occur**:

- **in relation to a decision issued by an ordinary court of a non-EU State**
- **under the relevant antitrust provisions of any jurisdiction** (*e.g.* the United States)

Conclusive Remarks

- The **Seraing ruling, essentially, does not state anything truly new**; rather, it has an illustrative and didactic function, as the **CJEU usefully explains some issues**, in particular clarifying some doubts generated by its ISU judgment of December 2023
- The Seraing ruling is **essentially neutral as to commercial arbitration and to CAS arbitration, and even supportive**
- **The CJEU might clearly issue an analogous judgment, *mutatis mutandis*, in relation to a judgment issued by a court of a non-EU State, such as a Swiss cantonal court** (in this case, the public policy exception would be based on the Lugano Convention of 2007 "*on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*")
- **The Seraing ruling reminds something that the CJEU already said many times** (starting with the Walrave case of 1974): **the fact that a sports organization is located outside the EU territory cannot shield it from the full application of fundamental principles of EU law** (in particular, EU competition law and the four freedoms of movement)

Thank you very much!

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