How the CJEU Should Supervise the Court of Arbitration for Sport

A Call for a Transnational Solange in the Seraing Case

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On 16 January 2025, Advocate General Ćapeta rendered her Opinion in the *Seraing* case which could have profound effects for transnational governance of sports. In her Opinion, AG Ćapeta highlights convincingly the specificities of the Court of Arbitration for Sport (CAS), the forced nature of its jurisdiction and the peculiar private enforcement system used to enforce its awards. However, I believe she might be going too far in deducing from these specificities not only that CAS awards should be deprived of *res judicata* effect, but also that national courts should be allowed to review decisions and regulations of international sports governing bodies (SGBs) against *any and all* rules of EU law and disregard entirely a pre-existing CAS award. The consequence would be a substantial devaluation of the legal bindingness of CAS awards and jeopardize the current system of transnational sporting justice. While I commend the AG for putting the finger on important specificities of CAS arbitration, which should indeed lead to a more stringent review of CAS awards, I'd like to advocate in this blog an alternative, less disruptive, approach to the scope of this review. Instead of a total devaluation of CAS awards, the recognition of their bindingness could be made dependent on their compliance with European public policy and fundamental due process rights.

The case behind the preliminary reference concerns a challenge brought before the Belgian courts by the Royal Football Club Seraing against FIFA, UEFA and the Belgian Federation against the implementation of sanctions pronounced by FIFA in 2016 and endorsed by the Court of Arbitration for Sport (CAS) in 2017. The sanctions were imposed as a response to the Club's violation of the ban on third-party ownership (TPO) introduced in the FIFA Regulations on the Status and Transfer of Players. Yet, the questions referred to the CJEU in this case are not focused on the legality of the TPO ban. Instead, they concern the bindingness of CAS awards in follow-up proceedings before national courts. On the one hand, the Belgian Cour de Cassation asked whether a national law conferring *res judicata* effect to a CAS award, which has not been reviewed by a court authorised to send a preliminary reference to the CJEU (CAS awards are subjected to setting aside proceedings before the Swiss Federal Supreme Court), is compatible with Article 19(1) TEU, Article 267 TFEU and Article 47 CFREU. On the other, it asked whether conferring probative value to such an award is compatible with the same EU law provisions. In her proposed reply to these questions, AG Ćapeta rejected the idea of conferring a *res judicata* effect to CAS awards and endorsed the possibility of conferring probative value to CAS awards. In this blog, we'll focus our attention on the former position.

An accurate diagnosis: CAS arbitration ≠ commercial arbitration

The Grand Chamber in the *ISU* ruling (December 2023) did not clearly draw a fundamental distinction between commercial and CAS arbitration. This led to some uncertainty amongst commentators (see here and here) on whether the impact of the judgement was restricted to sports arbitration or also affected commercial arbitration. Unlike the Court in *ISU*, AG Ćapeta makes one fundamental point throughout her Opinion: CAS arbitration does not equal commercial arbitration. This specificity of the CAS is grounded in two characteristic features of its operation: the forced

nature of its jurisdiction and the private enforcement of its award. Let's unpack briefly the AG's Opinion on this point.

In its *ISU* ruling, the Court alluded to the forced nature of CAS arbitration, where it pointed out that effective judicial review was "particularly necessary 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" (para. 193) and that "[c]ompliance with that requirement for effective judicial review applies in particular to arbitration rules such as those imposed by the *ISU*" (para. 195). However, the Court did not delve further into the forced nature of CAS arbitration, nor did it consider its consequences with regard to the intensity of the review exercised on CAS awards.

On the contrary, the AG in the *Seraing* case puts this distinction front and centre in her Opinion, as she embraces the findings of the ECtHR in the *Mutu and Pechstein* ruling in reaching the conclusion that "[s]port 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" (para. 74). As she points out, this is because a "failure to accept CAS's mandatory jurisdiction prevents players from playing and clubs from competing" (para. 74). Consequently, she reckons that "for players and clubs, CAS's jurisdiction is mandatory and not chosen of their own free will" (para. 75). The post-consensual nature of CAS arbitration is thus fully recognised by the AG, as it was by the ECtHR in 2018. Such a recognition is not to be underestimated, as it entails important consequences in the assessment of the CAS's compliance with fundamental requirements of due process and human rights. Accordingly, one would welcome a similar stress on this specificity of CAS arbitration by the CJEU itself, which would draw a more explicit distinction of sports arbitration from traditional commercial arbitration.

The second specificity of CAS arbitration documented by the AG concerns the enforcement of CAS awards. Unlike the forced nature of CAS arbitration, well recognized since the *Mutu and Pechstein* judgement of the ECtHR, the enforcement process of CAS awards has rarely been considered as a specificity of CAS arbitration. However, in its *ISU* decision, the European Commission (EC) highlighted that SGBs have the disciplinary power to self-enforce CAS awards with the help of their affiliates (see para. 270).[1] The EC emphasised that due to this "self-enforcing character of sanctions imposed by sports governing bodies", challenges against CAS awards "are in practice difficult and burdensome for athletes" (para. 284). AG Ćapeta brings this specificity of CAS arbitration further under the spotlight. As she points out, "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". Instead, "FIFA can enforce the award on its own" (para. 78). Concretely, in the case of *Seraing*, the club was banned from registering new players during three transfer windows. This ban was directly implemented by the Belgian federation and meant that the club could not recruit any player (amateur or professional) for 18 months. Moreover, when a club refuses to comply with a FIFA decision or a CAS award imposing a fine or monetary compensation, FIFA can make use of its disciplinary power to impose sporting sanctions on the club (typically a points deduction) which will then be automatically implemented by the national federation concerned and severely affect the club's ranking. Consequently, she rightly concludes that in such a system "it is unlikely that the question of compatibility of the arbitral award with EU law will reach a 'court or tribunal' in the sense of Article 267 TFEU in enforcement proceedings" (para. 79).

In sum, the AG put the finger on two key specificities of the CAS. First, its legitimacy cannot be traced back to the party's consent as its jurisdiction is in most instances imposed through the SGBs' private power to exclude athletes and clubs from key sporting opportunities. Second, the AG recognised, like the EC before her, that in practice it is extremely difficult to chal-

[1] I represented (with Ben Van Rompuy) the athletes in the ISU proceedings before the European Commission.

lenge *ex post* the implementation of CAS awards due to the effective transnational private enforcement capacity of the SGBs. Accordingly, she concludes that it is possible "that judicial remedies that were considered sufficient to guarantee effective judicial protection and uniformity of EU law in the context of commercial arbitration are not sufficient for the system of the self-sufficient mandatory arbitration at issue in the present case" (para. 80).

AG Ćapeta's consequential proposal: the devaluation of the bindingness of CAS awards

AG Ćapeta draws one main conclusion from her finding that CAS arbitration is fundamentally different from commercial arbitration. It calls for a "specific assessment in light of the principle of effective judicial protection, in relation to both the question of access to courts and the scope of judicial review" (para. 95).

Regarding access to courts, the fact that CAS awards are very unlikely to be reviewed by a national court at the enforcement stage leads the AG to interpret the principle of effective judicial protection as requiring "a direct judicial path to assess and, if necessary, to prevent the application of FIFA's rules that are contrary to EU law" (para. 105). Consequently, she concludes that "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" (para.106). This conclusion is grounded on the *ISU* judgement (AG Opinion, at para. 104) and aligns with the distrust expressed by the Grand Chamber vis-à-vis the CAS and the Swiss Federal Supreme Court (SFSC) regarding their ability to guarantee the compatibility of transnational sports governance with EU public policy. However, the concerns raised by the Grand Chamber in ISU and reiterated in her Opinion by the AG with regard to the lack of a "direct judicial path" could in principle be alleviated with a move of the seat of the CAS from Lausanne to an EU member state where CAS awards would be subjected to setting-aside proceedings before a Court in a position to refer a preliminary reference to the CJEU (e.g. UEFA has already amended one of its regulations to allow challenges against its decisions to be arbitrated by a CAS panel seated in Ireland).

Importantly, the AG's Opinion in *Seraing* goes beyond the CJEU's *ISU* ruling concerning the scope of the review that ought to be exercised by national courts on CAS awards. In essence, the AG proposes to sideline the longstanding *Eco-Swiss* case-law in the context of forced CAS arbitration. She stresses that "the reasons that justify a limited scope of judicial review in commercial arbitration cannot readily be applied to mandatory arbitration" (para. 113) and, therefore, argues that a national court of a Member State must "be able to conduct the review of FIFA rules against *any and all* rules of EU law, any CAS award notwithstanding" (emphasis added, para. 114). Furthermore, she also rejects the applicability of the New York Convention to CAS awards, as she considers that the Convention's application requires the free consent of the parties to the arbitration (see paras 118-119).

If followed by the Court, these conclusions, grounded in the specificities (or paradoxes) of CAS arbitration, would substantially reduce the authority of CAS awards, as the SGBs' decisions or regulations endorsed by CAS awards would become challengeable anew throughout the EU on any EU law ground. In short, this would drastically devalue the legal bindingness of a CAS award for the parties involved and would risk returning us to the situation which prevailed before the emergence of the CAS, when decisions of international SGBs were being challenged throughout the world by different national courts leading to contradictory outcomes and protracted processes.

A plea for a transnational Solange

I've shown in the past that the CAS lacks in institutional transparency, is applying the ECHR in a very restrictive manner favouring the interests of the SGBs, and is often ignoring or misapplying EU law. Furthermore, I've called numerous times for a profound institutional reform of the CAS (see here and here). Yet, I also believe that CAS fulfils an important transnational function: ensuring that athletes and clubs are on a (relatively) level playing field regarding the rules

that define and constitute their common transnational sporting practice. In my view, this is CAS's main legitimate post-consensual foundation and the only good reason for it to continue to operate despite the forced nature of its jurisdiction. It is important to stress that this function can be discharged by the CAS only if all those directly affected by the regulations and decisions of international SGBs have no other choice but to appeal to the CAS when they challenge decisions of SGBs. Furthermore, the ensuing CAS awards should also have some degree of bindingness and be subjected to challenges only when they breach fundamental principles (such as due process rights or human rights). Otherwise, multiple judicial interpreters would compete in determining the meaning and implications of the same rules and equality before the law would be jeopardized.

While the *ISU* judgment of the Grand Chamber did sap the bindingness of CAS arbitration clauses, it left an important opening for the CAS to recover its exclusive jurisdiction by moving its seat onto the territory of the EU. Thus, *ISU* was primarily an attack against the monopoly of the SFSC as a supervising court rather than against the CAS itself. Moreover, it was limiting the scope of the review exercised to matters of EU public policy (*ISU*, para 193). AG Ćapeta's Opinion, however, if followed by the Court, would leave CAS awards easily challengeable or disregarded throughout the EU, thus inviting parties to systematically re-litigate their cases before national courts. This could lead to fragmentation of transnational sports law and would risk reviving judicial nationalism/favouritism in the context of international sporting disputes. It would also considerably increase the litigation risks and costs faced by SGBs, thus diverting economic resources from the support of their sport to their legal teams and advisers.

The AG is entirely correct to point out the exceptionalism of the CAS and its post-consensual foundations. She is also right to consider that CAS awards need to be subjected to external control (more serious than the light touch supervision currently exercised by the SFSC). The transnational function of the CAS does not justify disrespecting the fundamental rights and freedoms of athletes or clubs. Yet, depriving its awards of all their binding value under EU law would be risking throwing away the baby with the bathwater. If this is the result of this case, then we might as well just close the CAS and accept that international sporting disputes will for now on be litigated before national courts (at least in the EU). What would come after, however, would probably be a chaotic and uncoordinated judicial landscape, unlikely to foster a governance of international sports more favourable to athletes or the public interest.

In conclusion, I'd like to invite the Court to be guided by the spirit of the Solange method of the German Constitutional Court when deciding the *Seraing* case. What do I mean by the "spirit of the Solange method"? It is obvious that the context of the present case is very different from the one of the original cases decided by the GCC. Yet, I believe that the approach of the 'Solange method' could be a productive inspiration to navigate the intricate tension between transnational sports law and EU law at the core of the *Seraing* case. Indeed, while there is a widely recognised need for global rules and processes to guarantee a level playing field at international sporting competitions or regulate the transnational labour markets emerging in their wake, these regulations should not escape entirely EU law scrutiny due to their functional necessity. Therefore, it is essential to find a way, a transnational form of Solange, to allow transnational legal pluralism to flourish while maintaining the potential for external intervention grounded in the EU's most fundamental values and principles. Thus, ensuring that common rules continue to be applied globally and at the same time guaranteeing that those subjected to these rules can effectively claim respect for their fundamental rights and freedoms enshrined in EU law or the ECHR.

Until now, national courts (most importantly, the SFSC) have systematically favoured the former concern (respect for global sporting regulations and processes) and showed quasi-absolute deference to the CAS. The Opinion of AG Ćapeta swings rightly the pendulum in the opposite direction. Nevertheless, I think the Court should take inspiration from the Solange method and

formulate its answer to the question in "as long as" terms. The CJEU could then, for example, conclude that "as long as" the CAS fails to ensure that international SGBs respect European public policy and "as long as" its own structure (i.e., its independence) and proceedings do not comply with the requirements of Article 6(1) ECHR and Article 47 CFREU, its awards should not have *res judicata* effects and be subjected to review under any and all of EU law. In practicing such a Solange approach, the CJEU would follow in the footsteps of the *Mutu and Pechstein* judgement of the ECtHR and act as a much-needed catalyst to transform the CAS into a judicial institution capable of constituting a real counter-power to the undemocratic executive power of the international SGBs.

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