

Kluwer Arbitration Blog

Sports Arbitration and EU Competition Law: No Escape to Switzerland!

Niklas Luft (University of Zurich) · Friday, March 8th, 2024

The review mechanism of sports arbitration in Switzerland is under scrutiny. After previous criticism from a human rights perspective, the Court of Justice of the European Union (“CJEU”), in its recent [International Skating Union \(“ISU”\) decision](#), found that the standard of review applied by the Swiss Federal Court (“SFC”) to mandatory arbitration awards by the Court of Arbitration for Sports (“CAS”) is insufficient to protect economic rights deriving from EU competition law (see previous blog post [here](#)). This means bad news for Sports Governing Bodies (“SGBs”), whose escape from EU competition law to Switzerland is no longer available, but good news for athletes and undertakings, whose economic rights and procedural options have been strengthened by the CJEU.

The ISU Decision

The CJEU’s decision concerned the prior authorization and eligibility rules set by the ISU, the international federation in the field of figure skating and speed skating. In a nutshell, the ISU adopted rules which determined the conditions for third-party undertakings to organize skating competitions, the conditions for athletes to compete in such competitions, and a regime for possible sanctions. The CJEU held that these rules violated EU competition law.

From a sports arbitration perspective, the CJEU’s decision contains some crucial considerations on the minimum requirements for CAS mandatory arbitration agreements within the ISU rules for the review of decisions taken by the ISU under the said rules.

The Vital Role of Sports Arbitration: Safeguarding a Level-Playing Field

Arbitration provides the essential means for the settlement of sports disputes. Particularly because, in comparison to litigation before state courts of various countries, arbitration provides a virtually worldwide acceptance based on the [New York Convention](#). The worldwide acceptance of arbitral awards is vital for organized sports, as it provides for a uniform and harmonized application of sports rules, which is essential to safeguard a level playing field among participants in international sports competitions. Therefore, the CAS has been accepted by numerous national and international SGBs to have exclusive jurisdiction over appeals against the SGBs’ internal decisions.

To ensure the exclusive jurisdiction of the CAS, SGBs demand athletes to accept mandatory CAS arbitration agreements, under which the exclusive jurisdiction of the CAS for appeals against their decisions constitutes a legal prerequisite to participate in sports competitions. In return, state courts set minimum requirements to accept such mandatory arbitration. Particularly, these minimum requirements call for the effective protection of athletes' rights. The CJEU's ISU decision specifies the minimum requirements for such mandatory arbitration concerning the protection of economic rights under Art. 101 and 102 Treaty on the Functioning of the European Union ("TFEU").

Mandatory Arbitration Must Allow for Effective Judicial Review for Compliance With Art. 101 and 102 TFEU

As a first step, the CJEU stated that the use of an arbitration mechanism that confers mandatory and exclusive jurisdiction to the CAS for the review of SGBs' decisions requires an effective judicial review of the resulting arbitral award. Such judicial review must, to be effective, be able to cover the question of whether an arbitration award complies with the rights and freedoms that individuals derive from EU law, which includes the protections under Art.101 and 102 TFEU.

As a consequence, when an SGB's decision concerns economic activities of athletes and entities or other undertakings in the EU, an effective judicial review of a CAS award must include an examination of whether the award complies with Art. 101 and 102 TFEU by the reviewing court. The court must also be empowered to refer a question to the CJEU for a preliminary ruling under Art. 267 TFEU.

Scope of SFC's Review Is Insufficient to Protect Rights and Freedoms Under EU Competition Law

In a second step, the CJEU examined whether the review mechanism of the SFC for mandatory CAS awards constitutes such effective judicial review. According to [R28 CAS Rules](#), all CAS arbitrations are seated in Lausanne, Switzerland. CAS awards are therefore subject to review by the SFC under Art. 190 [Swiss Federal Act on Private International Law \(IPRG\)](#), ie *Swiss lex arbitri*. Under Art. 190 para. 2 lit. e) IRPG, the substantive review of a CAS award is limited to the analysis of incompatibility with Swiss public policy (*ordre public*).

According to the CJEU, this standard of review of the SFC does not include the consideration of whether the award complies with the provisions of Art. 101 and 102 TFEU, and therefore does not constitute an effective judicial review from an EU law perspective. The reason for this is that (i) the *ordre public* review of the SFC under Art. 190 para. 2 lit. e) IRPG does not ask whether the award is compliant with Art. 101 and 102 TFEU, and (ii) the SFC is not a court or tribunal of an EU member state and therefore not empowered to refer a question to the CJEU for a preliminary ruling under Art. 267 TFEU when reviewing a CAS award.

What Are the Immediate Consequences?

As an immediate consequence, the CJEU found that the mandatory arbitration rules stipulated by

the ISU made judicial review concerning EU competition law more difficult, and therefore reinforced the anticompetitive nature of the ISU's substantive prior authorization and eligibility rules. The validity of the arbitration agreements was not one of the questions considered by the CJEU, and the CJEU therefore did not decide whether mandatory CAS arbitration agreements themselves constitute an infringement of Art. 101 and 102 TFEU.

However, the CJEU's decision sends a strong signal to the CAS and all SGBs that provide for mandatory CAS arbitration: If an SGB's decision concerns economic activities in the EU, a mandatory CAS arbitration agreement and the review jurisdiction of the SFC is not permissible as it would undermine the protection of individual economic rights in Art. 101 and 102 TFEU.

Extending Concerns Against the Review Mechanism of the SFC

Regarding the criticism of the SFC's review mechanism of mandatory CAS arbitration awards, the CJEU's decision can be seen as in line with previous decisions of the European Court of Human Rights ("ECtHR") on the protection of athletes' rights under the European Convention on Human Rights ("ECHR").

In its *Mutu and Pechstein* decision (see also [here](#)), the ECtHR strengthened the protection of athletes' procedural rights that were not considered as part of *ordre public* analysis under Art. 190 para 2 lit. e) IPRG by the SFC. According to ECtHR, the procedural rights within Art. 6 para 1 ECHR, including the right to a public hearing, are applicable in cases where the review of SGBs' decisions through CAS arbitration is mandatory. As a consequence, the CAS Rules were amended with the right for athletes to claim a hearing held in public ([R57 CAS Rules](#)).

In its *Caster Semenya* decision, which is still subject to review by ECtHR's grand chamber, the ECtHR extended this jurisprudence to the substantive ECHR rights that were not considered to be part of *ordre public* under Art. 190 para 2 lit. 2 IPRG by the SFC. The ECtHR found that the SFC's review of *ordre public* violations was too limited to provide individuals with sufficient institutional and procedural safeguards under the ECHR. In particular, the ECtHR criticized that under the SFC's jurisprudence, the prohibition of discrimination under Art. 14 ECHR together with Art. 8 ECHR emanating from private law entities, such as SGBs, did not fall under the concept of *ordre public*.

In light of these ECtHR decisions, the ISU decision of the CJEU marks another criticism of the SFC's limited scope of review of mandatory CAS arbitration awards. And, yet again, the criticism benefits the protection of athletes and undertakings subject to SGB's rules – only this time, the protected rights being individual economic rights protected by EU competition law.

What's Next?

For SGBs, who are natural monopolists in their respective sports and operate in the EU, the very limited review of CAS awards in Switzerland regarding EU competition law was considered an advantage, because they were able to escape a full review of their decisions under Art. 101 and 102 TFEU. In contrast, e.g. [German courts](#) conduct a full review of arbitration awards regarding their compliance with EU competition law. This escape now seems to be blocked by the CJEU's decision.

It remains to be seen whether the CJEU would find mandatory CAS arbitration clauses, including the restricted review mechanism before the SFC, to be consistent with EU competition law. Until further certainty from the CJEU, its ISU decision produces new arguments for the protection of athletes' rights in CAS proceedings and broadens procedural possibilities in litigation against SGBs' rules containing mandatory CAS arbitration.


From the perspective of SGBs, the CJEU's decision creates legal uncertainty regarding their choice of dispute settlement. One possible solution might be for the CAS to adjust its rules and allow other seats of arbitration outside Switzerland, e.g. in EU countries that fulfill the CJEU's requirements. Until then, SGBs might consider opting for different sports arbitration institutions, instead of the CAS, which allow a seat or arbitration in an EU member state, e.g. the [German Court of Sports Arbitration](#).

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please [subscribe here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels, derived from Kluwer Arbitration's comprehensive collection of international cases and awards and appointment data of leading arbitral institutions, to uncover potential conflicts of interest.

Learn how [Kluwer Arbitration](#) can support you.



Newly updated

Profile Navigator and Relationship Indicator Tools

Wolters Kluwer

Request your free trial now →

This entry was posted on Friday, March 8th, 2024 at 8:28 am and is filed under [CAS arbitration](#), [Court](#)

of Arbitration for Sport, EU Competition Law, EU Law, European Court of Justice, Sport arbitration
You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.