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CJEU's Advocate-General Calls for a Separate Approach to Forced Arbitration and Pleads for a Full Court Review of CAS Awards for Compatibility with EU Law

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On 16 January 2025, Advocate General Capeta ("AG") issued her opinion in a dispute concerning third party ownership ("TPO") rules between Belgian football club RFC Seraing and the International Federation of Association Football ("FIFA"). Pending the CJEU's highly anticipated judgment in this case, this post seeks to give some insights into the scope and potential far-reaching consequences of the AG's advice.

Background

To recall, FIFA's Appeal committee confirmed the fine and four-year transfer ban imposed on RFC Seraing for concluding two TPO agreements with Maltese company Doyen Sports in violation of FIFA's rules. TPO refers to arrangements where private investors acquire rights over football players to later profit from transfer fees, a practice gradually banned by FIFA between 2008 and 2015. On 9 March 2017, a CAS arbitral tribunal seated in Lausanne reduced the transfer ban. On 20 February 2018, the Swiss Supreme Court rejected RFC Seraing's plea to set aside the CAS award.

However, this was not the end of the saga: Doyen Sports – later joined by RAFC Seraing – had commenced parallel legal proceedings before the Belgian state courts. By interim judgment of 29 August 2018, the Court of Appeal of Brussels ("CoA") assumed jurisdiction, holding that the broad wording of the arbitration clause in FIFA's statutes failed to meet the "*defined legal relationship requirement*" under Article 1681 of Belgian Judicial Code ("BJC)" (see previous Blog post here). In its final judgment of 12 December 2019, the CoA held *inter alia* that, pursuant to Articles 24 and 1713, §9 BJC, arbitral awards rendered abroad have *res judicata* effect in Belgium and may be invoked as a rebuttable presumption against a third party, without the need for a prior *exequatur*. Based in part on the consideration that certain points in dispute had already been settled in the CAS award (with *res judicata* effect against RFC Seraing and constituting a rebuttable presumption against Doyen Sports, which was not a party to the CAS arbitration), the CoA finally rejected the claims on the merits.

RFC Seraing launched recourse before Belgian Supreme Court. On 8 September 2023, the Belgian Supreme Court decided to refer two preliminary questions to the CJEU for a preliminary ruling. In

essence, these concern the issue whether, in situations where an arbitral award is rendered outside the EU – and consequently subject to review only by a court which does not have the possibility to refer questions to the CJEU for a preliminary ruling (Art. 267 TFEU) – EU law prevents the application of a rule of national law which (i) accords *res judicata* effect (first question) and/or (ii) evidential value as a rebuttable presumption (second question) to such an arbitral award.

The case is pending before the CJEU under number C-600/23.

The AG's Opinion

Against this background, the AG issued her opinion, recommending that Member States must give sports actors direct access to a court with the power to conduct a full judicial review of the FIFA Rules' compliance with EU law, regardless of whether the dispute has already been the object of a CAS arbitral award.

With regard to the first question, the AG proposed a specific approach for mandatory arbitration, such as sports arbitration in the present case.

As a starting point, the AG considered that the rules developed for commercial arbitration in the CJEU's *Nordsee* and *Eco Swiss* case-law, which accepts in principle that commercial arbitral awards may be reviewed only exceptionally and for limited reasons, are not suitable for FIFA's system of mandatory CAS arbitration.

The AG opined that a distinction is justified for two reasons. First, the mandatory nature of FIFA's arbitration rules does not leave sports actors a free choice to submit their disputes to any other dispute resolution system (as opposed to the voluntary nature of commercial arbitration, which is based on the free acceptance of an arbitration clause and its consequences). In the AG's view, this lack of free choice must also have consequences for the scope of judicial review by national courts in relation to EU law. A second justification, says the AG, lies in the self-sufficient system of enforcement of the FIFA system. While parties in commercial arbitration will have to turn to the state courts to enforce the arbitral award (leaving such courts an opportunity to review its conformity with EU law), FIFA can directly enforce a CAS award itself.

Accordingly, drawing from the CJEU's findings in *International Skating Union* – but rejecting parallels with the CJEU's decisions in *Achmea* and *PL Holdings* – the AG opined that mandatory arbitration requires a specific approach in light of the principle of effective judicial protection, both in terms of access to courts and scope of judicial review.

On access to the courts, the AG considered that, where arbitration is imposed, there must be a direct judicial path to assess and, if necessary, prevent the application of rules that are contrary to EU law.

With regard to the scope of such judicial review, the AG opined that a national court must be able to conduct a review of FIFA rules against "any and all rules" of EU law, regardless of whether a CAS award has been rendered, whether initiated as a direct challenge to FIFA's rules, in enforcement proceedings of a CAS arbitral award, or in a different type of procedure, such as an action for damages.

As to the interaction of this proposed review with the New York Convention ("NYC"), the AG first questioned whether the NYC even applies to CAS awards. According to the AG, one may conclude that mandatory arbitration does not meet the requirement of Article II(1) NYC, as the parties did not "undertake" – in the meaning of "freely and consensually" – to submit any or all of their disagreements to arbitration. Even if the NYC would apply, the AG considered that its provisions are not incompatible with the proposed different approach to mandatory arbitration. As the reference to issues of public policy in Article V(2) NYC does not have an autonomous meaning under the convention and is therefore to be determined by reference to national laws, the AG proposed interpreting the EU principle of effective judicial protection – including the proposal that in mandatory arbitration this requires a full judicial review in respect of the applicable EU law – as part of public policy for the purpose of the NYC.

Accordingly, the AG recommended that the CJEU answer to the first question that EU law must be interpreted as precluding the application of provisions of national law providing for *res judicata* effects for arbitral awards that have not been reviewed for conformity with EU law by a court with permission to ask preliminary questions to the CJEU.

On the second question, the AG concluded that the probative value of arbitral awards – which constitutes no more than a rebuttable presumption vis-à-vis third parties – does not prevent national courts from ensuring the full effect of EU law or refer a preliminary question to the CJEU. The AG therefore recommended that the CJEU answer the second question in the negative.

Analysis

As is well known, the CJEU is not bound to follow the AG's opinion, although it often does. Whatever the case will be, the CJEU's judgment in this matter is highly anticipated.

While the AG focuses on FIFA's system, the underlying considerations appear to be more broadly applicable to other forms of mandatory arbitration. If the CJEU follows the AG, this may therefore have far-reaching consequences, not only for sports arbitration, but also for mandatory arbitration in other sectors. This being said, arbitration practitioners will be interested – if not cautiously relieved – to read that the AG expressly agreed with the Netherlands that the proposed different approach for mandatory arbitration is justified by the very need to preserve the system of voluntary accepted commercial arbitration as it stands (¶¶97-98).

One may wonder, however, if the AG's conclusion on the first question fully appreciates the correct scope of recognition of the binding effects of foreign arbitral awards in Belgium. Pursuant to Article 1713, § 9 BJC, arbitral awards have the same legal value and effect as state court decisions (see M. Draye, "No Do-Overs, No Takebacks? A Belgian Perspective on Res Judicata and Arbitration", pp. 113 – 114 (¶¶6-7)). As stated in the *travaux préparatoires* of the 2013 law, this also applies to foreign arbitral awards, which – like foreign judgments – are in principle recognized as binding on the parties, an *exequatur* only being required where a party wishes to enforce the findings of the arbitral award by constraint. However, a party under Belgian law also has the possibility to oppose the recognition of the *res judicata* effect of a foreign arbitral award invoked against it in other proceedings, if such recognition would constitute a violation of Belgian public policy (see O. VAN DER HAEGEN & F. CUVELIER, "Clause d'arbitrage: caractérisation d'un 'rapport de droit déterminé et rôle du juge", *RDC* 2023/09, p. 1273 (¶ 15)). As the Belgian

State pointed out, neither RFC Seraing nor Doyen Sports used this opportunity (cf. ¶ 89 and 58 of the CoA judgment). The AG does not address this point and simply concludes in ¶ 31 of her opinion that the CoA would have been precluded from making any assessment on the possible infringements of EU law. This is not correct. Notwithstanding the question whether the CoA under relevant facts and circumstances of the case should have addressed this issue *sua sponte*, it is clear that the CoA could have reviewed the compliance with EU law if RFC Seraing and/or Doyen Sports had called into question the possibility to recognize the *res judicata* effect of the CAS award in Belgium in light of the applicable rules of EU law.

This does not end the discussion. In her opinion, the AG recognizes that not all rules of EU law bestowing a right on an individual are necessarily of public policy. However, the AG advocates that the state court review of arbitral awards resulting from mandatory arbitration should be made against the "*any and all*" rules of EU law, because in that case the parties have not voluntarily renounced provisions of EU law that are not of public policy (¶¶ 110-114). As the notion of public policy is not fixed under Belgian law and the scope of public policy to be considered by Belgian courts may fluctuate depending on the circumstances, one solution may lie in a broad approach to the public policy nature of EU law in case of mandatory arbitration. As can be seen above, the AG proposed a similar solution to ensure compatibility with the NYC.

It is finally worth noting that, in the wake of *International Skating Union* (see Blog post here), the UEFA had already provided the possibility to have a place of arbitration within the EU. Pursuant to Article 16.3 of its UEFA Authorisation Rules, the applicant may now choose to bring CAS arbitration proceedings with seat in Dublin rather than Lausanne. One may expect that FIFA will contemplate a similar rule. Through such change, sports associations provide access to courts guaranteeing effective judicial protection under EU law. Where Dublin is chosen as seat, all actors in sports disputes will indeed have an opportunity to submit questions relating to the compliance with rules of EU law to an EU Member State court through an application for setting aside the CAS award. If the CJEU would follow the AG, the mandatory nature of CAS arbitration would, however, (again) require that the scope of any such review be construed broadly, thus requiring that the Irish courts at the seat – through a broad interpretation of public policy or otherwise – be given the possibility of a full judicial review in order to assess compliance with "any and all" rules of EU law.

To be continued.

The author writes this contribution strictly in his own name.

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