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The Advocate General Opinion in Seraing vs FIFA: A Cautionary Tale

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On 16 January 2025, Advocate General Capeta ("AG Capeta") rendered her opinion (the "Opinion") in Case C-600/23 – *Royal Football Club Seraing v. FIFA et al.* ("*RFC Seraing*"). She purports to be building upon the 21 December 2023 decision of the Court of Justice of the European Union ("CJEU") in Case C-124/21 P, *International Skating Union* v. *European Commission* ("*ISU*"). But she takes a most expansive view of the CJEU's requirements in that case. On the other hand, unlike the CJEU in *ISU* (see Blog post here), AG Capeta at least engages with numerous knotty legal matters, like the significance of arbitration not having been freely chosen, and EU Member State obligations under the New York Convention ("NY Convention"). But her explanations as to compliance with the NY Convention fail to convince.

Advocate General Opinions Are Non-Binding on the CJEU but Persuasive

Opinions of Advocates General are not binding on the CJEU. But the CJEU will only initiate its deliberations after an opinion of the Advocate General is issued (which is the case in about 70% of cases raising a new legal issue – see Art. 20(5) of the Statute of the Court of Justice of the European Union). Today most decisions of the CJEU take the Advocate General's opinion expressly into account. The Advocate General attends hearings in the case, and has the right to question the parties. Advocates General are free in the manner in which they express themselves, in contrast to the terse and formulaic expression of CJEU judgments, and their reasoning often ranges more widely than the latter (see the European Parliament Briefing "Role of Advocates General at the CJEU").

A Wide Reading of *ISU*

The Opinion has the merit of illustrating just how revolutionary to international arbitration a wide reading of *ISU* would be. It is hoped that the specter of such far-reaching consequences will give the CJEU pause in formulating its decision in *RFC Seraing*.

In *RFC Seraing*, the eponymous football club challenged a FIFA prohibition on third parties taking an economic interest in player transfers as contrary to various EU free movement provisions of accepted direct horizontal effect (in accordance with the *Bosman* principle), and EU competition

law. Before the Belgian courts, the football club alleged that the unavailability of review of Court of Arbitration for Sport ("CAS") arbitration awards by EU Member State courts resulted in a deprival of protection of EU legal rights guaranteed by Art. 19(1) TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law […]"), in conjunction with Art. 267 TFEU, and Art. 47 of the Charter of Fundamental Rights of the EU. This unavailability arose of course since the Belgian courts treated CAS arbitration awards rendered in Lausanne, Switzerland as *res judicata* as a matter of Belgian law transposing the NY Convention. A fuller recitation of the facts is found here.

The facts of *ISU* were that CAS arbitration prohibited parties from seeking interim relief outside CAS arbitration, such that skaters designated by the ISU, and also later by a CAS arbitral tribunal, as ineligible to compete in ISU events had no effective means of relief before an EU Member State court if this ineligibility was contrary to EU competition law.

On the widest reading of *ISU*, the CJEU required that there be immediate access to EU Member State courts in view of the fact that skaters have brief careers, a good part of which ineligibility deprives them of, such that later relief cannot repair the loss in violation of their EU competition law rights. It is available, however, to read *ISU* as not requiring anything more than a removal of the actual EU law competition violation, a glaring one in that case, which the lack of access to EU Member State courts merely "reinforced". See Blog post here.

The CJEU only mentioned, as a consideration in its decision, the fact that in arbitration under the ISU statutes the athlete must accept such arbitration as a condition of competition. Additionally, it entirely passed over without mention any consideration of compliance with the NY Convention, to which all 27 EU Member States are signatories, although the EU itself is not.

In *RFC Seraing*, relying on the finding of the European Court of Human Rights ("ECtHR") in *Mutu and Pechstein* v. *Switzerland*, AG Capeta concluded that athletes have no real choice of CAS arbitration, since it is a condition of access to competition. She pronounced such arbitration "mandatory". Again, in reliance on *Mutu and Pechstein*, AG Capeta appears to have accepted that where there is no real choice of arbitration, there is no valid waiver of rights, in her case, the legal protection of EU rights.

Moreover, she distinguished the Court's deference to arbitration in its foundational 1999 decision in *Eco Swiss China Time* v. *Benetton International*. In CAS arbitration with FIFA (as indeed with any sports federation) there is no opportunity for EU Member State court review at the enforcement stage, since FIFA self-enforces its CAS awards. One must understand the Opinion therefore as requiring the availability of actions before EU Member State courts to set aside CAS arbitration awards wherever they are rendered, in AG Capeta's analysis the only sufficient remedy to this concern.

She concluded that EU Member States' review of such arbitration awards must extend to all EU legal rights, and is not confined to EU competition law rights.

On the other hand, the Opinion is silent on the required intensity of the review. No secure conclusion can be reached on this point in the requirement in para. 122 in the Opinion of "full judicial review".

So, AG Capeta recommended developing even the widest interpretation of *ISU* in three ways. First, all CAS "mandatory" arbitration awards require EU Member State court review, not just

those where *concretely* there is concern about the protection of substantive EU rights. Secondly, there must be such review for all EU rights, not just EU competition law rights. Thirdly, such review must be available as a setting aside action and not just in enforcement of the award.

On the other hand, AG Capeta's opinion may be narrower than the holding in *ISU* in that it only requires EU Member State court review of the arbitration award, whereas this wide reading of *ISU* also requires immediate access to these courts, notably in the form of provisional measures.

Criticism of AG Capeta's Wide Reading and Extension of *ISU*

AG Capeta's treatment of the individual's rights under Art. 19 TEU is far too absolutist. *Mutu and Pechstein* is about the waiver of procedural rights, and whether a particular arbitration procedure nonetheless sufficiently guarantees them. *RFC Seraing* concerns the "waiver" of jurisdictional rights. Unlike procedural rights, the protection of jurisdictional rights as conceived by AG Capeta admits of no limitation by substantial equivalence.

Moreover, jurisdictional rights engage the legitimate interests of the state, and other states. These interests are not sufficiently accounted for in AG Capeta's Opinion. Indeed, they were not sufficiently accounted for in *ISU*.

Even without an international treaty affecting jurisdiction, other states have an interest in the jurisdiction of their own courts, in the abstract of equal value to that of any other state.

The EU's crass preference for the jurisdiction of its own courts and those of its Member States disturbs this equilibrium. The EU's approach violates international comity, and upends the Savignian system of jurisdiction so successfully operating in the world for over 100 years. A cogent analysis of Art. 19 TEU requires account for these other interests. The Belgian *res judicata* rule, and *res judicata* in general, exist for a good reason.

Additionally, AG Capeta's analysis fails to account for the interest and value of international arbitration in general, and sports arbitration in particular. As regards the latter, already the CJEU's decision in *ISU* failed to integrate such interest and value into its analysis. But the decision of the court below, the EU General Court, took these into account, at para. 156. Paraphrasing the ECtHR in *Mutu and Pechstein*, it stated:

> "[…] it was clearly in the interest of disputes arising in the context of professional sport, in particular those involving an international dimension, that they could be submitted to a specialised court which is capable of adjudicating quickly and economically. It added that high-level international sporting events are organised in different countries by organisations having their seat in different States, and that they are often open to athletes throughout the world. In that context, recourse to a single, specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty […]".

Unsurprisingly, for its part, the General Court concluded that the CAS arbitration in the *ISU* case entailed no (reinforcing) violation of EU law.

Incompatibility With the NY Convention

AG Capeta's suggestion that the NY Convention does not apply to sports arbitration since there is no free "undertaking" to arbitrate within the meaning of Article II of the NY Convention is misconceived. The law applicable to the validity of the arbitration agreement must be exclusively that designated under Art. V(1)(a) of the NY Convention, namely the law the parties chose, and, in the absence of a choice, that of the place of arbitration. In the Opinion, AG Capeta noted, at para. 117 that "[a]ll the parties at the hearing agreed that the New York Convention applies to CAS awards". This included Belgium, Greece, France, Lithuania, and the Netherlands (para. 37 of the Opinion). The position is the same in Switzerland.

Additionally, whatever the law applicable, most legal systems are justifiably guarded about the vitiating of contracts due to economic pressure especially where, as in *RFC Seraing*, that pressure does not extend from the contractual counterparty. See for example the recent judgment of the UK Supreme Court in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40. Even civilian legal systems with a generalized doctrine of good faith will typically require a resulting substantive imbalance, derived as they are from Roman law *laesio enormis*. See for example Art. 21 of the Swiss Code of Obligations ("a clear discrepancy", in unofficial English translation). There is no necessary imbalance between the parties inhering in the choice of CAS arbitration and the ensuing exclusion of EU Member State court jurisdiction.

AG Capeta goes on to suggest that the protection of EU legal rights may be treated by EU Member States as a public policy matter permitting refusal to enforce an arbitration award under Art. V(2)(b) of the NY Convention. The protection of EU legal rights as conceived by AG Capeta is a jurisdictional rule. Although the content of public policy in the NY Convention is not harmonised but is rather left for good faith interpretation by signatory states, the concept has universally been treated as the protection of procedural and substantive legal rights. It is the result of the arbitration that is examined for its compliance with public policy, not the fact of the arbitration itself.

Moreover, interpreted in good faith, public policy protection must entail limits to the substantive scope of the review. The notion has always operated this way, apparently without exception, under municipal laws around the globe applying numerous international conventions integrating it, including the NY Convention.

Requiring setting aside review of foreign arbitration awards is contrary to the duty under Art. II(1) of the NY Convention to recognise arbitration agreements. It would be to drive a cart and horses through such recognition to limit it to first instance jurisdiction, but then permit review especially one which may be tantamount to an appeal.

Taking jurisdiction to invalidate a NY Convention award offends moreover against the obligation in Art. III of the NY Convention to recognise arbitration awards. Recognition denotes not just a legal proceeding. It is a more generalised treatment of the finality of NY Convention awards. The NY Convention in that Article goes out of its way to stipulate that such awards are "binding".

Under the NY Convention an arbitral award is "foreign" since it is a product of a foreign legal order. Requiring its setting aside review by domestic courts is therefore also repugnant to the jurisdictional assumptions underlying the NY Convention. The scheme of the NY Convention affords recognition and enforcement proceedings as the only opportunity for review of a (otherwise

qualifying) foreign arbitration award.

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