

The Court of Arbitration for Sport and the EU – a crisis in the making?

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As the world of sport grew in economic importance through the 1980s, it became apparent that a specialised tribunal for the resolution of disputes could be of value. In 1983, the International Olympic Committee (IOC) set up the Court of Arbitration for Sport (CAS) for that purpose. The CAS achieved its current structure in 1994. Based in Lausanne, it is subject to judicial control by the Swiss Federal Tribunal, which has generally been slow to interfere with CAS awards. For some 40 years, it has operated successfully as an expert arbitral institution, dealing with every sort of sports-related dispute, including commercial and doping matters.

The CAS can point to the growth of its caseload as an indicator of its vitality. In 1993, 10 disputes were filed. In 2022, 830 cases were filed.² More than 900 cases were filed in 2023.³ In 2010, it was not unreasonable to assert that:

*The Court of Arbitration for Sport (CAS) has grown up and is flourishing after its first quarter century of development. It has lived up to its founders' expectations and is recognized as the world's supreme court of sport.*⁴

However, recent jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) affecting the enforceability of CAS awards, together with a general decline in support among states and civil society for arbitration as a dispute resolution mechanism, suggest that the CAS will increasingly face challenges to its effectiveness. These challenges are not without significance for international arbitration outside the sporting context.

1. Objectives of the CAS

According to Matthieu Reeb, Secretary General of the CAS since 1999, the creation of the court was motivated by the perception that sport-related disputes were increasing in number and required a dedicated tribunal to resolve them. Implicit in that aspiration was the notion that the decisions rendered by the CAS would be enforceable. The objectives of the CAS were to be specialised, able to deal with international disputes, quick, flexible, and inexpensive.”⁵ As discussed below, judicial review of CAS awards is limited.

Following the decision of the Swiss Federal Tribunal in the case of *Gundel*,⁶ in which the status of the CAS as an independent tribunal was put in doubt, the court was re-established as an institution more independent of the IOC. This was achieved by the Paris Agreement of

¹ Arbitrator-Mediator, 4-5 Gray's Inn Square, London.

² Statistics, CAS, 2022.

³ CAS Bulletin, 2024/1, at 3.

⁴ Richard H. McLaren, Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror, 20 Marq. Sports L. Rev. 305 (2010).

⁵ Reeb, Matthieu, 'The Court of Arbitration for Sport: History and Operation', in Matthieu Reeb (ed), Digest of CAS Awards II 1998-2000, Digest of CAS Awards Series Set, Volume 2 (Kluwer Law International 2002), at xxiv.

⁶ *Gundel v. Fédération Équestre Internationale*, 15 March 1993, 119 II 271, ASA Bull. 3/1993, p. 398.

1994, made between the IOC, the summer and winter international sporting federations and the Association of National Olympic Committees.⁷ This change was intended to ensure that CAS awards would be recognised and enforced as valid arbitral awards. The Swiss Federal Tribunal approved.⁸

2. New York Convention

The ability of the CAS to render effective international awards is supported by the wide acceptance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁹ The provisions of the Convention on the refusal of enforcement of international arbitration awards frame the discussion as to the effectiveness of CAS awards and, hence, the institution's continued viability.

Most pertinently in this context, Article V(2)(b) of the Convention permits a court to refuse enforcement of a foreign award on the grounds that the arbitration agreement is "[t]he recognition or enforcement of the award would be contrary to the public policy of that country."

3. Developing scepticism about arbitration

Schwebel opined in 2016:

*In recent years, investor–State arbitration—one of the most progressive developments in international law and relations in the history of international law—has been under attack, not from the reactionary right but from a mélange of academics, some eminent, by labour union spokesmen, by others antagonistic to globalization such as the greens, by well-meaning critics...*¹⁰

Since 2015, the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) has argued that "there is a pressing need for systematic reform of the global [International Investment Agreement] regime".¹¹ In 2017, the United Nations Commission on International Trade Law (UNCITRAL) entrusted a working group "with a broad mandate to work on the possible reform of investor-State dispute settlement".¹² That work continues.¹³

⁷ Agreement related to the constitution of the International Council of Arbitration for Sport (ICAS) (The Paris Agreement) 1994, 22 June 1994, in Reeb, fn 5, at 881.

⁸ *Lazutina v IOC*, 4P.267/2002.

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. At the time of the Paris Agreement, there were 98 members of the Convention. There are now 172.

¹⁰ Stephen M. Schwebel, 'The outlook for the continued vitality, or lack thereof, of investor–State arbitration', in William W. Park (ed), *Arbitration International*, (OUP, 2016, Volume 32, Issue 1), 1 – 15.

¹¹ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015 - Reforming International Investment Governance*, at page xi.

¹² United Nations Commission on International Trade Law (UNCITRAL), *General Assembly Official Records, Fiftieth session (3-21 July 2017)*, at pages 43-47.

¹³ UNCITRAL Working Group III: Investor-State Dispute Settlement Reform (webpage), accessed on 29 July 2024, available at: https://uncitral.un.org/en/working_groups/3/investor-state.

The European Commission¹⁴ (along with the European Economic and Social Committee¹⁵) joined this tendency, initially in the context of negotiations regarding the Transatlantic Trade and Investment Partnership between the EU and the United States.¹⁶ In September 2015 the Commission published proposals for the creation of an “Investment Court System” to replace ISDS.¹⁷ This movement found its first expression in the EU in the dispute provisions of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, which assigned dispute resolution to a permanent tribunal, with an appeals procedure.¹⁸ For more than a decade, therefore, there has been scepticism in the EU in relation to investor-state arbitration.

With the CJEU’s decision in the *ISU* case, this scepticism has definitively spilled over into commercial arbitration. It is not clear where the journey will end, but the direction of travel is towards the rejection of CAS jurisdiction in matters affecting intra-EU activities, either by reason of the lack of EU judicial review or on public policy grounds based on human rights.

4. Public policy and the role of the Swiss Federal Tribunal

An appeal against an award in a domestic or international arbitration seated in Switzerland must be brought in the Swiss Federal Tribunal.¹⁹

The jurisdiction of the Swiss Federal Tribunal is purely *cassatoire* – it will not annul an award merely on account of a mistake of fact or law. The grounds on which an award can be annulled are set out in articles 190(2) of the Law on Private International Law. These are procedural or jurisdictional, save for article 190(2)(e):

2. *An arbitral award may be set aside only:*

...

e. *where the award is incompatible with public policy.*

¹⁴ European Commission, Press Release, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations*, 16 September 2015.

¹⁵ European Economic and Social Committee, *Opinion of the European Economic and Social Committee on investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries*, 8 August 2015, OJ C 332, 8.10.2015, p. 45–63.

¹⁶ Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America* (17 June 2013), Doc. 11103/13 DCL 1, 9 October 2014.

¹⁷ European Commission, Press Release, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations*, 16 September 2015.

¹⁸ Chapter 8, section F, Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Document 22017A0114(01), OJ L 11, 14.1.2017, p. 23–1079. The dispute resolution provisions have not yet come into force, as CETA has not yet been ratified by all 27 EU Member States. It may never come into force: Inti Landauro, *French Senate votes against ratification of EU-Canada free trade deal CETA* (news article) Reuters, 21 March 21, 2024.

¹⁹ Article 389, Swiss Civil Procedure Code; Article 191, Swiss Private International Law Act (PILA).

An arbitral tribunal seated in Switzerland has jurisdiction to decide questions of foreign competition law, if that law is applicable to the dispute.²⁰ Such questions have arisen in CAS proceedings.²¹ However, the Federal Tribunal has held that foreign competition law does not fall within international public policy, for the obvious reason, among others, that the specificities of such laws differ from country to country.²²

5. Exclusive jurisdiction of the CJEU

Article 344 of the Treaty on the Functioning of the European Union (TFEU) provides:

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

In its *Opinion on the draft treaty on a European Economic Area* (1992), the CJEU held that this provision was an undertaking by Member States “not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty”.²³ In subsequent judgments, such as *Re Draft Agreement on the European and Community Patents Court* (2011)²⁴ and *Opinion 2/13 of the court (Re accession to European Convention on Human Rights)* (2014)²⁵, the CJEU has confirmed the principle that Article 344 TFEU:

*is specifically intended to preserve the exclusive nature of the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.*²⁶

In short, an institutional arrangement which fails to give the last word on the interpretation of EU law to the CJEU is incompatible with the EU Treaties.²⁷

²⁰ See, e.g., *Company A (Italy) v 6 Respondents (Italy)*, Final Award, ICC Case No. 14046, in Albert Jan van den Berg (ed), ICCA Yearbook Commercial Arbitration 2010 - Volume XXXV, Yearbook Commercial Arbitration, Volume 35 (ICCA & Kluwer Law International 2010), pp. 241 – 271. See also: *Arbitration CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)*, award of 20 August 1999. In the latter case, the CAS held that EU law should be taken into account as a mandatory provision having a close connection with the case, under Article 19, PILA.

²¹ Arbitration CAS 2005/A/951 *Guillermo Cañas v. ATP Tour*, 23 May 2007.

²² X. S.p.A. contre Y. S.r.l., 4P.278/2005 du 8 March 2006.

²³ CJEU, *Re the Draft Treaty on a European Economic Area* (Opinion 1/91) [1992] 1 C.M.L.R. 245, para. 35.

²⁴ CJEU, *Re Draft Agreement on the European and Community Patents Court* (Opinion 1/09) [2011] 3 C.M.L.R. 4.

²⁵ CJEU, *Re Accession to European Convention on Human Rights* (Opinion 2/13), [2015] 2 C.M.L.R. 21.

²⁶ *Ibid*, at para. 210.

²⁷ The Court's approach to external adjudication was not originally so absolute. In *Re the Draft Agreement Establishing A European Laying-Up Fund for Inland Waterway Vessels* (Opinion 1/76) [1977] 2 C.M.L.R. 279 the Court held that a court set up under a multilateral agreement between member states and non-member states was compatible with the European treaties.

6. The International Skating Union case

In *Eco Swiss*, the CJEU had held that EU competition law was a matter of *ordre public* and that a court to which an application for annulment is made must examine the question of compliance with that law, if relevant.²⁸ However, where the complaining party has failed to comply with procedural rules which would have given it a reasonable opportunity to raise that issue, in the interests of legal certainty *res judicata* would apply between the parties and the complaint would not require to be considered. This was consistent with the development of doctrine in the US.²⁹

In a decision of 8 December 2017, the European Commission ruled that by adopting and enforcing its eligibility rules for participation in international skating competitions the International Skating Union (ISU) infringed EU competition law under Article 101 of the Treaty on the Functioning of the European Union (TFEU).³⁰ In brief, skaters were forbidden to take part in competitions which had not been approved by the ISU or one of its member national skating associations. An athlete who contravened the rules would be liable to sanctions, including the possibility of a lifetime ban from competition. The Commission found the ISU to have infringed Article 101 TFEU and ordered it to bring the infringement to an end within 90 days on pain of a daily fine.

According to the ISU's Appeals Arbitration rules, appeals against decisions under the eligibility rules were subject to the exclusive jurisdiction of the CAS. The Commission found that:

*the hurdles that the Appeals Arbitration rules impose on athletes in obtaining effective judicial protection against potentially anti-competitive ineligibility decisions of the ISU reinforce the restriction of their commercial freedom and the foreclosure of ISU's potential competitors... since those rules protect potentially anti-competitive decisions of the ISU Council issued under the Eligibility rules by curtailing the reach of EU/EEA competition law to those decisions.*³¹

The CJEU confirmed this reasoning.³² As a result, the Commission was right to order the ISU *inter alia* to amend “the arbitration rules so as to ensure the effective review of decisions made at the end of those procedures.”

7. Threat 1: CJEU interpretative supremacy

The scope of EU public policy – that is to say, overriding rules of EU law binding on Member States – is broad. It is the obligation of a state court to enforce any provision that constitutes

²⁸ *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) EU:C:1999:269; [2000] 5 C.M.L.R. 816.

²⁹ *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

³⁰ Commission Decision C (2017) 8230 final, adopted on 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (Case AT/40208 — International Skating Union's eligibility rules).

³¹ *Ibid.*, para. 277.

³² *International Skating Union v European Commission* [2024] 4 C.M.L.R. 17, para. 184.

“an essential rule of law in the EU legal order”. It seems that any law, at least, which significantly furthers the integration of the EU market will fall within this category.³³

Obviously, non-EU courts will have on occasion to pass judgment by reference to EU law and there is no mechanism by which the CJEU will ever be able to express a view on their interpretation. As the Court implicitly recognised in *Eco Swiss*, national courts and tribunals may reach incorrect interpretations of EU law that, for valid procedural reasons, will never reach the CJEU.³⁴

If the CJEU is the exclusive authority on EU law, one might ask why it matters whether a provision of EU law represents a principle of public policy? It is surely because the New York Convention, as a matter of international law, forbids review of awards by enforcing courts save where “recognition or enforcement of the award would be contrary to the public policy of that country”.³⁵

However, in *Achmea*, the CJEU held that an arbitration agreement under a bilateral investment treaty between EU Member States implicated the possibility of submitting disputes involving EU law to a body, namely an arbitral tribunal, which was not part of the judicial system of the EU. This was:

*such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in art. 267 TFEU, and is not therefore compatible with the principle of sincere co-operation.*³⁶

The arbitration agreement was hence invalid.

The Court sought to distinguish treaty-based arbitration from commercial arbitration on the basis that the former derives from an agreement between Member States, which are subject to the obligations of the EU Treaties. This is unpersuasive, as the CJEU’s supremacy may be flouted in either context. As Cordero-Moss observes, “[t]hat the distinction between commercial and investment arbitration is unconvincing, gives reason to fear that the distinction may be abandoned.”³⁷

The intra-EU invalidity of investor-state arbitration under *Achmea* would seem easily extensible to Member State adherence to the New York Convention. Where a dispute arises between an EU athlete and a sports institution in a different Member State, it would be but a short step for the CJEU to hold that *any* issue of EU law should be subject to its jurisdiction.

³³ *Ingmar Gb Ltd v Eaton Leonard Technologies Inc.* (Case C-381/98) [2001] 1 C.M.L.R. 9. Cf *Diageo Brands BV v Simiramida-04 EOOD* (C-681/13) [2016] Ch. 147, paras 48-52.

³⁴ *Eco Swiss*, fn 28, at para. 48.

³⁵ Article V(2)(b), New York Convention.

³⁶ *Slovak Republic v Achmea BV* [2018] 2 C.M.L.R. 40, para. 58.

³⁷ Giuditta Cordero-Moss, 'Chapter 12: Court Control on Arbitral Awards: Public Policy, Uniform Application of EU Law and Arbitrability', in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Volume 2 (Kluwer Law International 2020), 199 – 216, at 208.

On this principle, given that the Swiss Federal Tribunal is not subject to the interpretative jurisdiction of the CJEU, it would be contrary to the duty of cooperation for a Member State court to enforce a CAS award which gave rise or *could* give rise to a question of EU law. And in fact in the *ISU* decision the Court bluntly states that the requirement of effective judicial review entails the reviewing court's being able to make a reference under Article 267 TFEU, which a Swiss court obviously cannot.³⁸ There is a substantial risk that future CAS awards will be ruled unenforceable not merely in relation to issues of EU public policy, but wherever an issue of EU law arises.

Non-EU courts may accept the ruling of the CJEU that a submission to CAS arbitration is invalid on policy grounds. In *Blasket*, the U.S. court accepted that the supposed impermissibility of arbitration between EU Member States under the Energy Charter Treaty rendered the award unenforceable for lack of a valid arbitration agreement.³⁹ The effects of EU public policy may hence extend to non-EU jurisdictions.

8. Threat 2: Relitigation of fundamental rights

In its judgments in *Pechstein*⁴⁰ and *Semenya*⁴¹, the European Court of Human Rights (ECtHR) has held that the limited power of review of CAS awards by the Swiss Federal Tribunal violates the European Convention of Human Rights (ECHR). The ruling in the former has been treated by the German Constitutional Court as amounting to a violation of German *ordre public*. In the latter, the ECtHR explicitly treated Semenya's rights as a matter of "European public policy".

The scope of EU public policy and its relation with the rights safeguarded by the ECHR and EU's Charter of Fundamental Rights remain undetermined. This factor alone renders the future recognition of CAS awards in Europe uncertain.⁴² However, for the CJEU, "fundamental rights form an integral part of the general principles of law whose observance the court ensures".⁴³ To a great extent the Charter tracks the ECHR, but notably the Charter recognises the right to conduct a business (Article 16), a right of potential relevance in every professional sports dispute.

In 2009, skater Claudia Pechstein was sanctioned by her national sports federation for a blood doping violation. Her appeal to the CAS was dismissed. She appealed to the Swiss Federal Tribunal without success. She then took her complaint to the ECtHR.

The ECtHR held that her consent to arbitration was in practical terms compulsory. It could not, therefore, be regarded as a voluntary waiver of her rights under Article 6(1) of the ECHR, namely "a fair and public hearing within a reasonable time by an independent and

³⁸ *ISU*, para. 198.

³⁹ *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023). Cf *Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201 (D.D.C. 2023).

⁴⁰ *Mutu and Pechstein v. Switzerland*, App. Nos. 40575/10 67474/10, Judgment of 2 October 2018.

⁴¹ *Semenya v Switzerland*, App. No. 10934/21, judgment of 11 July 2023.

⁴² Jerca Kramberger Škerl (2011) European Public Policy (With An Emphasis on Exequatur Proceedings), *Journal of Private International Law*, 7:3, 461-490, at 479-482.

⁴³ *Bamberski v Krombach* (Case C-7/98) [2001] Q.B. 709.

impartial tribunal established by law". The arbitral proceedings had therefore to provide sufficient safeguards for these rights.

So far as the independence and impartiality of the CAS was concerned, the ECtHR (by a majority) was not persuaded that the influence of the IOC and other sports bodies on the CAS or the method of appointment of the arbitral panel justified concern. However, there had been a violation of Pechstein's rights by reason of the fact that, contrary to her request, she was refused a public hearing without good cause. She took her complaints back to the German courts where, on 3 June 2022, the Federal Constitutional Court reversed the decision of the Federal Court of Justice, accepting, and to a degree extending, the analysis of the ECtHR, namely that in view of the more or less compulsory nature of the arbitration agreement the refusal of a public hearing was an infringement of the skater's constitutional right to access to justice. The question whether *in the particular case* a public hearing was required by Article 6(1) ECHR was not material. The point was that the rules of the CAS did not grant a right to any litigant to a public hearing even when it was required by Article 6(1).⁴⁴ Such an award is hence liable to be refused recognition and enforcement under the grounds set out in Article V(1)(a) or V(2)(b) of the New York Convention, whether or not in the particular instance the athlete had grounds for complaint.⁴⁵

In *Semenya*, the European Court of Human Rights found Switzerland to have breached the complainant's right not to be discriminated against in relation to her private life, contrary to Articles 14 and 8 ECHR, by reason of its limitation of the Federal Tribunal's role to the question of public policy.⁴⁶ The Federal Tribunal had not carried out a detailed review of the facts, by reason of its holding that the complaint did not give rise to a question of public policy. In addition, the limitation of review amounted to a failure to provide an effective remedy under Article 13 of the ECHR. The ECtHR did not say that the Federal Tribunal was wrong in its interpretation of Swiss public policy; rather, the limitation of its reviewing function to the question of public policy in this context was in itself a violation of the ECHR. In so holding, the ECtHR referred to itself as exercising "its limited role as guardian of European public order".

Pechstein opens up the possibility that issues of independence and procedural fairness (including the cost of proceedings⁴⁷) will be relitigated in EU Member State courts and the CJEU, courts which are unlikely to be as well-disposed to the CAS as the Swiss Federal Tribunal. There seems to be nothing preventing athletes from pursuing their *ordre public* objections based on human rights in successive jurisdictions or from suing in national courts for declarations of the invalidity of the arbitration agreement. Successful challenges on such grounds will severely undermine the reputation of CAS as an effective and expeditious tribunal.

⁴⁴ *Pechstein v International Skating Union*, BVerfG, 1 BvR 2103/16 -, Rn. 1-54. The CAS amended its rules in 2019 to permit a public hearing: CAS, *Amendments to the Code of Sports-related Arbitration* (in force as from 1 January 2019).

⁴⁵ Section 1059(2)(1)(a) and (2)(b), Book X, Civil Procedure Code, available at: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3535.

⁴⁶ *Semenya v Switzerland*, Application no. 10934/21, judgment of 11 July 2023.

⁴⁷ The Swiss Federal Tribunal has held that public policy does not require that legal aid be available in CAS cases: *NADA v. Patrick Sinkewitz*, 4A_178/2014.

Conclusion

McClaren concluded his 2010 essay by observing:

*the Swiss Federal Tribunal has repeatedly ruled on the credibility of the CAS decisions and in large measure has endorsed the procedures and process by which it makes its awards thereby leaving them to go unchallenged.*⁴⁸

That period without challenge seems to be coming to an end, though whether the damage to CAS's perceived effectiveness will be significant remains to be seen.

⁴⁸ McLaren, fn 4, at 333.