

President's Message

CJEU: Get Off That Slippery Slope, Before It's Too Late, Please!

Once upon a time, in an arena far, far away, sport was sport and law was law and that was that. Sport was a pastime for the wealthy few. Until about 30 years ago, the Olympic Games were (at least on paper) strictly for amateurs. Those were the days. Today, sports law is big business, with top athletes making money like music stars. Where there is money, there are lawyers. The Court of Arbitration for Sport (CAS) alone handles about 1,000 cases a year.¹

And now it is the Court of Justice of the European Union's turn. In *Royal Football Club Seraing v FIFA et al* (C-600/23) it will have to decide whether the Belgian courts should apply the principle of *res judicata* to a CAS award.² At issue is whether the arbitral tribunal correctly applied EU law and whether the Belgian courts need to defer to a CAS award that was issued in Switzerland and thus not subject to review by a EU court. At the time of writing, the CJEU had not yet decided the case. But, on January 16, 2025, Advocate General Capeta delivered her opinion. I read it and my jaw dropped.

Although there is much to be written about this remarkable opinion, let me focus on two points.

First, the AG draws a strict distinction between arbitration under the FIFA rules, which she describes as mandatory, and commercial arbitration, which is not mandatory. In the case of mandatory arbitration, i.e. all CAS cases under the FIFA rules, "*a national court must [...] be able to conduct the review of FIFA rules against any and all rules of EU law, any CAS award notwithstanding*". This goes far beyond existing case law. In particular, the AG relies on a distinction between voluntary and mandatory arbitration introduced by the ECtHR in the *Pechstein* decision.³ There, with some creative slicing and dicing, the ECtHR held that athletes subject to *de facto* mandatory arbitration must be protected by at least two principles: a right to an independent and impartial tribunal (which is guaranteed as a matter of course anyway) and a right to a public hearing (wow, big deal – few athletes want their doping history played out in front of the public).⁴

¹ https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2023.pdf

² CAS case no. 2016/A/4490. Award upheld by the Swiss Federal Supreme Court, DFT 144 III 120, 20 February 2018.

³ ECtHR, nos. 40575/10 and 67474/10, 4 February 2019, *Mutu and Pechstein v. Switzerland*.

⁴ I am told that there is likely less than one public hearing per year at the CAS.

The AG blows this rather artificial and irrelevant distinction out of proportion, and in doing so unwittingly opens the floodgates that protect commercial arbitration from the same fate: What exactly is the difference between voluntary and “mandatory” arbitration? Does the AG really believe that in commercial cases each party enters into an arbitration agreement entirely voluntarily? There will be no shortage of lawyers eager to test that proposition. *Second*, there is the obvious obstacle of the New York Convention (“NYC”). The AG gets around this nuisance with two creative proposals:

(i) While acknowledging that all parties in *Royal Football Club* agreed that the NYC applied, she suggested that the NYC does not apply to mandatory arbitration after all because there is no free and consensual undertaking within the meaning of Article II(1) NYC (para. 118).

Seriously? CAS awards are not awards under the NYC? And neither are commercial arbitral awards if one of the parties has not “freely” consented?

(ii) Even if the NYC applied, she suggested that the public-policy exception under Art. V(2)(b) could be interpreted as a “*gateway to a full review of the arbitral award in respect of the applicable EU law*” (para. 122).

Really? The whole of EU law is public policy? What about all of Belgian law? Greek law? Iranian law? Russian law? Aside from being preposterous, this is an invitation to authoritarian regimes to refuse to enforce foreign arbitral awards because of alleged contradictions with obscure local laws.

It is not the first time that I have bemoaned the EU’s tendency to undermine the rule of law masochistically and attack arbitration, both of which Europe has traditionally promoted, perhaps even invented, and which remain vital for European users in international trade. I typically do not indulge in EU-bashing, but reading this nonsense and considering the terrible example that the CJEU could give to the world if it adopts these proposals, I feel compelled to speak out. It is highly unlikely to make a difference, but at least I can say that I tried.

Dear CJEU: *Eco Swiss*, *Achmea*, and their progeny⁵ created a slippery slope; don’t slip all the way down to the depths proposed by the AG! Please!

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⁵ CJEU, C-126/97, 1 June 1999, *Eco Swiss China Time Ltd v Benetton International NV*; C-284/16, 6 March 2018, *Slovak Republic v Achmea BV*.

SAVE THE DATE

ASA Fall Conference September 2025
26 September 2025, Bellevue Palace Bern, Switzerland

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