THE AUSTRALIAN AND NEW ZEALAND SPORTS LAW JOURNAL

ANZSLA
THE SPORTS LAW ASSOCIATION

2025 VOLUME 18 NO.1

THE AUSTRALIAN AND NEW ZEALAND SPORTS LAW JOURNAL

Volume 18 2025 Number 1

Editors

Editorial Committee

THE HAYDEN OPIE KEYNOTE ADDRESS, 2025 ANZSLA ANNUAL CONFERENCE: ACCESS TO JUSTICE AND THE COURT OF ARBITRATION FOR SPORT

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1. The Right of Access to Justice

Most national legal systems provide a right of access to justice in their constitutions. In Switzerland, this right of access to justice is enshrined in Article 29a of the Federal Constitution (FC), which states as follows:

> *"In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case."*

Comparable guarantees exist in Dutch (Article 17(1) of the Constitution), Italian (Article 24(1) of the Constitution) or German law (Article 2(1) in conjunction with Article 20(3) of the Constitution). Across jurisdictions, the right of access to justice is largely identical and aims to ensure effective legal protection, including access to state courts, full review of the facts and the law in formal proceedings, and a binding decision by a court within a reasonable time.[1]

The right of access to justice is also protected in international legal instruments. For example, Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR) states – *inter alia* – as follows:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."*

Article 19(1) (second half-sentence) of the Treaty on European Union (TEU) similarly provides as follows:

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1 Switzerland: Waldmann, in Basler Kommentar zum Verfassungsrecht, 2nd ed. 2025, Art. 29a no. 3 et seq. and 13 et seq.; Germany: Rixen, in Stern/Sodan/Möstl (eds.), Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund, 2nd ed. 2022, § 131 no. 36; Rauscher, in Münchner Kommentar zur ZPO, 7th ed. 2025, Einleitung no. 18.

> *" ... Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."*

Apart from the territorial and personal scope of application, the content of the right of access to justice in international legal instruments largely corresponds to that in national legal systems. For example, according to the European Court of Human Rights (ECtHR), Article 6(1) of the ECHR guarantees "*... to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court' … .*"[2] The legal situation is similar under Article 19(1) TEU. According to the case law of the Court of Justice of the European Union (CJEU), the right of access to justice is "*a general principle of law which underlies the constitutional traditions common to the Member States* [of the European Union]. *That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. ...* [According to the right of access to justice] *all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary …* [to European law] *… It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which …* [European law] *provides*."[3] Article 19(1) TEU, therefore, contains a "*comprehensive system of legal protection*" in which, in principle, none of the actions of the institutions of the European Union or of the Member States can be exempt from judicial review.[4] In addition, the CJEU has held that Article 19(1) TEU secures within the EU legal order, the same protection as Article 6(1) ECHR.[5]

2. The Admissibility of Arbitration

At first sight, arbitration seems to conflict with the right of access to justice. While access to justice guarantees access to a state court, the very purpose of arbitration is to exclude state courts' jurisdiction. Yet the prevailing opinion is that arbitration is compatible with the right of access to justice.[6] In some jurisdictions, the admissibility of arbitration is even explicitly recognized

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[2] ECtHR (4.2.2019) *Mutu and Pechstein v. Switzerland*, application nos. 40575/10 and 67474/10), no. 92; cf. also ECtHR (21.2.1975) *Golder v. United Kingdom*, application no. 4451/70, no. 35; Dold, in Frowein/Peukert (eds.), EMRK-Kommentar, 4th ed. 2024, Art. 6 no. 84.

[3] CJEU (15.5.1986) *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, case 222/84, no. 19.

[4] Wegener, in Calliess/Ruffert (eds.), EUV – AEUV, 6th ed. 2022, Art. 19 EUV no. 63; Schwarze/Wunderlich, in Schwarze/Becker/Hatje/Schoo (eds.), EU-Kommentar, 4th ed. 2019, Art. 19 EUV no. 14.

[5] Court of Justice (8.12.2011) *Chalkor AE Epexergasias Metallon v. European Commission*, case C-386/10, no. 51; cf. also Bastianon/Colucci, Sports Arbitration and Effective Judicial Protection under EU Law: The RFC Seraing Case, Rivista di Drititto ed Economia dello Sport 2025 1, 17.

[6] Switzerland: Waldmann, in Basler Kommentar zum Verfassungsrecht, 2nd ed. 2025, Art. 29a no. 30; for Germany: German Constitutional Court (3.6.2022 – 1 BvR 2103/16), NJW 2022, 2677 no. 39; Austria: Kodek, in Liebscher/Oberhammer/Rechberger (eds.) Schiedsverfahrensrecht, Bd. 1, 2012, no. 1/5.

constitutionally. An example for this can be found in Chapter V, Article 5 of the French Constitution of 1791, which provided as follows:

> *"Le droit des citoyens, de terminer définitivement leurs contestations par la voie de l'arbitrage, ne peut recevoir aucune atteinte par les actes du pouvoir législatif. "*
>
> **Free translation :** The right of citizens to definitively settle their disputes through arbitration cannot be infringed upon by the actions of the legislative branch.

Elsewhere, party autonomy is referred to as a justification for arbitration.[7] According thereto, the right of access to justice is waivable and parties resorting to arbitration thereby waive their right of access to state courts. Some scholars add a historical argument: when legislators introduced constitutional access to justice guarantees, arbitration already existed, and there is no evidence they intended to abolish it.[8]

The international legal instruments are no different. The ECtHR[9] has held that "*Article 6* [of the ECHR] *does not ... preclude the establishment of arbitral tribunals in order to settle certain pecuniary disputes between individuals ... . Arbitration clauses, which have undeniable advantages for the individual concerned as well as for the administration of justice, do not in principle offend against the Convention*." Also the ECtHR relies on the principle of part autonomy to justify this result:[10]

> *"En effet, les parties à un litige sont libres de soustraire aux juridictions ordinaires certains différends pouvant naître de l'exécution d'un contrat. En souscrivant à une clause d'arbitrage, les parties renoncent volontairement à certains droits garantis par la Convention. Telle renonciation ne se heurte pas à la Convention pour autant qu'elle soit libre, licite et sans équivoque (Eiffage S.A. et autres (décision précitée) ; Suda, précité, § 48 ; R. c. Suisse, no 10881/84, décision de la Commission du 4 mars 1987, Décisions et rapports (DR) no 51 ; Osmo Suovaniemi et autres c. Finlande (déc.), no 31737/96, 23 février 1999, et Transportes Fluviais do Sado S.A. c. Portugal (déc.), no 35943/02, 16 décembre 2003). De*

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7 Germany: German Constitional Court (3.6.2022 – 1 BvR 2103/16), NJW 2022, 2677 no. 39; German Federal Tribunal (3.7.1975 – III ZR 78/73), NJW 1976, 109; Schulze-Fielitz, in Dreier (ed.), Grundgesetz-Kommentar, 3rd ed. 2018, Art. 92 no. 52; Hossfeld, Die Abtretung schieds- und gerichtsstandsgebundener Forderungen, 2013, p. 16; Switzerland: SFT (18.10.2001 – 4P.176/2001) 128 III 50, consid. 2 c) aa); Waldmann, in Basler Kommentar zum Verfassungsrecht, 2nd ed. 2025, Art. 29a no. 30.

8 Austria: Kodek, in Liebscher/Oberhammer/Rechberger (eds.) Schiedsverfahrensrecht, Bd. 1, 2012, no. 1/6; Germany: Hillgruber, in Dürig/Herzog/Scholz (eds.), Grundgesetz, Stand: 3/2025, Art. 92 no. 90.

9 ECtHR (4.2.2019) *Mutu and Pechstein v. Switzerland*, application nos. 40575/10 and 67474/10), no. 94; (24.3.2016) *Tabbane v. Switzerland*, application 41069/12, no. 25

10 ECtHR (24.3.2016) *Tabbane v. Switzerland*, application 41069/12, no. 27; cf. also the analysis in Hossfeld, Die Abtretung schieds- und gerichtsstandsgebundener Forderungen, 2013, p. 24 seq.

> *plus, pour entrer en ligne de compte sous l'angle de la Convention, la renonciation à certains droits garantis par la Convention doit s'entourer d'un minimum de garanties correspondant à sa gravité."*
>
> **Free translation :** The parties to a dispute are free to exclude certain disputes that may arise from the performance of a contract from the jurisdiction of the ordinary courts. By agreeing to an arbitration clause, the parties voluntarily waive certain rights guaranteed by the Convention. Such a waiver does not conflict with the Convention provided that it is free, lawful and unequivocal (Eiffage S.A. and Others (above-mentioned decision); Suda, above-mentioned, § 48; R. v. Switzerland, no. 10881/84, Commission decision of 4 March 1987, Decisions and Reports (DR) no. 51; Osmo Suovaniemi and Others v. Finland (dec.), no. 31737/96, 23 February 1999, and Transportes Fluviais do Sado S.A. v. Portugal (dec.), no. 35943/02, 16 December 2003). Furthermore, in order to be considered under the Convention, the waiver of certain rights guaranteed by the Convention must be accompanied by a minimum of safeguards commensurate with its seriousness.

Similarly, the case law of the CJEU provides that "*the legal order established by the Treaties does not preclude, in principle, individuals who are subject to that legal order by virtue of pursuing an economic activity, within the territory of the European Union, from submitting disputes that may arise between them in the context of that pursuit to an arbitration mechanism*".[11] Accordingly, "*an individual may enter into an agreement that subjects, in clear and precise wording, all or part of any disputes relating to it to an arbitration body in place of the national court that would have had jurisdiction to rule on those disputes under the applicable national law*".[12]

3. The Need to Retain Judicial Control

Although arbitration is allowed, arbitral proceedings must satisfy minimum guarantees. As a general rule, therefore, the various legal systems provide for some level of court intervention vis-à-vis private arbitration. This follows from the paramount importance of the right of access to justice. Thus, the parties by resorting to arbitration cannot escape judicial control. Instead, courts must retain some residual oversight over arbitration. By way of example, reference is made to a decision by the German Constitutional Court justifying the above as follows:[13]

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[11] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 78.
[12] CJEU (21.12.2023), *International Skating Union v. European Commission et al*., case C-124/21 P, no. 193.
[13] German Constitutional Court (3.6.2022) – 1 BvR 2103/16, NJW 2022, 2677 no. 40.

"Sowohl der allgemeine Justizgewährungsanspruch selbst als auch der Schutz der ... [durch das Verfassungsrecht] *gewährleisteten Privatautonomie setzen der Abdingbarkeit im Weg einer Schiedsvereinbarung Grenzen. Mit der gesetzlichen Anerkennung privater Schiedsgerichtsbarkeit eröffnet der Staat dem rechtsuchenden Bürger eine alternative, nicht-staatliche Möglichkeit der verbindlichen Streitbeilegung ... Damit der Staat schiedsrichterliche Entscheidungen anerkennen und in Ausübung seiner Hoheitsgewalt vollstrecken kann, muss er dafür Sorge tragen, dass das schiedsrichterliche Verfahren effektiven Rechtsschutz gewährleistet und rechtsstaatlichen Mindeststandards entspricht."*

> **Free translation:** Both the general right of access to justice itself and the protection of private autonomy guaranteed [by constitutional law] set limits on the possibility of derogation by means of an arbitration agreement. By legally recognising private arbitration, the state offers citizens seeking justice an alternative, non-state alternative for binding dispute resolution ... In order for the state to recognise arbitral awards and enforce them in the exercise of its sovereign power, it must ensure that the arbitral proceedings guarantee effective legal protection and comply with minimum standards of the rule of law.

The ECtHR has similarly stressed that the right of access to justice requires courts to retain some level of control over arbitration For example, in the *Mutu-Pechtstein* decision the ECtHR stated as follows:[14]

> *"At the outset the Court would point out that, as it has previously found, the ...* [Swiss Arbitration Law] *reflected a choice of legislative policy which addressed the wish of the Swiss legislature to increase the attractiveness and effectiveness of international arbitration in Switzerland (see Tabbane, cited above, § 33) and the development of Switzerland's position as a venue for arbitration could be regarded as a legitimate aim. ... the Court thus agrees with the Government and acknowledges that a non-State mechanism of conflict resolution at first and/or second instance, with the possibility of appeal, albeit limited, before a State court at last instance, could be an appropriate solution in this field."* (emphasis added)

[14] ECtHR (4.2.2019) *Mutu and Pechstein v. Switzerland*, Application nos. 40575/10 and 67474/10), no. 97 seq.

Also on other occasions, the judicial bodies of the ECHR have emphasised the need for state courts to "*retain some measure of control*" over arbitration:[15]

> *"However, the Commission considers that account must be taken not only of the arbitration agreement between the parties and the nature of the private arbitration proceedings, but also of the legislative framework providing for such proceedings in order to determine whether the domestic courts retained some measure of control of the arbitration proceedings and whether this control has been properly exercised in the concrete case (cf. No. 10881/84, Dec. 4.3.87, D.R. 51, p. 83)."*

Thus, also from the perspective of the ECHR a certain degree of judicial review with respect to arbitration is required under article 6(1) ECHR.[16]

The CJEU likewise requires arbitral proceedings to be subject to judicial control:[17]

> *"... the Court of Justice has observed that individuals may conclude an agreement that subjects, in clear and precise terms, all or part of any disputes relating to that agreement to an arbitration body in place of the court ... However, once the arbitration mechanism established or designated by such an agreement is to be implemented in all or part of the territory of the European Union, ... that mechanism must be designed and implemented in such a way as to ensure ... effective compliance with EU public policy. ... To that end, it is important to point out that, irrespective of the rules which may apply to the arbitration body having jurisdiction under such an arbitration mechanism, the awards made by that body must be amenable to judicial review such as to guarantee the effective judicial protection to which the individuals concerned are entitled, ... in accordance with the second subparagraph of Article 19(1) TEU."* (emphasis added)

4. The Extent of Judicial Control

Judicial control typically (but not exclusively) occurs in the post-arbitral phase, i.e. after the arbitral tribunal has issued its award. When exercising judicial control, the courts – in most jurisdictions – will refrain from a *révision au fond*

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[15] Commission (28.11.1996), *Lila Marianne Nordström-Janzon and Aira Marja Nordström-Lehtinen v. Netherlands*, Application No. 28101/95; Commission (22.10.1996), *société Molin et Tahir Molu v. Turkey*, Application No. 23173/94; Kodek, in Liebscher/Oberhammer/Rechberger (eds.) Schiedsverfahrensrecht, Bd. 1, 2012, no. 1/41.

[16] Landrove, in Besson/Hottelier/Werro (eds), Human Rights at the Center, 2006, p. 73, 93; Kodek, in Liebscher/Oberhammer/Rechberger (eds.) Schiedsverfahrensrecht, Bd. 1, 2012; no. 1/41; Mayer, in Karpenstein/Mayer (eds.), EMRK, 2nd. Ed. 2022, Art. 6 no. 69.

[17] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 81 et seq.

of the arbitral award, i.e. in a full review of the facts and the law of the case. Instead, substantive review in most jurisdictions is limited to the *ordre public.* Such review is designed to ensure compliance with a narrow range of values only. The specificities of such *ordre public* review vary from one jurisdiction to another.[18] In Austrian law, for example, the *ordre public* comprises only the "*fundamental values of the legal system*",[19] while in German law it is constituted by the "*norms governing the foundations of the state and economic life, including the fundamental concepts of justice*".[20] The Swiss concept of *ordre public* is even narrower. The SFT has held that arbitral awards can be set aside on grounds of *ordre public* only in the most exceptional cases ("*est chose rarissime"*) and that, therefore, the chances of succeeding with an appeal on such ground are extremely small ("*chances de succcès extrêmement minces"*).[21] The latter is also corroborated by statistics. In the timeframe between 1989 until 2017, only 1% of the appeals filed, in which a violation of the *ordre public* was alleged, were successful.[22] Unlike in most other jurisdictions, competition law does not form part of the Swiss *ordre public*.[23]

Also from a European law perspective, a limited juridical review of arbitral awards is compatible with the right of access to justice in Article 19(1) TEU. In its "*Eco Swiss*" judgment, the CJEU confirmed that EU law does not impose a more intrusive review criterion. The decision states in that regard as follows:[24]

> *"[I]t it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances."*

These "*exceptional circumstances*" are nothing more than an *ordre public* review of the arbitral award:[25]

> *"... the Court has nevertheless pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy ..."*

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[18] Cf. for a comparative analysis Maurer, The Public Policy Exception under the New York Convention, 2012, p. 73 et seq.; Girsberger/Voser, International Arbitration, 5th ed. 2024, no. 1571; Landolt, Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements, Arbitration International vol. 23 (2007) issue 1, p. 63, 66.

[19] Austrian Federal Court (26.4.2006 3Ob211/05h).

[20] German Federal Tribunal (30.10.2008 – III ZB 17/08), SchiedsVZ 2009, 66 no. 5; (6.10.2016 – I ZB 13/15), SchiedsVZ 2018, 53 no. 55.

[21] SFT (8.3.2006 – 4P.278/2005) 132 III 389 consid. 2.1.

[22] Dasser/Wojtowicz, Swiss International Arbitral Awards Before the Federal Supreme Court, Bull.ASA vol 36 (2025) no. 2, 276, 281.

[23] SFT (8.3.2006 – 4P.278/2005) 132 III 389 consid. 3.1.

[24] ECJ (1.6.1999) *Eco Swiss China Time Ltd v. Benetton International NV*, case C-126/97 and C-126/97, no. 35.

[25] CJEU (21.12.2023), *International Skating Union v. European Commission et al*., case C-124/21 P, no. 193.

As previously pointed out, also the right of access to justice under the ECtHR demands that state courts "*retain some measure of control*" over arbitration. The extent of such control is, however, unclear, since the ECtHR has failed so far to provide details in its jurisprudence. The ECtHR, though, has shown judicial restraint in principle when exercising control over arbitration, arguing that:[26]

> *"In particular, ...* [the ECtHR] *is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (see Lupeni Greek Catholic Parish and Others v. Romania [GC], no. 76943/11, § 90, 29 November 2016, and López Ribalda and Others v. Spain [GC], nos. 1874/13 and 8567/13, § 149, 17 October 2019, with further references), for instance where they can be said to amount to 'unfairness' in breach of Article 6 of the Convention .. The Court cannot itself assess the facts which led a national court to adopt one decision rather than another; otherwise, it would be acting as a court of fourth instance and would disregard the limits imposed on its action. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. ... The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable."*
> (emphasis added)

5. The Particularities in Sports Arbitration

Unlike in other areas of life, arbitration is the norm in elite sports,[27] where uniform rules and their harmonized application is key to ensure fair competition. The most important arbitral tribunal in international sports is the Court of Arbitration for Sport ("CAS"), which is seated in Lausanne, Switzerland. With a caseload of almost 1,000 cases a year,[28] the CAS plays a central role for organized sport, by furthering the development of sports law, ensuring uniform jurisprudence and application of the law, and by offering legal protection for the benefit of stakeholders worldwide.

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[26] ECtHR (10.7.2025) *Semenya v. Switzerland*, *Application no. 10934/21*, no. 193.
[27] Haas/Kahlert/Rigozzi, Sports Arbitration under Threat, jusletter 19 May 2025, no. 1.
[28] https://www.tas-cas.org/en/general-information/statistics.html.

A characteristic feature of the sports industry is that – in many, but not in all cases –[29] sports arbitration is mandatory. Sports organisations impose CAS jurisdiction in their rules and regulations onto the athletes, clubs or federations subject to their rules. This phenomenon has been accurately described by the Swiss Federal Tribunal ("SFT") in the Cañas case as follows:[30]

> *Competitive sport is characterized by a highly hierarchical structure, both at international and national level. Established on a vertical axis, the relations between the athletes and the organizations that occupy the various sporting disciplines are thus distinguished from the horizontal relations between the parties to a contractual relationship (DSFT 129 III 445 consid. 3.3.3.2 p. 461). This structural difference between the two types of relationship has an influence on the volitional process leading to the formation of any agreement. In principle, when two parties negotiate on a basis of equality, each of them expresses its will without being subject to the good intentions of the other. This is generally also the case within the framework of international commercial relations. The situation is quite different in the field of sport. If one excepted the case – quite theoretically – where a renowned athlete, due to his notoriety, would be able to dictate his conditions to the international federation regulating the sport he practises, experience shows that, for most of the time, a sportsman does not have the franchises of his federation and that he has to comply, good and bad, with the latter's requirements. Thus, the athlete who wishes to participate in a competition organized under the control of a sports federation whose regulations provide for recourse to arbitration has no other choice than to accept the arbitration clause, in particular by adhering to the statutes of the sporting federation in question in which this clause has been inserted, especially if it is a professional sport. He would be confronted with the following dilemma: to consent to arbitration or to practise his sport as a dilettante ... Given the choice of submitting to an arbitral tribunal or practising their sport 'in their own back yard' ... watching competitions 'on television' ... , the athlete who wishes to compete against real competitors or who has to do so because it is his only source of income (prizes in cash or in kind, advertising revenue, etc.) will be forced, in reality, to choose, nolens volens, the first term of this alternative."* (emphasis added)

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[29] Haas/Kahlert, Im Westen (scil. Luxemburg) nichts Neues für die (Sport-)Schiedsgerichtsbarkeit?, SchiedsVZ 2025, 157, 119.

[30] SFT (22.3.2007 – 4P.172/2006), consid. 4.3.2.1.

The CJEU denominates the above phenomenon as "mandatory arbitration" [31] while the ECtHR labels it "compulsory arbitration".[32] Be it as it may, both terms describe a situation of unequal bargaining power that undermines the concept of party autonomy. Considering that the compatibility of arbitration with the right of access to justice is (predominantly) justified with the principle of party autonomy, the question arises if and to what extent such justification can be upheld in the face of mandatory or compulsory arbitration. Two recent landmark cases address this issue: the CJEU ruling in the *Seraing* case and the ECtHR ruling in the *Semenya* case.

A The Seraing case

The football club Royal Football Club Seraing ("Seraing") challenged a CAS award concerning FIFA's rules on Third-Party Influence and Ownership. These rules prohibit certain types of football club financing agreements where these would have the effect of enabling a third party to acquire the ability to influence a club's independence in employment and transfer-related matters, as well as its policies or the performance of its teams. CAS jurisdiction was based on the following provisions in the FIFA Statutes:

> *"Article 49*
> *(1) FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials, intermediaries and licensed match agents. ...*
>
> *Article 50*
> *(1) Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question. ...*
>
> *Article 51*
> ...
> *(2) Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited."*

CAS, in essence, upheld the sanction issued by FIFA against Seraing. Seraing then applied for the annulment of the CAS award to the SFT. The latter

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[31] CJEU (21.12.2023), *International Skating Union v. European Commission et al*., case C-124/21 P, no. 176.
[32] ECtHR (4.2.2019) *Mutu and Pechstein v. Switzerland*, Application nos. 40575/10 and 67474/10), no. 115.

dismissed the appeal on the ground that, *inter alia*, EU competition law does not form part of Swiss public policy within the meaning of Article 190(2) lit. e of the PILA. Seraing subsequently started proceedings afresh, in the courts of Charleroi, in Belgium, during which FIFA claimed that the matter was *res judicata* following the rejection of the action to set aside the CAS award by the SFT. The Belgian proceedings ended up before the Belgian Cour de Cassation, which referred to the CJEU according to Article 267 TFEU the question that may be summarized as follows: Does effective legal protection according to Article 19(1) TEU prohibit Belgium to recognize the above CAS award and grant it *res judicata* effects in Belgium?

B The Semenya case

Ms Caster Semenya is an elite-level athlete in athletics. She challenged before the CAS the validity of World Athletics' so-called regulations on "differences of sex development" (DSD-Regulations). These rules require female athletes with naturally elevated testosterone levels to undergo medical interventions to compete in certain women's events. The DSD-Regulations provided in clause 5.2 as follows:

> *"Any dispute arising between the IAAF and an affected athlete (and/or her Member Federation) in connection with these Regulations will be subject to the exclusive jurisdiction of the CAS. In particular (but without limitation), the validity, legality and/or proper interpretation or application of the Regulations may only be challenged (a) by way of ordinary proceedings filed before the CAS; and/or (b) as part of an appeal to the CAS made pursuant to clause 5.3."*

The CAS dismissed her claim in an award issued in 2019. Subsequently, Ms Semenya appealed the CAS award to the SFT, who confirmed the CAS award in 2020.[33] Ms Semenya then brought a claim against Switzerland before the ECtHR. In a judgment rendered in 2023, the ECtHR's Third Section Chamber concluded that Switzerland had failed to provide Ms Semenya with sufficient institutional and procedural safeguards to address her credible claims of discrimination, thereby breaching Articles 8, 13, and 14 ECHR. Following this decision, the Swiss government referred the case to the ECtHR Grand Chamber under Article 43 ECHR, which accepted to hear the case and who analysed her case, however, limited to an alleged breach of Article 6(1) ECHR only.

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[33] SFT 4A_248/2019 and 4A_398/2019.

6. The Admissibility of Mandatory / Compulsory Arbitration

The Seraing and the Semenya case deal with a forced waiver of the right of access to state courts. In both cases the dispute resolution mechanism had been imposed by the sports organisation onto the opposing party. Seraing and Semenya – in the words of the SFT – had "*no other choice than to accept the arbitration clause, in particular by adhering to the statutes of the sporting federation in question in which this clause has been inserted"*[34]. The CJEU acknowledged this in the *Seraing* decision as follows:[35]

> *"In accordance with Article 47(3) and Article 50(1) of the FIFA Statutes, any appeal against a decision passed by the FIFA Appeal Committee and, more broadly, against a decision taken at last instance by FIFA and its bodies must be lodged with the CAS. ... Next, in accordance with Articles 11, 14, 15 and 51 of those statutes, the national football associations that are members of FIFA must, first, submit to the jurisdiction and decisions of the CAS and, second, cause their own members or affiliates, such as leagues, clubs and players, to submit, as the case may be, to that jurisdiction and to those decisions or to the jurisdiction and the decisions of arbitration bodies established at national level. ...* [Thus] *the jurisdiction of the CAS and of the arbitration bodies established at national level is thus not only general and mandatory but also exclusive for all of the categories of persons referred to in those provisions."* (emphasis added)

The question arising from the above is, whether this lack of voluntariness invalidates the waiver of access to state courts.[36] The CJEU answers this question in the *Seraing* case in the negative. The Court in its decision first highlights the "*cardinal importance*"[37] of the right of access to justice in Article 19(1) TEU by stating – *inter alia* – that this provision requires a court "*to be able to carry out an effective judicial review of the acts, measures or behaviour alleged, in the context of a given dispute, to have infringed the rights or freedoms which EU law confers on individuals. That requirement means, in principle, that those courts or tribunals must have the power to consider all the issues of fact and of law that are relevant for resolving that case.*"[38] However, despite the above, the CJEU concludes that in the *Seraing* case the compulsory waiver of the right of access to justice does not violate Article 19(1) TEU. The CJEU, thus,

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[34] SFT (22.3.2007- 4P.172/2006), consid. 4.3.2.2.
[35] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 97.
[36] Cf. Adolphsen, Umfang der gerichtlichen Überprüfung von Sportschiedssprüchen, LMK 2025, 815776.
[37] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 69.
[38] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 75.

acknowledges that a mandatory arbitration mechanism, in principle, is not precluded by the European Treaties.[39]

The decision of the CJEU deviates significantly from the Opinion of the Advocate General in the *Seraing* case.[40] The task of an Advocate General is to assist the Court by presenting a complete impartial and independent 'opinion' in the cases assigned to him. The Advocate General in the *Seraing* case held that:[41]

> *"for players and clubs, CAS's jurisdiction is mandatory and not chosen of their own free will. It therefore does not reflect their own choice to exclude access to a court and to prevent the applicability of certain legal rules to the dispute between them. ...*
>
> *I agree. If mandatory sports arbitration requires rules offering more generous access to justice and a broader scope of review in order to satisfy the requirements of effective judicial protection, it should be distinguished from voluntarily accepted commercial arbitration ...*
>
> *A national rule such as the one at issue in the main proceedings, which attaches the force of res judicata to a CAS arbitral award, must, therefore, be set aside to give way to the possibility of a national court to exercise its power of judicial review of FIFA's rules against EU law"*

This conclusion was far-reaching, since it deprived forced arbitration within the EU of any relevant effects, i.e. to derogate the jurisdiction of state courts and to finally and bindingly dispose of a dispute with *res judicata* effects. The decision of the CJEU is, therefore, a clear and welcome rejection of all those who consider forced arbitration to be fundamentally incompatible with the principle of access to justice.

The jurisprudence of the ECtHR is in line with the CJEU.[42] The ECtHR first dealt with the phenomenon of a compulsory waiver of the right of access to justice in the *Mutu-Pechstein* case and held that imbalance of bargaining power between the parties when executing the arbitration agreement did not

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[39] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 78 ; Demaurex/Hababou, Hot Summer at CAS : Sports Arbitration Under Scrutiny in Europe, jusletter 10 November 2025, no. 29 ; Cf. Adolphsen, Umfang der gerichtlichen Überprüfung von Sportschiedssprüchen, LMK 2025, 815776.

[40] Opinion of the Advocate General (16.1.2025), *Royal Football Club Seraing v. Fédération Internationale de Football Association (FIFA) et al*, Case C-600/23. For a detailed analysis and criticism of the opinion of the Advocate General, cf. Haas/Kahlert/Rigozzi, Sports Arbitration under Threat, jusletter 19 May 2025.

[41] Opinion of the Advocate General (16.1.2025), *Royal Football Club Seraing v. Fédération Internationale de Football Association (FIFA) et al*, Case C-600/23, no. 75, 98 and 107.

[42] Demaurex/Hababou, Hot Summer at CAS : Sports Arbitration Under Scrutiny in Europe, jusletter 10 November 2025, no. 29.

invalidate the waiver of access to justice per se.[43] In the *Semenya* case the ECtHR reaffirmed this jurisprudence and stated as follows:[44]

> *"Recognising the advantages that arbitration clauses could have for the individual concerned as well as for the administration of justice, the Court has held that they do not in principle offend against the Convention"* (no. 195);
>
> *"In the area of international sports competition, there is thus a situation where private entities not governed by public law de facto regulate individuals' activity and have the capacity to restrict the exercise of their rights, thus exercising powers close to those of a public body."* (no. 202)
>
> *"Thus, even more than where arbitration is required by law, in a situation where the CAS's exclusive jurisdiction for resolving a dispute between a sports organisation and a sportsperson has been imposed on that on that person, he or she must be able to benefit from the safeguards provided for by Article 6 § 1 of the Convention"* (no. 205)

The view held by the CJEU and the ECtHR is also supported by the jurisprudence of the SFT. The latter in the *Cañas* case concluded that mandatory or compulsory arbitration does not invalidate *per se* a waiver of the right of access to state courts and does not deprive the decision issued in such a dispute resolution mechanism of *res judicata* effects.[45] However, this decision must not be misunderstood as giving powerful parties *carte blanche* to impose a mandatory arbitration mechanism on the other party under all circumstances. A key point of the SFT in allowing mandatory or compulsory arbitration was that, in this specific case, the settlement of the dispute by an arbitral tribunal was in the well-understood interests of both parties, and that the coercion exercised by one party did not, therefore, serve the pursuit of unilateral interests. It is only for this reason that the SFT showed benevolence ("*bienveillance*")[46] faced with a lack of voluntariness.[47]

The German Federal Tribunal ruled in a very similar manner. It also permitted compulsory arbitration in a sports-related case on the basis of a weighing of interests:[48]

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43 ECtHR (4.2.2019) *Mutu and Pechstein v. Switzerland*, application nos. 40575/10 and 67474/10), no. 115.
44 ECtHR (10.7.2025) *Semenya v. Switzerland*, *application no. 10934/21*.
45 SFT (22.3.2007 – 4P.172/2006), consid. 4.3.2.2.
46 SFT (22.3.2007 – 4P.172/2006), consid. 4.3.2.3.
47 SFT (22.3.2007 – 4P.172/2006), consid. 4.3.2.3.
48 German Federal Tribunal (7.6.2016 – KZR 6/15), NJW 2016, 2266 no. 58.

> *"Im Rahmen der umfassenden Interessenabwägung ist auf Seiten der Klägerin vornehmlich deren Interesse an einer Entscheidung durch ein unabhängiges (Schieds-)Gericht in einem fairen Verfahren zu berücksichtigen, auf Seiten der Beklagten ... vornehmlich das Interesse der Sportverbände an einer funktionierenden weltweiten Sportschiedsgerichtsbarkeit. Beide Gesichtspunkte betreffen jedoch nicht nur das Interesse einer Seite. Nur eine unabhängige und faire Sportschiedsgerichtsbarkeit kann weltweite Anerkennung erwarten, und jedem den fairen Wettkampf suchenden Sportler muss daran gelegen sein, dass mutmaßliche Verstöße gegen die Anti-Doping-Regeln auf internationaler Ebene nach einheitlichen Maßstäben und unter Gleichbehandlung der betroffenen Sportler aus unterschiedlichen Ländern aufgeklärt und sanktioniert werden."*
>
> **Free translation:** In weighing up the interests involved, the plaintiff's interest in a decision by an independent (arbitral) tribunal in fair proceedings must be taken into account, while on the defendant's side, the interest of the sports federations in a functioning global sports arbitration system must be considered. However, both aspects do not only concern the interests of one side. Only an independent and fair sports arbitration system can expect worldwide recognition, and every athlete seeking fair competition must be keen to ensure that alleged violations of anti-doping rules are investigated and sanctioned at international level according to uniform standards and with equal treatment of the athletes concerned from different countries.

Ultimately, the CJEU also permits compulsory arbitration only because there are good reasons for settling disputes in sport through arbitral tribunals. The CJEU, for example, states as follows:[49]

> *"It is true that that imposed recourse to arbitration may be warranted in principle, in the light of the legal autonomy enjoyed by international sports associations and having regard to their responsibilities ... , by the pursuit of legitimate objectives such as ensuring the uniform handling of disputes relating to the sporting discipline that is within the purview of their jurisdiction or enabling the consistent interpretation and application of the rules applicable to that discipline."*

The legal situation is no different under the ECHR, since also the ECtHR weighs up the interests involved when assessing the legality of a compulsory

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[49] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 94.

waiver of the right of access to justice. For the ECtHR, too, it is crucial that the use of arbitral tribunals in sport is in the objective interests of both parties, i.e. that the party with superior bargaining power did not act to the other party's disadvantage:[50]

> *"In the specific case of sports arbitration, the Court takes the view that it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which is able to give a ruling swiftly and inexpensively. High-level international sports events are held in various countries by organisations based in different States, and they are open to athletes from all over the world. Recourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal may be appealed against before the supreme court of a single country, in this case the Swiss Federal Court, whose ruling is final."*

The idea of accepting arbitration based on a balance of interest test in case of lack of voluntariness is not unique to sports arbitration. Instead, comparable situations may be encountered also in commercial arbitration. A prominent example of the above arises, where a contractual claim covered by an arbitration clause is assigned to a third party. In such case – according to most jurisdictions –[51] the assignee is bound to the arbitration clause irrespective of whether he or she consented to it or had any knowledge of its existence. The binding effect of the arbitration clause in such cases is not based on a voluntary waiver of the right of access to justice, but on a balancing of the interests of all parties involved.[52]

In summary, it should be noted that even a "compulsory" or "mandatory" waiver of the right of access to justice in the form of arbitration is legitimate if such waiver is in the well-understood interests of all parties involved.[53]

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[50] ECtHR (4.2.2019) *Mutu and Pechstein v. Switzerland*, application nos. 40575/10 and 67474/10), no. 98.

[51] Switzerland: SFT (16.10.2001 – 4P.176/2001) 128 III 50, consid. 2 b bb; Sweden: Supreme Court (15.10.1997) (1999) IntALR N-2; France: Cour Cass (5.1.1999 – No. S. 96-20.202) Rev. Arb. 2000, 85, 86; Germany: German Federal Tribunal (2.10.1997) ZIP 1997, 2082, 2083; Australia: High Court (13.-14.9.1989 and 6.3.1990) (1991) XVI YCA 521, 523; US: *Banque de Paris et des Pays-Bas v. Amoco Oil Company*, 31.10.1983, S.D.N.Y. 573 F.Supp. 1464 (1469).

[52] Haas/Kahlert, in Weigand/Baumann (eds) Practitioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, no. 21.189 seq.; Vincze, Arbitration Clause – Is it transferred to the assignee?, Nordic Jpournal of Commercial Law, issue 2003 # 1, p. 9; Hossfeld, Die Abtretung schieds- und gerichtsstandsgebundener Forderungen, 2013, p. 183 et seq.

[53] Haas/Kahlert, Im Westen (scil. Luxemburg) nichts Neues für die (Sport-)Schiedsgerichtsbarkeit?, SchiedsVZ 2025, 157, 159; Demaurex/Hababou, Hot Summer at CAS : Sports Arbitration Under Scrutiny in Europe, jusletter 10 November 2025, no. 29.

7. Extent of Judicial Review in Mandatory / Compulsory Arbitration

If the lack of voluntariness in mandatory arbitration does not undermine the legitimacy of the dispute resolution mechanism as such, the question remains whether the right of access to justice demands courts to exercise a more rigorous judicial review of the award in these circumstances.

A Direct and/or indirect judicial control

As previously noted, most jurisdictions provide for judicial control vis-à-vis arbitration in the post-arbitral stage. In principle, the various jurisdictions distinguish between direct and indirect judicial control. The former consists of an action for the annulment or appeal against the arbitral award.[54] Such action is directed against national arbitral awards, i.e. awards made in the country in which the annulment is sought. National courts, however, also exercise judicial control vis-à-vis foreign arbitral awards.[55] They usually do so based on the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), which has been ratified by over 170 states. The NYC regulates in an exhaustive manner[56] the grounds for refusal with regard to the recognition and enforcement of foreign arbitral awards.[57] Such judicial control is referred to as "indirect", since the purpose of such procedure leaves the existence of an arbitral award untouched. It merely deals with the question whether the effects of an award made in a country different from the one were recognition and enforcement is sought are to be accepted in the internal legal order.

In its *Seraing* ruling, the CJEU addressed the question of whether European law requires "direct" judicial review of arbitral awards in cases of mandatory arbitration. It correctly answered this question in the negative. In order to enforce minimum standards under European law in relation to mandatory arbitration, it is therefore not necessary for there to be a (direct) right of appeal against an arbitral award. Instead, an indirect path to review the award for its compatibility with the *ordre public* suffices.[58] In this regard, the CJEU's *Seraing* decision provides:[59]

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[54] Switzerland: Art. 190 Private International Law Act and Art. 389 et seq. Code of Civil Procedure; Germany: sec. 1059 Code of Civil Procedure; Austria: sec. 611 Code of Civil Procedure; France: Art. 1492 and 1591 seq. Code of Civil Procedure.

[55] Landolt, Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements, Arbitration International vol. 23 (2007) issue 1, p. 63, 65 seq.

[56] Haas/Kahlert, in Weigand/Baumann (eds) Practitioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, no. 21.299.

[57] According to Article VII NYC, the Contracting Parties to the Convention are free to provide for a more recognition-friendly law at national level.

[58] Bastianon/Colucci, Sports Arbitration and Effective Judicial Protection under EU Law: The RFC Seraing Case, Rivista di Drititto ed Economia dello Sport 2025 1, 9 seq.; Haas/Kahlert, Im Westen (scil. Luxemburg) nichts Neues für die (Sport-)Schiedsgerichtsbarkeit?, SchiedsVZ 2025, 157, 160; Cf. Adolphsen, Umfang der gerichtlichen Überprüfung von Sportschiedssprüchen, LMK 2025, 815776.

[59] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 76.

> *"However, ... [the right of access to justice does not imply] that individuals must have a direct legal remedy the primary object of which is to call into question a given measure, provided that one or more legal remedies also exist, in the national judicial system concerned, enabling those individuals to obtain, indirectly, effective judicial review of that measure, thereby ensuring respect for the rights and freedoms guaranteed to those individuals by EU law ... ."*

The CJEU then continues to state as follows:[60]

> *"Moreover, it must be noted that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (United Nations Treaty Series, Vol. 330, p. 3), which is not binding on the European Union, but to which all the Member States and, moreover, the Swiss Confederation are parties, also provides for judicial review of arbitral awards as regards consistency with public policy.*
>
> *... it follows from that convention that, although any State party to it must recognise the existence and the authority of foreign arbitral awards made pursuant to an agreement under which natural or legal persons have undertaken to submit to arbitration all or part of any disputes which may arise between them concerning a particular legal relationship, that obligation goes hand in hand with the obligation, for such a State, to ensure that the persons concerned have the possibility of obtaining from the national court ... a review of those awards for consistency with that State's public policy. As regards the ...* [EU-] *Member States, the latter obligation itself goes hand in hand with the obligation to ensure that those persons have the possibility of obtaining a review of those awards for consistency with EU public policy (see, to that effect, judgment of 1 June 1999, Eco Swiss, C126/97, EU:C:1999:269, paragraph 37)*."

Consequently, compulsory arbitration in favour of the CAS does not entail – as some have argued and still argue–[61] that the CAS will have to relocate its seat to an EU Member State in order to comply with the right of access

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[60] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 116 seq.

[61] Cf for example Duval, How the CJEU Should Supervise the Court of Arbitration for Sport : A Call for a Transnational Solange in the Seraing Case, VerfBlog 2025/2/18; Scheuch/Brandenberg, Was bedeutet das Urteil für die Sportgerichtsbarkeit ? Legal Tribunae Online 8.8.2025; Becker, Erhebliche Niederlage für Sportverbände, Frankfurter Allgemeine Zeitung dated 1.8.2025, https://www.faz.net/aktuell/sport/sportpolitik/eugh-urteil-zum-cas-erhebliche-niederlagefuer- sportverbaende-110618812.html (visited on 18.8.2025); Tagesschau, Gerichte dürfen CAS-Schiedssprüche prüfen, 1.8.2025; Süddeutsche Zeitung, „Ein Hammer": Höchstes EU Gericht schwächt Sportgerichtshof, 1.8.2025, https://www.sueddeutsche.de/sport/eughurteil-gerichte-sportgerichtshof-cas-li.3293035 (visited on18.8.2025).

to justice in Article 19(1) TEU. The CJEU also makes this very clear in the *Seraing* decision:[62]

> *"... the second subparagraph of Article 19(1) TEU does not necessarily imply that there must be a direct legal remedy within the territory of the European Union, such as an action for annulment, an objection or an appeal, the object of which is to enable the individuals concerned to challenge such awards, and, in so doing, to obtain from the court or tribunal having jurisdiction effective judicial review of those awards."*

In this respect, too, the CJEU's *Seraing* decision stands out favourably from the Advocate General's opinion in the same case. At the time, the latter demanded the following:[63]

> *"The principle of effective judicial protection therefore requires a direct judicial path to assess and, if necessary, to prevent the application of FIFA's rules that are contrary to EU law. ..."* (emphasis added)

The Advocate General's opinion is not convincing, because the grounds for refusal in the NYC largely correspond to the grounds on which a domestic arbitral award can be challenged in the various legal systems. This follows not least from the UNCITRAL Model Law on International Commercial Arbitration of 1985 (ML), which has served as a model for numerous national reforms of the respective laws on arbitration. The grounds justifying the challenge of a domestic arbitral award under the ML (see Article 43(2)) are taken from Articles IV and V of the NYC. In addition, the NYC – like an action to set aside the arbitral award –[64] also allows for judicial review of arbitral awards in light of public policy (Article V(2) lit. b). Both paths of judicial review (direct and indirect) are, therefore, absolutely equivalent.[65]

B The notion of ordre public

Most national legal systems – when reviewing an arbitral award in light of public policy – operate on the basis that not every mandatory rule of national law forms part of it. Instead, most jurisdiction accept that only a narrow range

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[62] CJEU (1.8.2025), *Royal Football Club Seraing SA v. Fédération internationale de football association et al*, case C-600/23, no. 99; cf. also Haas/Kahlert, Im Westen (scil. Luxemburg) nichts Neues für die (Sport-) Schiedsgerichtsbarkeit?, SchiedsVZ 2025, 157, 160 seq.; Cf. Adolphsen, Umfang der gerichtlichen Überprüfung von Sportschiedssprüchen, LMK 2025, 815776.

[63] Opinion of the Advocate General (16.1.2025), *Royal Football Club Seraing v. Fédération Internationale de Football Association (FIFA) et al*, Case C-600/23, no. 105.

[64] Switzerland: Article 190(2) lit. e PILA; for Austria: sec. 608(2) no. 8 Code of Civil Procedure; France: Article 1492 no. 5 and Article 1520 no. 5 Code of Civil Procedure; Germany: sec. 1059(2) no. 2 lit. b Code of Civil Procedure

[65] Cf. Bastianon/Colucci, Sports Arbitration and Effective Judicial Protection under EU Law: The RFC Seraing Case, Rivista di Drititto ed Economia dello Sport 2025 1, 15 seq.

of values constitute the *ordre public* (see supra). It appears questionable, however, whether this narrow concept of judicial review primarily designed for commercial arbitration is also appropriate in case of mandatory arbitration.

Some jurisdiction draw a distinction, in terms of *ordre public*, between a stricter domestic and a more liberal international *ordre public*, depending on how closely connected the facts underlying the arbitral award are to the forum state.[66] However, no national jurisdiction – to my knowledge – distinguishes between voluntary and compulsory arbitration with respect to the *ordre public*. The ECtHR, however, takes a different approach. The ECtHR advocates a more rigorous examination of the arbitral awards in case of compulsory arbitration. In its *Semenya* decision the Court stated as follows:[67]

> *"It is apparent from that case-law that an arbitral award is incompatible with substantive public policy where it constitutes a serious breach of fundamental principles of substantive law ... the Court observes that, as illustrated by the present case, what is at stake in the international sports disputes examined by the CAS may go beyond the exercise of the pecuniary or economic rights usually at issue in commercial arbitration proceedings, and concern the exercise of 'civil' rights relating, for example, to respect for privacy, bodily and psychological integrity and human dignity.*
>
> *Consequently, given the structural imbalance which characterises the relationship between sportspersons and the bodies which govern their respective sports, the Court considers that where the CAS's mandatory and exclusive jurisdiction is imposed on a sportsperson by a sport governing body, with the result that the Swiss Federal Supreme Court has jurisdiction to hear a civil-law appeal against the CAS award, in accordance with section 190 PILA; where the dispute between them concerns one or more 'civil' rights, within the meaning of Article 6 § 1, of that sportsperson; and where that or those 'civil' rights correspond, in domestic law, to fundamental rights, respect for that individual's right to a fair hearing requires a particularly rigorous examination of his or her case."* (emphasis added)

The Advocate General in the *Seraing* case argued in the same vein and stated as follows:[68]

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[66] Cf. France: Fouchard/Gaillard/Goldman, On International Commercial Arbitration, 1999, no 1647; Germany: German Federal Tribunal (23. 02. 2006 – III ZB 50/05) NJW 2007, 772 no. 28; (29. 1. 2009 – III ZB 88/07) NJW 2009, 1747 no. 27

[67] ECtHR (10.7.2025) *Semenya v. Switzerland*, Application no. 10934/21, no. 207 et seq.

[68] Opinion of the Advocate General (16.1.2025), *Royal Football Club Seraing v. Fédération Internationale de Football Association (FIFA) et al*, Case C-600/23, no. 110 et seq.

> *"Public policy control therefore does not necessarily concern every rule of EU law that bestows a right on an individual.*
>
> *That is acceptable in commercial arbitration, as it may be considered that the parties voluntarily excluded the application of some rules of a legal system, but could not exclude those of public policy.*
>
> *However, in mandatory arbitration, such as the CAS arbitration under the FIFA Statutes, the parties do not freely choose to exclude the application of some EU rules to their situation.*
>
> *Therefore, the reasons that justify a limited scope of judicial review in commercial arbitration cannot readily be applied to mandatory arbitration.*
>
> *A national court must, therefore, be able to conduct the review of FIFA rules against any and all rules of EU law, any CAS award notwithstanding."*

The CJEU in the *Seraing* case, did not follow the Advocate General's Opinion. According to the CJEU the "fundamental" principles of European law, which form part of the EU *public policy* exception, include European competition law (Articles 101 et seq. Treaty of the Functioning of the European Union – TFEU) and the fundamental freedoms, such as the freedom of movement for workers (Article 45 TFEU), the freedom to provide services (Article 56 TFEU) and the free movement of capital guaranteed by Article 63 TFEU).[69] This yardstick of judicial review is – according to the CJEU in the *Seraing* matter – identical for voluntary und mandatory arbitration.[70]

The view held by the CJEU is to be preferred over the one advocated by the ECtHR. From a procedural point of view, legal protection before the CAS (in case of compulsory arbitration) is in no way inferior to state court proceedings. The ECtHR held in the *Mutu-Pechstein* case that the guarantees of Article 6(1) ECHR applicable to state court proceedings apply in full in case of compulsory arbitration.[71] Thus, a procedural deficit for the parties concerned that would need to be compensated by way of a more rigorous judicial review, does not exist in CAS arbitration. It is incomprehensible why the standard of substantive review applicable to a decision by a state court (bound by the ECHR) should be any different from the standard applicable to an arbitral award issued by a panel

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[69] CJEU (21.12.2023), *SA Royal Antwerp Football Club v. Union royale belge des sociétés de football association ASBL (URBSFA)*, case C680/21, no. 139; cf. also Haas, in Rigozzi/Mueller (eds), New Developments in International Commercial Arbitration 2012, p. 47, 59.

[70] Landolt, The CJEU's Judgment in the RFC Seraing v. FIFA: Legal Clarity but Diminished Finality and Independence of Sports Award, Kluwer Arbitration Blog 21 August 2025; this issue is overlooked by Demaurex/Hababou, Hot Summer at CAS : Sports Arbitration Under Scrutiny in Europe, jusletter 10 November 2025, no. 30 et seq.

[71] ECtHR (4.2.2019) *Mutu and Pechstein v. Switzerland*, application nos. 40575/10 and 67474/10), no. 115.

in a compulsory arbitration proceeding that adheres to the exact same ECHR guarantees. If the ECtHR were correct, it would have to perform also a more rigorous review in a case where a claim arising from a contract covered by an arbitration clause is assigned to a third party, since such assignee has never voluntarily consented to a waiver of access to state courts. Such conclusion is obviously absurd. One can only decide otherwise, if one regards – as the ECtHR apparently does – arbitration as an inferior mechanism of dispute resolution compared to state court proceedings, warranting – in situations of unequal bargaining power – a more thorough judicial review. This, however, should not be followed. Arbitration is – provided certain procedural safeguards are complied with – a means of alternative dispute resolution that is absolutely equivalent to state court proceedings.

C The notion of breach

Most national laws do not regard an erroneous failure to apply the relevant provision as sufficient to constitute a breach of substantive *ordre public* in and of itself. Instead, they require that the specific "result" of the application be contrary to the *ordre public*.[72] This is the position in France[73], Germany,[74] Austria[75] and Switzerland[76], for example. Accordingly, an award that was rendered in violation of the applicable rules of law is not, as such, contrary to public policy. There is some controversy between the various jurisdiction whether a court is bound to the facts as established by the arbitral tribunal in the context of its *ordre public* review. The latter is the case – e.g. – in Switzerland.[77] In German law, on the contrary, this question is not yet settled.[78]

The CJEU deviates in the *Seraing*-decision partially from the above and advocates a review of the reasoning and the result, however based on the facts

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[72] Landolt, Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements, Arbitration International vol. 23 (2007) issue 1, p. 63, 70

[73] France: Cour d'Appel Paris (7.7.1989) Rev. Arb. 1990, 115, " [...] *le moyen tiré d'une violation de l'ordre public* [...] *doit porter, non sur l'appréciation que les arbitres ont faite des droits des parties au regard des dispositions d'ordre public invoquées, mais sur la solution donnée au litige* [...]"; Cour d'Appel Paris (30.3.1995) Rev. Arb. 1996, 125; Cour Cass. (4.6.2008) Rev. Arb. 2008, 473, 475 (Fadlallah).

[74] German Federal Tribunal (6.10.2016 – I ZB 13/15), SchiedsVZ 2018, 53 no. 55; Kröll/Kraft, in Arbitration in Germany, 2nd ed. 2015, sec 1059 no. 83 ; Wilske/Markert, in BeckOK ZPO, 1.9.2025, sec. 1059 no. 63.

[75] Austrian Supreme Court (5.5.1998 3 Ob 2372/96m); (8.6.2000 2 Ob 158/00z); Liebscher, in Liebscher/Oberhammer/Rechberger (eds.) Schiedsverfahrensrecht, Bd. 2, 2016, no. 11/271.

[76] SFT (30.3.2023 – 4A-420/2022), consid. 8.1.1; (13.3.2023 – 4A_312/2017, consid. 3; cf. also Girsberger/Voser, International Arbitration, 5th ed. 2024, no.1939.

[77] Switzerland: SFT (30.3.2023 – 4A_420/2022), consid. 10.1; Girsberger/Voser, International Arbitration, 5th ed. 2024, no.1939; cf. for a comparative analysis, cf. Landolt, Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements, Arbitration International vol. 23 (2007) no. 1, p. 63, 83; Harbst, Korruption und andere *ordre public*-Verstöße als Einwände im Schiedsverfahren – Inwieweit sind staatliche Gerichte an Sachverhaltsfeststellungen des Schiedsgerichts gebunden?, SchiedsVZ 2007, p. 22, 25 et seq.

[78] Situation in Germany is controversial, cf. Higher Regional Court of Cologne (23.4.2004 – 9 Sch 01/03), SchiedsVZ 2005, 163, 165 on the one hand and on the other, Higher Regional Court of Düsseldorf (21.7.2004 – VI-Sch 1/02), no. 24; Voit, in Musielak/Voit (eds.) 22nd ed. 2025, sec. 1059 no. 30.

as established by the arbitral tribunal. The pertinent paragraph of the judgments reads as follows:[79]

> *"... the courts or tribunals of the Member States that are called upon to carry out such a review must, where such an award involves, as in the present case, an interpretation or application of the principles or provisions which form part of EU public policy and which confer rights or freedoms on individuals, be able to review the interpretation of those principles or provisions, the legal consequences attached to that interpretation as regards their application to the case at hand, and the legal classification which was given, in the light of that interpretation, to the facts as established and assessed by the arbitration body."* (emphasis added)

The ECtHR in the Semenya decision goes far beyond the above. Its "*particularly rigorous examination*" is not limited to the outcome or the result of the arbitral tribunal's finding. Instead, the ECtHR in its decision undertakes a very detailed analysis of the reasoning of the CAS award, i.e. its length, the evidence assessed by the panel, the legal principles applied by it and whether the panel in its view "exhaustively" dealt with the arguments of Ms Semenya. The ECtHR found that there was a lack of reasoning, that the CAS award dismissing Ms Semenya's appeal was somehow "ambiguous" and that the SFT's decision to dismiss Ms Semanya's appeal on grounds of public policy "*did not reach the required level of rigour*", because it failed – inter alia – to sufficiently distinguish the Semenya case from the Matuzalam case[80]. It is quite obvious that the ECtHR in the *Semenya* case – to a certain extent – not only reviewed the CAS decision, but – comparable to a court of appeal – substituted its own assessment for the one of the arbitral tribunal and the SFT. Such approach is – as shown above – not persuasive. This is all the more true considering that the dividing line between "voluntary" and "compulsory" arbitration is somehow blurred. There are many situations of unequal bargaining power in arbitration in practice (e.g. intra-company disputes or trust disputes) and it appears difficult to find a clear-cut, binary criterion to distinguish where arbitration among private parties is to be regarded as (in-)sufficiently consensual.[81]

8. Conclusion

➢ When assessing the implications of the right of access to justice, the ECtHR and the CJEU operate under two different frameworks. However,

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[79] CJEU (21.12.2023), *SA Royal Antwerp Football Club v. Union royale belge des sociétés de football association ASBL (URBSFA)*, case C680/21, no. 101 ; cf. also Landolt, The CJEU's Judgment in the RFC Seraing v. FIFA: Legal Clarity but Diminished Finality and Independence of Sports Award, Kluwer Arbitration Blog 21 August 2025.

[80] In the so called Matuzalam case, the SFT set aside the CAS award for violation of the substantive Swiss *ordre public*, SFT (27.3.2012 – 4A_558/2012) 138 III 322, consid. 4.3.2 et seq.

[81] Weible/Cerqueira/Viret, The Legal Implications of the Semenya Ruling from a Swiss Perspective, strasbourgobservers 10 October 2025, 2 B.

the contents of the right of access to justice under the two legal instruments (Article 19(1) TEU and Article 6(1) ECHR) is similar.

➢ Both, the ECtHR and the CJEU accept that the parties can waive the right of access to justice by resorting to arbitration. However, both Article 19(1) TEU and Article 6(1) ECHR require that national courts must retain a certain degree of control over arbitration in order to ensure compliance with some minimum standards.

➢ Neither European law nor the ECHR regulate how judicial review shall be exercised by the courts. Both leave it to the law of the relevant states how to implement such judicial review. Insofar, the states concerned enjoy a certain margin of discretion. Most jurisdiction provide for judicial control vis-à-vis arbitration in the post-arbitral phase. Depending on whether the award is a domestic or a foreign award, courts exercise judicial control either in setting aside procedures against arbitral awards or in the context of recognition and enforcement.

➢ Dispute resolution in sports is characterized by the fact that – frequently – arbitration agreements are unilaterally imposed by sports organisations on other stakeholders. Sports arbitration is, thus, often "mandatory" or "compulsory", which undermines party autonomy and, thus, the concept of a waiver of the right of access to justice.

➢ National and "international" courts struggle to find an appropriate response to this deficit in party autonomy in sports arbitration. Both the ECtHR and the CJEU accept now that the mere fact that the waiver of the right of access to justice was (unilaterally) imposed on one of the parties does not *per se* invalidate the alternative dispute resolution mechanism. Instead, both courts perform a balancing of the interests involved. It follows from this test that in case the waiver of the right of access to courts is in the (objective) interest of both parties, the agreement must be upheld.

➢ Whether the lack of party autonomy in sports arbitration needs to be compensated, in addition to the above, by a more rigorous judicial review of the arbitral award is disputed. To this question, the CJEU gives a much more arbitration-friendly answer than the ECtHR.[82] While the CJEU denies different review standards in the context of ordre public depending on whether the arbitration is voluntary or compulsory, the ECtHR advocates a more rigorous examination in case of compulsory arbitration. The latter view is highly problematic and should be reconsidered.

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[82] Contra Demaurex/Hababou, Hot Summer at CAS : Sports Arbitration Under Scrutiny in Europe, jusletter 10 November 2025, no. 33 et seq.