TENSION BETWEEN PARTY AUTONOMY AND EU POLICY IN INTERNATIONAL ARBITRATION: *SERAING* AND THE CJEU ARBITRATION SAGA

ANASTAZJA MARIA PIECHULA,* SAMUEL IKEM CHIRA**

I. INTRODUCTION

If the Court of Justice of the European Union ("CJEU") has a signature colour, it is unmistakably red – either because arbitration agitates the Court like a bull teased by a matador's cape, or because the Court stands poised to flash yet another red card against arbitral autonomy. In the recent case of *Royal Football Club Seraing v FIFA* ("Seraing"),[1] the CJEU held that a sports arbitration award cannot be accorded binding effect within a Member State when it concerns EU public policy unless it has undergone judicial review by a court that can make a preliminary reference to the CJEU. The Court justified its decision by claiming to apply it only to "mandatory" (sports) awards, conditioned on an intra-EU economic criterion. However, once an intra-EU link is established and the Court finds that the arbitration

*LL.M. Candidate, New York University School of Law. Research Assistant at the NYU Rule of Law Lab. Graduate Editor of the N.Y.U. Journal of International Law and Politics.

The views expressed herein are solely those of the author and do not necessarily reflect the views of any institution with which the author may be affiliated.

**LL.M. Candidate, International Business Regulation, Litigation and Arbitration, New York University School of Law. Graduate Editor of the N.Y.U. Journal of International Law and Politics.

The views expressed herein are solely those of the author and do not necessarily reflect the views of any institution with which the author may be affiliated.

1. *Royal Football Club Seraing SA v. Fédération Internationale de Football Association (FIFA)*, C-600/23, ECLI:EU:C:2025:617 (C.J. Aug. 1, 2025).

proceedings resulted from a significant power imbalance between the parties, the ruling may torpedo arbitral autonomy beyond sports arbitration by inviting ex ante judicial oversight in place of post hoc enforcement review. This commentary will analyze key issues in *Seraing* and discuss whether these features, when considered together, suggest that the judgment may serve as a tool to torpedo arbitration proceedings, thereby having a serious chilling effect on their existence.

II. CONTEXTUAL BACKGROUND

To fully comprehend the significance of the *Seraing* judgment, it is essential to first look at how the CJEU progressively dismantled intra-EU investment arbitration. Over the past decade, the Court has issued a series of high-profile rulings that have established a consistent body of jurisprudence that effectively forecloses the availability of investor-state arbitration within the EU legal order.

Long before the CJEU's first judicial intervention, the European Commission ("EC") voiced its concerns about the compatibility of intra-EU bilateral investment treaties ("BITs") with mandatory provisions of EU law and the EU's judicial system.[2] In an *amicus curiae* brief, the EC labeled intra-EU BITs an "anomaly within the EU internal market".[3] This set the stage for the CJEU's doctrinal intervention in *Achmea*.[4]

In *Achmea*, the CJEU held that investor-state arbitration clauses[5] in intra-EU BITs are incompatible with EU law, as they remove disputes on EU law from the EU's judicial system.[6] The CJEU emphasized that tribunals established under the BIT may be required to interpret and apply EU law in the course of the arbitration proceedings.[7] Yet, arbitral tribunals do not qualify as a "court or tribunal of a Member State" pursuant to Article 267 TFEU,[8] and are therefore not entitled to refer questions to the CJEU for preliminary judgment.[9] Thus, an arbitral award must be subject to review by a court of a

---

2. See, *Eureko B.V. v. Slovak Republik*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, at para. 177 (26 October 2010).

3. *Id.*

4. *Slovak Republic v Achmea BV*, Case C-284/16, at para. 56, 6 March 2018.

5. Investor–State arbitration clauses are treaty or contract provisions that grant foreign investors the right to submit disputes with a host State to binding international arbitration.

6. *Id.* at para. 56.

7. *Id.* at paras. 41 et seq.

8. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 26, 2012, 2012 O.J. (C 326) 47.

9. *Slovak Republik v. Achmea BV* at paras. 43 et seq.

Member State that can refer any question of EU law to the CJEU for preliminary judgment in accordance with the provisions of Article 267 TFEU.[10] Limited – and deferential – judicial review by national courts is insufficient if it does not enable the national court to refer to the CJEU for preliminary judgment.[11] Accordingly, *Achmea* established that intra-EU BIT arbitration is fundamentally incompatible with the EU legal order.

In a subsequent judgment, the CJEU extended its reasoning to cases involving the Energy Charter Treaty ("ECT")[12] In *Komstroy*, the CJEU held that Article 26 ECT – settlement of disputes between investors and contracting parties[13] – cannot be relied upon for disputes between an EU investor and another Member State. This conclusion is drawn from the CJEU's determination that the ECT forms an integral part of EU law. This requires any arbitral tribunal constituted in conformity with the ECT to interpret and apply EU law.[14] Consequently, the CJEU held that Article 26(2)(c) ECT must be inapplicable to disputes between a Member State and an investor of another Member State.[15] Although the underlying dispute involved non-EU parties, *i.e.* neither an EU investor nor a Member State, the CJEU asserted jurisdiction because (i) the ECT applies to areas falling within the scope of EU law and therefore requires uniform interpretation, and (ii) the parties freely selected a seat within the EU, Paris, triggering the applicability of EU law.[16] Nonetheless, the jurisdiction of the CJEU was debated.[17]

Subsequent decisions reaffirmed and expanded upon this stance with regard to intra-EU investment arbitration. In *PL Holding*, the CJEU confirmed that *Achmea* may not be circumvented by concluding ad hoc arbitration agreements that mirror intra-EU BITs. As such, intra-EU ad hoc investment arbitration is equally non-conformant with EU law.[18] In another decision, the CJEU upheld the EC's

10. *Id.* at para. 50.

11. *Id.* at paras. 52 et seq.

12. Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95.

13. *Id.,* Art 26.

14. *Republic of Moldova v Komstroy LLC*, Case C-741/19, at para. 49 et seq (2 September 2021).

15. *Id.* at para. 66.

16. *Id.* at paras. 29 et seq.

17. *Id.* at para. 21.

18. *Republic of Poland v PL Holdings Sàrl*, Case C-109/20, para. 47, 26 October 2021.

determination that an intra-EU award may qualify as unlawful state aid that is incompatible with the internal market.[19]

These decisions establish a clear doctrine: intra-EU investor-state arbitration, regardless of whether it is based on BITs, the ECT or ad hoc agreements, is incompatible with EU law, preventing awards resulting from such arbitration from enforcement within the EU.

Similarly, in commercial arbitration cases, such as *Eco Swiss*[20] and *ISU,*[21] the CJEU has established that arbitral awards may be subject to review on EU public policy grounds at the annulment or enforcement stage. This is particularly true when mandatory arbitration combined with limited judicial review risks reinforcing violations of EU law. Notably, *ISU* laid the groundwork for the Court's subsequent judgment in *Seraing*. In other words, these cases establish that such review may occur after arbitration proceedings conclude.

This concern is mirrored in a parallel Straßbourg case, *Semenya v. Switzerland*,[22] The ECtHR held that the limited review exercised by Swiss courts over Court of Arbitration for Sport ("CAS") awards failed to provide an effective remedy in the context of mandatory sports arbitration. Echoing *ISU* and anticipating *Seraing*, Semenya is based on the premise that when access to arbitration is unilaterally imposed, deferential post-award review can reinforce violations of higher-order legal norms.[23]

III. *SERAING* JUDGMENT

The *Seraing* judgment is a continuation of that saga, with a new grain of novelty. The case concerned a dispute between FIFA and the Belgian Royal Football Club Seraing, which arose from Seraing's agreements with Doyen Sports Investment, which gave Doyen economic rights over four Seraing players. Consequently, the FIFA Disciplinary Committee held that by entering into those agreements, Seraing was in breach of the Regulations on the Status and Transfer of Players and

19. Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013, in Official Journal of the European Union, Volume 58, 4 September 2015, Article 1; Judgment of the General Court (Second Chamber, Extended Composition), para. 160, 2 October 2024, ECLI:EU:T:2024:659.

20. *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, Case C-126/97, 1999 E.C.R. I-3055.

21. *International Skating Union v. European Commission*, Case C-124/21 P, ECLI:EU:C:2023:1012 (C.J. Dec. 21, 2023).

22. *Semenya v. Switzerland*, No. 10934/21, European Court of Human Rights (Grand Chamber), Judgment (July 10, 2025).

23. *Id.* at para. 209.

imposed relevant sanctions. As a result, Seraing initiated arbitration proceedings at the CAS, with virtually the same result.[24] The club proceeded to unsuccessfully challenge the award before the Swiss Supreme Court, while simultaneously bringing proceedings in Belgium. The case went up to the Belgian Court of Cassation, which referred two questions to the CJEU. The Court grappled with the interpretation of the second subparagraph of Article 19(1) TEU (on providing effective legal protection in areas covered by EU law), Article 267 TFEU (on CJEU's power to issue preliminary rulings) and Article 47 of the Charter of Fundamental Rights of the EU (on the right to an effective remedy and to a fair trial).[25] The CJEU asked whether these provisions, read in conjunction, must be interpreted as, first, barring *res judicata* authority of a CAS arbitral award within an EU Member State, and second, as a consequence of that authority, whether the arbitral award has probative value on the parties to the dispute as well as third parties within the EU.[26]

The CJEU first made general observations as to the nature of arbitration and EU public policy and then narrowed down the scope by considering mandatory CAS arbitration.[27] The Court stated that arbitral awards related to intra-EU economic activity and implemented within the EU must: reflect the "judicial architecture" of the EU, be in compliance with EU public policy, and be capable of judicial review to offer substantive judicial protection.[28] The Court then classified the three freedoms (workers, services, capital) and competition law rules under Article 101 and 102 TFEU as constituting EU public policy, as they are inherent to the functioning of the internal market (Article 26 TFEU).[29]

Building on this, the Court set a standard for judicial review which sport arbitral awards within the EU must meet: the reviewing court must be able to verify, in substance, whether the arbitral process has adequately safeguarded the effectiveness of EU law in light of both the award's subject matter and its economic connection to the internal market. Because CAS arbitration is, in practice, mandatory for clubs and athletes, the Court reasoned that the absence of freely negotiated consent heightens the need for judicial oversight. Thus, whenever an arbitral award pertains to an activity pursued within the EU's economic space, the national court must ensure that the award neither

24. *Seraing* at paras. 25 et seq.
25. *Id.* at paras. 43 et seq.
26. *Id.* at para. 68.
27. *Id.* at paras. 69 et seq.
28. *Id.* at paras. 82 et seq.
29. *Id.* at paras. 87 et seq.

undermines fundamental freedoms nor impairs the uniform application of competition law. In this way, the Court linked the mandatory character of CAS arbitration with the economic-activity trigger, setting the stage for the broader implications explored in the next section.

This holding was also a retreat from Attorney General Ćapeta's opinion, in which she favored a very wide interpretation of *ISU*, suggesting that all awards rendered as a result of "mandatory" arbitrations require review by Member States' courts, without any connecting criteria – not even an economic one.[30]

IV. THE "VOLUNTARY ARBITRATION" QUESTION

According to *Seraing*, where CAS jurisdiction is unilaterally imposed by sports regulators, enhanced judicial supervision is required in order to ensure effective judicial protection. This approach narrows AG Ćapeta's opinion, as she distinguished mandatory sports arbitration from commercial arbitration on two grounds: (i) the absence of genuine voluntary acceptance of the arbitration clause; and (ii) the system's "self-enforcement," which deprives EU courts of the ordinary enforcement moment that can trigger EU-law review. In the AG's view, those features weaken the usual justification for *Eco Swiss*–style deference and support broader Member State review than the CJEU ultimately adopted.[31]

Importantly, in its judgment, the CJEU recognized that arbitration concerning international sports associations is of a unilaterally imposed character, rendering it a "mandatory" dispute mechanism.[32] This feature, according to the Court, makes effective judicial review even more important, given the *sui generis* power of sports associations.[33] Therefore, the Court distinguished between mandatory and voluntary arbitration, implying that the latter would enjoy more freedoms from scrutiny, giving greater weight to party autonomy.[34] The open-ended question emerging from *Seraing* is how far the Court's ruling extends beyond that mandatory sports arbitration.

---

30. Phillip Landolt, The Advocate General Opinion in Seraing vs FIFA: A Cautionary Tale, *Kluwer Arbitration Blog* (Mar. 17, 2025), https://legalblogs.wolterskluwer.com/arbitration-blog/the-advocate-general-opinion-in-seraing-vs-fifa-a-cautionary-tale/

31. Opinion of Advocate General Ćapeta, Case C-600/23, *Royal Football Club Seraing v. Fédération Internationale de Football Association (FIFA)*, ECLI:EU:C:2025:24, at paras. 70 et seq. (Jan. 16, 2025).

32. *Id.* at paras. 90 et seq.

33. *Id.* at para. 93.

34. *Seraing* at para. 80.

The answer is uncertain. It is conceivable that the judgment will share the fate of *Komstroy*, which arbitral tribunals have largely treated as irrelevant to their own jurisdiction and whose practical impact has been confined to intra-EU enforcement. Yet, *Seraing* is different. Unlike investment arbitration, international commercial arbitration is deeply embedded in domestic private law and supervised closely by national courts, particularly through the lex arbitri. For that reason, the *Seraing* judgment may well extend beyond the confines of mandatory sports arbitration and impose meaningful constraints on party autonomy in ostensibly voluntary commercial arbitration.[35] This is amplified by the fact that the line between "mandatory" and "voluntary" arbitration is often blurry in practice, suggesting that the Court may have given this distinction far greater analytical weight than it can realistically bear.[36]

That indeterminacy is not merely a matter of classification. It is crucial because *Seraing*'s *res judicata* holding is not merely a procedural framing; it is the judgment's most radical and disruptive move – and the feature that can, in practice, torpedo arbitration.[37] The Court effectively reclassifies non-EU CAS awards within the Union: until an EU court capable of making a preliminary reference has reviewed an award for compatibility, Member State courts must deny it any legal effect. That denial operates on two levels: courts must refuse to recognize both (i) the award's binding authority between the parties (*res judicata*) and (ii) its evidentiary weight against third parties (*probative value*).

This is an obvious temporal inversion of the New York Convention framework, which provides for a recognition system in which awards are immediately binding and enforceable, subject only to subsequent refusal or setting-aside on limited grounds; *Seraing*, by contrast, makes legal force inside the EU contingent on affirmative judicial validation, requiring award-holders to secure EU-court approval before their awards acquire finality.[38]

Under *Seraing*, CAS awards lack legal force in the Union unless and until they are affirmatively validated. The Court further provides that this review may occur indirectly, in any proceeding in which the award is invoked, not only in enforcement or annulment.[39] The

---

35. Felix Dasser, President's Message – Welcome to the Age of Chaos, 5 Aug. 2025, 43 Swiss Arbitration Association Bulletin 2/2025, at 265 et seq.

36. Felix Dasser, President's Message: CJEU: Get Off That Slippery Slope, Before It's Too Late, Please!, 43 ASA Bull. 1/2025, at 1 et seq.

37. Charles N. Brower, *How the European Union Acts as an Empire of Yore Seeking to Destroy International Arbitration Globally*, TLJ 2025, 193

38. *Id.*

39. *Seraing* at para. 76.

consequence is persistent legal uncertainty, as such awards remain vulnerable to challenge across multiple Member State jurisdictions until the requisite review is completed – if it is ever completed at all.[40]

Seraing risks becoming a gateway decision that, while formally limited to the *sui generis* world of sports arbitration, provides the conceptual architecture for extending EU-law constraints deep into the voluntary realm of commercial arbitration. Once the Court anchors its intervention in the combination of an intra-EU economic link and a finding (however constructed) that consent was not meaningfully negotiated, many commonplace commercial arrangements begin to resemble "*de facto* mandatory" arbitration in the Court's eyes. The result is an elastic test that empowers EU courts to treat arbitration as subject to *ex ante* public-law supervision rather than *post hoc* enforcement review.[41]

V. THE "CONNECTION CRITERIA"

The aforementioned case law has highlighted the CJEU's sustained effort to dismantle intra-EU investment arbitration. Although the CJEU's jurisdiction has been disputed,[42] the scope of applicability has remained clear. The prohibition applies where a dispute arises between an EU investor and another Member State[43] or in cases where the arbitral tribunal is constituted under an instrument of EU law, coupled with a sufficient connection to EU territory.[44]

By contrast, *Seraing* does not operate on a treaty-based or party-based criterion. Instead, the CJEU seems to establish an "effects-based" connecting factor by referring to the pursuit of an *economic activity* in the EU.[45] Where such a link exists, the dispute settlement mechanism must be compatible with the EU's judicial architecture and must be compliant with EU public policy.[46] In other words, an arbitral award adjudicating a dispute relating to an economic activity within the EU must not be accorded binding effect on a matter touching on EU public policy within a Member State, without prior review by a court capable of making a preliminary reference to the CJEU. Applied within the narrow confines of "mandatory" arbitration, as the CAS system at issue, this approach does not seem to disrupt present practice.

---

40. Brower, supra note 34.
41. Brower, supra note 34.
42. *Komstroy* at para. 21.
43. *Achmea* at para. 60.
44. *Komstroy* at para 31.
45. *Seraing* at para. 82.
46. *Id.*

However, in the preceding section, this article has explored the possible expansion of "mandatory" arbitration to certain scenarios of *de facto* mandatory arbitration in commercial arbitration. In these circumstances, difficulty may emerge. If the connecting factor in *Seraing* is read broadly, parties who intentionally selected a non-EU seat and non-EU law to avoid EU oversight may nonetheless find themselves unable to enforce an arbitral award in the EU, that touches on EU law issues, if the dispute is sufficiently connected to economic activity within the EU territory. This may become especially acute in cases where the characteristic performance is performed outside the EU, yet the contract requires some element of economic activity – however ancillary – within the EU territory.

This could raise doctrinal uncertainty over whether any economic activity within EU territory suffices to trigger the standards established in *Seraing*, or whether a more substantial link is required. This interpretation of "economic activity" will determine whether *Seraing* remains limited in its application or whether it has the potential to disrupt the finality and enforceability of arbitration agreements whose sphere of application happens to intersect with EU interest.

VI. INTERIM MEASURES

Even though arbitral tribunals are not obliged to stay proceedings due to a pending preliminary referral to the CJEU, such parallel proceedings may nonetheless exert a sufficiently chilling effect on the non-invoking party, raising doubts about the enforceability of a future award and undermining the economic rationale of pursuing arbitration altogether.

In *Seraing*, the CJEU has gone one step further from previous case law. Prima facie, the Court in *Eco Swiss* held that courts at the seat must apply EU public policy rules, even if they extend beyond national public policy, to annul an award on this basis.[47] Seraing broadens the scope of Eco Swiss, as compliance with EU public policy was previously sought at the annulment stage and building on the *ISU* judgment,[48] at the enforcement stage.

Following from the principle of "full effectiveness" of judicial review, national courts, if properly seized, must have the power to assess whether an arbitral award aligns with EU public policy principles without having to wait on a decision on the substance of the case. This

47. *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, Case C-126/97, 1999 E.C.R. I-3055.

48. *International Skating Union v. European Commission*, Case C-124/21 P, ECLI:EU:C:2023:1012 (C.J. Dec. 21, 2023).

necessarily includes the ability to refer to the CJEU for preliminary judgment.[49] In *Seraing*, the Court clarified that this power exists irrespective of sports association rules that prohibit recourse to state courts for interim measures.[50] Therefore, Member State courts must disapply such rules when they hinder effective judicial protection. According to this reasoning, CAS Procedural Rule R.37.3 (2025), insofar as it restricts applications for interim relief before national courts, loses its effect within the EU legal order when EU public policy is at stake.

Admittedly, the CJEU states that such powers are necessary only in cases of "an arbitration body whose jurisdiction is, in practice, unilaterally imposed […]".[51] Considering the inclusion of "in practice" and the potential spillover effect to a wider set of arbitrations that may include a *de facto* mandatory mechanism, such interim measures – especially referring to the CJEU for preliminary judgment – have the potential to significantly torpedo commercial arbitration proceedings in the future.

VII. CONCLUSION

The CJEU should recognize where its bullring ends, instead of stretching its perimeter each time an arbitration case steps inside. Due process rights and the rule of law should not be trumped by party autonomy. However, creating a test based on an enigmatic "economic activity" linked to the EU, which is supposed to apply in cases which are in practice not well defined ("mandatory arbitration") and could be considered de facto mandatory also does not provide for more clarity and protection of the rule of law. By making the legal force of non-EU CAS awards contingent on prior validation by a reference-capable Member State court and permitting that review to arise incidentally in any proceeding, *Seraing* establishes a durable mechanism of uncertainty that can be deployed to destabilize arbitral finality across the EU. If parties wish to derogate from their right to a more rule of law-based system, they should be able to do so without torpedoing arbitration proceedings, thereby causing a chilling effect and undermining the rationale of pursuing arbitration.

49. *Seraing* at paras. 105 et seq.
50. *Id.* at para. 107.
51. *Id.* at para. 106.