**Diritto dello Sport (ISSN 2785-1141)** Fondazione Bologna University Press
Vol. 6 n. 1 (2025) https://doi.org/10.30682/disp0601d

# PRELIMINARY REMARKS ON THE *SERAING* CASE, PENDING JUDGMENT*

**Elena Zucconi Galli Fonseca**

Full Professor of Civil Procedure in Bologna University

**Abstract**

*La relazione presentata in occasione della Conferenza annuale Sport&EU del 2025, affronta in maniera critica i temi della prossima decisione della Corte di giustizia dell'Unione europea nel caso Royal Football Club Seraing. La questione principale trattata è se i lodi arbitrali pronunciati al di fuori dell'Unione europea possano produrre effetti di cosa giudicata negli Stati membri quando siano coinvolti profili di ordine pubblico europeo. L'analisi si concentra su tre aspetti fondamentali: il riconoscimento incidentale dei lodi arbitrali stranieri, le vulnerabilità strutturali dell'arbitrato sportivo e la necessità di rafforzare le garanzie procedurali nell'ambito del procedimento arbitrale stesso, piuttosto che ricorrere a un controllo giurisdizionale ex post. Attraverso richiami a settori giuridici affini, l'autrice sostiene l'opportunità di introdurre meccanismi di natura preventiva all'interno del procedimento arbitrale e auspica una maggiore attenzione da parte degli arbitri alle istanze dell'Unione europea, eventualmente sostenuta da forme di collaborazione istituzionale con gli organi dell'UE.*

Keywords: Arbitrato sportivo TAS, Ordine pubblico dell'UE, Riconoscimento dei lodi

**Abstract**

*This speech, delivered at the 2025 Annual Sport&EU Conference, critically addresses the upcoming European Court of Justice ruling in the Royal Football Club Seraing case. At stake is whether arbitral awards issued outside the EU can have res judicata status within Member States when EU public policy is implicated. The analysis focuses on three core issues: the incidental recognition of foreign arbitral awards, the structural vulnerabilities of sports arbitration, and the need to strengthen procedural guarantees during arbitration itself rather than through ex-post judicial review. Drawing parallels with other legal domains, the speaker argues for preventive mechanisms within the arbitral process and for arbitrators' greater attention to EU public policy, possibly supported by institutional collaboration with EU bodies.*

Keywords: Tas Sports Arbitration, EU Public Policy, Recognition of the award

* This is the text of the speech delivered at the *2025 Annual Sport&EU Conference*, on 1 July 2025

### 1. The *Seraing* Case

On 1 August 2025, the European Court of Justice will decide on the *Royal Football Club Seraing* case. At the heart of the matter lies a critical question: can an arbitral award issued in a non-EU country, and subject to the supervision of a court that is not integrated into the EU legal order, acquire *res judicata status* within a Member State when it touches upon issues relating to European public policy?

The Advocate General's Opinion raises serious concerns for the future of sports arbitration in Europe. It can be summarised as follows.

a) Individuals domiciled in the EU have the right to obtain a complete review of arbitral awards based on conformity with EU law, not merely limited to the public policy (as in the Eco Swiss doctrine), but encompassing all EU law.

b) The New York Convention should be interpreted in line with this requirement.

c) The possibility that arbitral awards may still have evidentiary value in national proceedings can be acceptable. Does this mean that all extra-EU arbitral awards relevant to the European legal order are now in jeopardy?

In my talk, I would like to highlight three aspects.

a) The case submitted to the Court of Justice raises a preliminary issue concerning the more general problem of incidental recognition of foreign arbitral awards.

b) The vulnerabilities of sports arbitration, which are also present in other fields, call for solutions that both safeguard the "law of the group" and provide a mechanism that respects legal guarantees.

c) These solutions should be ensured during the arbitration process itself, rather than afterwards, in accordance with the principle that prevention is better than cure.

### 2. Incidental Recognition of Foreign Arbitral Awards

The reading of the judgment of the Brussels Court of Appeal raises at least three questions.

The first concerns the decision capable of producing *res judicata*. The appeal before the Swiss Federal Tribunal has what, under the Italian legal system, is known as a rescinding nature: its object is solely the validity or invalidity of the arbitral award. Therefore, when the appeal is dismissed, it is not a state court judgment that becomes final (and thus produces the effects of substantive res judicata), but rather the arbitral award itself. And if this is the case, the issue is not the circulation of a foreign judgment, but the recognition of arbitral awards under the New York Convention.

This leads to the second question: in the *Seraing* case, we are dealing with a situation of so-called incidental recognition, which occurs when a party relies on the effects of the arbitral award in a different proceeding, as the recognition is raised not by way of action but by way of exception. The Belgian court takes for granted that incidental recognition is automatic in that legal system, unlike recognition by way of action. However, in other European legal systems, such as the Italian one, incidental recognition still requires a control—albeit incidental—of


doi.org/10.30682/disp0601d

public policy, as provided for by the New York Convention in the recognition of foreign awards. In this way, European public policy remains protected, even when the award is invoked by way of exception.

Finally, the third question concerns the object of *res judicata*. As noted by Sébastien Besson, the arbitral award is invoked not in relation to its operative part, which merely imposes a sanction, but rather in relation to the reasoning that led to the decision. Can the reasoning of a decision be treated as binding in another proceeding, even if the latter does not concern the same claim or a dependent claim? In the Italian legal system, at least up to now, due to the autonomy of the sports legal system, it is quite possible for the disciplinary sanction to remain effective while, at the same time, a civil court grants compensation for the damages resulting from its unlawfulness.

### 3. The three vulnerabilities of sport arbitration

The Court of Justice in the ISU case, and even earlier, the European Court of Human Rights in the *Pechstein-Mutu* case, considered that the need for ad hoc rules is justified on the basis of three critical issues that characterise sports arbitration.

a) Athletes and sports organisations typically operate under severe contractual imbalance.

b) In the vast majority of cases, CAS awards do not require enforcement by state courts, as their implementation is ensured through sporting sanctions, which may be far more coercive than judicial enforcement.

c) Both the *lex arbitri* and *lex causae* are, by institutional design, external to the EU legal space—even though CAS awards have direct and substantial effects within it; it follows that the arbitral award is subject to review by a court (the Swiss Federal Tribunal) that cannot make preliminary references to the CJEU and is not bound by EU law.

But are we sure that sport arbitration is an exceptional, stand-alone phenomenon? a) The first vulnerability: "forced" consent to arbitration. The existence of a single, supreme arbitral authority for sport, designed to ensure uniform interpretation and application of *lex sportiva*, necessarily implies that all professional athletes must submit to its jurisdiction for any dispute connected to their sporting activity. This generates two fundamental issues:

- First, the arbitration clause is often indeterminate, raising formal validity concerns, as noted by the Brussels Court of Appeal in Seraing.
- Second and more importantly, the so-called "consent" to arbitration is substantially weakened, "forced" as clarified by the ECtHR in *Pechstein-Mutu* and accepted by the CJEU.

The terminology used (forced arbitration) can have different meanings. Under Italian constitutional law, arbitration imposed by the law is contrary to the Constitution. But what these Courts are really highlighting is the power imbalance: private sports bodies, within a context of effective monopoly, impose arbitration on weaker parties. This, in turn, justifies heightened scrutiny with respect to procedural fairness and compliance with EU public order.


doi.org/10.30682/disp0601d

In Italy, company law raises a similar issue concerning the "law of the group": shareholders may be bound by an arbitration clause introduced into a company's articles of association, even if they dissented, though their only remedy is withdrawal, with no assurance of access to similar opportunities elsewhere. And yet, arbitration is permitted.

b) The second vulnerability: the lack of exequatur. Because sports law tends to be self-executing—enforced through internal sanctions rather than state mechanisms—there is often no need for a CAS award to be submitted to a national court for enforcement. As a result, the opportunity for judicial review, particularly in light of EU public policy, may never arise.

This "closed" nature of the sports regulatory order, it is said, is a defining feature, and one less commonly encountered in commercial arbitration. But, what about major online marketplaces whose conduct can significantly affect European consumers, irrespective of whether arbitral awards involving them are enforced in the EU? As recognised by the Court, relevance to the EU legal order does not hinge on whether the award is enforced within a Member State, but rather on whether it produces legal or economic effects within that space. I am also thinking of arbitration solutions based on blockchain, designed to be self-executing through the incorporation of the algorithm into the smart contract.

c) The third vulnerability: both the *lex arbitri* and *lex causae* are external to the EU legal space. The reasoning adopted by the Court of Justice could readily extend to arbitrations of all kinds seated in Switzerland—or, indeed, in any third country, so it cannot be regarded as a decisive factor.

#### 4. Prevention is better than cure

If it is true that these features can be found in other sectors as well, then, rather than designing a special system for sports arbitration, it would be more useful to identify and mitigate the structural vulnerabilities of arbitration wherever they arise.

I don't think that the right solution should be reopening the merits of arbitral decisions within the EU, with all the legal uncertainty that would entail.

One solution invoked is to simply relocate the arbitral seat within the EU (UEFA itself has taken such steps in its 2024 *Authorisation Rules*, allowing parties to select Ireland as the seat in derogation of CAS Rule R28). This "Eurocentric" approach - probably unlikely to gain broad international support - would satisfy the Court; nonetheless, we must ask whether this is truly the most effective safeguard. The duration of CJEU proceedings remains a serious concern—even post-reform—and sport demands not only fairness but also speed.

I think that prevention is better than cure: the most effective remedy lies in enhancing compliance with EU law during the arbitral phase itself.

Regardless of the applicable law or enforceability, arbitrators should apply European public policy whenever their awards are likely to have effects within the Union. Their mandate is to deliver robust and enforceable decisions.


doi.org/10.30682/disp0601d

Thus, it is vital that CAS arbitrators focus more explicitly on EU public order, as the Court underscored in *Diarra*. A constructive dialogue between CAS and EU institutions should be encouraged: I'm considering a broader interpretation of the *amicus curiae* role under CAS procedural rules, allowing for intervention by the European Commission in appropriate cases.

We can now only await the final judgment in *Seraing*, which may mark turning points in this evolving dynamic.


doi.org/10.30682/disp0601d