

IMPACT OF STRASBOURG AND LUXEMBOURG COURTS ON *LEX SPORTIVA*

EUROPEAN CASE-LAW ON SPORT: CHALLENGES FOR NATIONAL JUDGES

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In my presentation today, I would like to briefly explore with you some of the implications for national judges of the coexistence of these two sources of European sport jurisprudence which are the ECtHR and the CJEU.

National judges are indeed faced with several challenges when applying this jurisprudence.

These challenges do not stem only from the fact that the two European courts rely on different methodologies. They also depend on the national context in which domestic judges operate.

The challenges might be a bit easier to handle by the judges in non-EU Member States, as these judges may confine themselves, in terms of European case-law, to applying the Strasbourg case-law. They have no dealings with EU law.

By contrast, the judges operating in EU Member States must have regard to both the Strasbourg and Luxembourg case-law, and somehow combine those two.

This is because the European Convention on Human Rights requires national judges, when applying EU law, to do so in a manner consistent with its provisions. In other words, the application of EU law at national level must respect the Convention minimum standard, which can however be raised.

The reason for this principle is historical and structural: the Convention predates the creation of the European Union, and no EU Member State has withdrawn from it since. As a result, the Convention continues to govern the application of EU law by the Member States.

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As a concrete illustration of the interplay between the Strasbourg and the Luxembourg jurisprudence in the field of sport, I would like to focus on 2 recent GC judgments which may be familiar to you: the judgment of the ECtHR in *Semenya v. Switzerland* and that of the CJEU in *Royal Football Club Seraing*.

Both cases deal, in different ways, with the role played in professional sport by the Court of Arbitration for Sport (Arbitration Court) and the Swiss Federal Tribunal (FT). What is briefly the gist of these 2 rulings?

As you may be aware and as Judge Bosnjak may have reminded you, in the *Semenya* case, the ECtHR found a violation of Article 6 § 1 of the Convention because the FT, in reviewing the award of the Arbitration Court, had failed to conduct a "particularly rigorous examination".

In the *Seraing* case, the CJEU ruled that professional athletes who are the subject of an arbitral award must have access to an effective judicial review of that award by a Member State court which has the power to make a preliminary reference to the CJEU.

Consequently, national law could not confer *res judicata* on an award which has not been made the subject of such a review.

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These two judgments raise a number of substantive issues, but their respective implications vary according to the legal system in which they are to be addressed.

The reality of sports litigation indeed is that while most professional athletes are subject to the same mandatory and exclusive jurisdiction of the Arbitration Court, with review by the FT, the effects of that single exclusive jurisdiction vary according to where its “production” is to be implemented, one significant difference being whether EU law applies or not.

To illustrate this varying reality, I will consider the position of three different judges: a Swiss judge, a UK judge, and a Belgian judge.

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The Swiss judge first.

In Semenya, the ECtHR found a violation of Article 6 § 1 of the Convention, for the reasons that I already mentioned.

So what we have here is a final judgment of the FT, enjoying *res iudicata*, which was found by the ECtHR to be incompatible with the Convention.

Under Swiss law, Semenya could have requested a revision of the judgment by the FT, but she did not do so - possibly because the regulations she had challenged were subsequently amended.

In any event, even without a revision of the FT judgment, and as confirmed by the Swiss Government in the context of the execution proceedings before the Committee of Ministers of the Council of Europe, all Swiss courts will now have to apply the Semenya standards.

This applies of course in the first place to the FT, but perhaps also to the ordinary Swiss courts, to the extent that they may be involved in the execution of some arbitral decisions.

Interestingly, EU law is also having some effect here, albeit an indirect one, in that, as we will see in a moment, the FT has been told by the CJEU in the *Seraing* case that however

compliant with Article 6 § 1 of the Convention its review of awards by the Arbitration Court might be in the future, it cannot possibly replace within the territory of the European Union a review by a court of a Member State authorised to make a reference to the CJEU for a preliminary ruling.

Which seems indeed to be bad news for the FT and its authority in the world of professional sport, as it seriously limits the “exportability” of its rulings in this field in the EU.

So much for the Swiss judge.

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How about the UK judge?

The question is relevant, it seems, to the extent that UK judges too might be involved in the execution, in the UK, of arbitral awards given in Switzerland by the Arbitration Court and reviewed by the FT.

In doing so, they would appear to be bound by the Convention.

In that case, they will have to satisfy themselves that the award by the Arbitration Court has been reviewed by the FT applying the Semenya standards and that a “particularly rigorous examination” has been carried out, failing which execution might be refused.

This would appear to be particularly relevant in respect of awards which were reviewed by the FT prior to the GC Semenya judgment.

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Let us now turn to the Belgian judge.

In contrast with his Swiss and UK colleagues, he/she is confronted with a twofold standard - which is not the same as a double standard actually (!) - this twofold standard being that of the Convention and that of the EU. So, how should he go about this?

To answer this question, we should take a close look at the Seraing ruling, at what it says and what it does not say.

The central issue in Seraing was about the legality of the ban imposed by FIFA on practices of third-party influence and third-party ownership. Interestingly, Seraing brought its case in parallel both before the Arbitration Court and the FT in Switzerland and before the ordinary courts in Belgium.

In Switzerland, Seraing challenged the fine of 150,000 Swiss francs imposed on it by FIFA, and in Belgium it challenged the lawfulness of the FIFA provisions imposing that ban.

In both sets of proceedings, Seraing alleged that this ban was incompatible with EU law, notably the competition rules and the fundamental freedoms establishing the single market.

Seraing lost its case in Switzerland but not in Belgium, with parts of it still pending, as I understand.

In Belgium, the Court of cassation made a preliminary reference to the CJEU. The CJEU answered, in essence, that for an arbitral award to be recognized and enforced in an EU Member State, its conformity with the provisions and principles which form part of EU public policy must have been made the subject of an effective review by a national court which is authorised to make a reference to the CJEU.

Since the FT is obviously not such a court, the Belgian courts were required to disapply the Belgian procedural provisions which conferred the authority of *res iudicata* to arbitral awards and, in doing so, prevented these courts from carrying out themselves such an effective review of the award by the Arbitration Court in the present case.

Very well, but what does that mean in practice for the Belgian courts?

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Basically, the ruling by the CJEU means that the Belgian courts should not treat the Arbitration Court award in the Seraing case as binding. This opens the way for a review of that award, not for the purpose of its enforcement in Belgium - this was obviously not the claim by Seraing before the Belgian courts - but in order to assess the compatibility with EU law of the legal basis for the fine imposed by FIFA on Seraing, this legal basis being the ban on practices of third-party influence and third-party ownership.

So here is our Belgian judge who has been ordered by the CJEU to carry out such an effective review under EU law. A very interesting question here is the exact scope of that review.

A first consideration in this connection is that the CJEU itself limits the scope of this compatibility review to the provisions and principles of EU public policy. And the CJEU adds that these provisions and principles certainly include the rules on competition law and on the fundamental freedoms underpinning the internal market. Whether any other elements are included in that notion, the CJEU does not say, but one can assume some are.

However, I suggest, the analysis should not stop here.

For as I indicated earlier in my presentation, the national judge applying EU law must also comply with the Convention. What does that mean in our case?

On the face of it, it does not mean any conflict or clash, since the Convention does not seem to stand in the way of EU rules on competition or the internal market.

But what the Convention can do, I suggest, is to add an important layer of protection to the EU layer. The Semenya judgment could indeed enrich the review in two significant ways.

First, in terms of the scope of the review. Semenya indeed tells us that the review of awards by the Arbitration Court should not be limited to economic rights or EU public policy considerations. Rather, in cases brought by athletes themselves, as opposed to cases brought by football clubs like Seraing, this review may also cover the personal circumstances of the athletes concerned and assess whether the athlete's fundamental rights, notably his/her privacy, integrity or dignity have been affected by the award.

A interesting question arising in this connection is indeed whether the disapplication of the domestic law, as imposed by the CJEU in Seraing, is necessarily limited to issues relevant under the EU public policy OR whether, in the context of his effective judicial review triggered by EU law, the national judge should also have regard to the Convention where it is relevant, especially in respect of athletes who claim to be the victim of their sport association. My inclination would be in favour of the latter option, for two reasons.

First, a full disapplication allowing not only a limited review under EU law but also a full review under the Convention would obviously be in the interest of the athlete concerned. But also technically, I do not think that a partial disapplication of domestic law, limited to EU public policy issues, would be feasible.

But the Semenya jurisprudence would also provide added value to a review under EU law in terms of the intensity of the review. Semenya indeed tells us that where arbitration is imposed by a sports association and creates a structural imbalance to the detriment of the athlete, the latter should not only enjoy the full panoply of the rights under Article 6 of the Convention, but he/she should also be entitled to a “particularly rigorous examination” of his/her case, whatever that means in concrete terms.

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Conclusion

What we are seeing here with the European jurisprudence on sport is a particularly interesting form of interplay between the two legal systems.

On the one hand, by disqualifying the review by the FT, EU law opens the way for a fresh judicial review applying EU law standards. On the other hand, the Convention enriches that review by broadening its scope and increasing its intensity.

This results in a form of complementarity in which the two systems reinforce one another, producing, to the benefit of the athletes concerned, something close to a full review of their rights.

However, the benefit of this mutual enrichment requires national judges to be well aware of the interplay between the legal systems involved and its implications.

Thank you.