Cambridge Law Journal, **85(1)**, March 2026, pp. 30–33 © The Author(s), 2026. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge.
doi:10.1017/S0008197326101391

IT is essential to the EU legal order that EU law is interpreted and applied uniformly across the Member States. While the Court of Justice of the European Union ("CJEU") is the authoritative interpreter of EU law, the CJEU must rely on Member State courts for the domestic application of directly effective EU law. The preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") helps to achieve uniformity in this domestic application of EU law. Article 267 facilitates a dialogue between Member State courts and the CJEU, through which the CJEU offers the determinative interpretation of EU law, to be applied by national courts (Judgment of 6 March 2018, *Slovakia v Achmea B.V.*, C-284/16, EU:C:2018:158, at [19]). Article 267 is therefore a "keystone" of the EU judicial system, facilitating the "consistency, [. . .] full effect and [. . .] autonomy" of EU law (Judgment of 18 December 2014, *Opinion 2/13 of the Court*, EU:C:2014:2454, at [176]).

Arbitration presents a challenge to the uniform application of EU law. Arbitral tribunals may interpret or apply EU law. But the CJEU has held that arbitral tribunals are not "courts or tribunals" under Article 267 TFEU and therefore cannot utilise the preliminary reference procedure (Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern A.G. & Co. K.G.* [1982] E.C.R. 1095). In so holding, the CJEU generated a threat to its authority: a tribunal sitting outside of the CJEU's Article 267 TFEU purview of control may interpret or apply EU law in a manner diverging from the CJEU's authoritative interpretation. The CJEU has long struggled to address this challenge and the CJEU's Judgment of 1 August 2025, *Royal Football Club Seraing S.A. v F.I.F.A.*, C-600/23, EU:C:2025:617 ("*Seraing*") represents the most important recent contribution to the debate.

Seraing concerned a challenge to arbitral proceedings for their alleged incompatibility with EU law. FIFA's Disciplinary Committee fined, and restricted the activities of players of, Royal Football Club Seraing ("RFC") on the basis that RFC's entry into financing arrangements breached FIFA's regulations. RFC alleged that FIFA's sanctions breached EU law and brought an appeal before FIFA's Appeal Committee, and subsequently the Court of Arbitration for Sport ("CAS"). Both appeals were unsuccessful. RFC then challenged the CAS arbitral award (the "CAS Award") before Swiss and Belgian courts. RFC's final appeal was to the Belgian Cour de Cassation, which made a preliminary reference to the CJEU.

https://doi.org/10.1017/S0008197326101391 Published online by Cambridge University Press

The CJEU reiterated its familiar aversion to arbitration. Although not the subject of the dispute, the Court offered a reminder that inter-Member State arbitration is prohibited by EU law, because it removes from the CJEU's jurisdiction disputes which may concern fields covered by EU law (*Seraing*, at [79]; see also Judgment of 26 October 2021, *Poland v P.L. Holdings*, C-109/20, EU:C:2021:875, at [44]–[45]). Turning to the dispute in *Seraing,* the CJEU confirmed that arbitration between (legal) individuals is "not preclude[d], in principle" by EU law (at [78]; see also Judgment of 21 December 2023, *International Skating Union v EU Commission*, C-124/21, EU:C:2023:1012). But this form of arbitration must be subject to oversight by way of a system of judicial review which can ensure (1) the "compatibility [of the arbitral process and award] with the principles underlying the judicial architecture of the [EU]" and (2) "effective compliance with EU public policy" (*Searing*, at [82]).

The rationale for this lies in the need to protect individuals' EU law rights (at [69]). In ordinary litigation, Article 19(1) of the Treaty on European Union ("TEU") imposes a duty on national courts to interpret and apply law in accordance with EU law, thereby ensuring that EU law rights are upheld (at [74]). Furthermore, Article 47 of the Charter of Fundamental Rights (the "Charter") requires courts to "carry out an effective judicial review of the acts, measures or behaviour alleged [. . .] to have infringed [EU law] rights" (at [75]). Arbitration, however, exists in a grey zone. Arbitral tribunals are not courts subject to duties under Article 19(1) TEU. They exist outside of the CJEU's Article 267 TFEU interpretive control. Arbitral proceedings thus create a potential gap in the protection of EU law rights.

Given the foregoing, where principles or provisions "which form part of EU public policy" are engaged in an arbitration (at [100]), there must be a possibility of the "judicial review of awards made pursuant to [arbitral mechanisms]" before Member State courts (at [98]). Such courts are subject to the CJEU's oversight and can in turn refer questions to the CJEU. The CJEU stressed the importance of this form of review: in its absence, effective judicial protection pursuant to Article 47 of the Charter cannot be ensured and Member States fall short of their duties under Article 19(1) TEU (at [83]).

This suggestion is worrying for those who adhere to the conventional view that arbitral awards should be final. The relitigation of arbitral proceedings risks undermining the integrity and finality of arbitral awards. At first blush, the CJEU appeared to acknowledge this concern. Echoing its comments in C-126/97, *Eco Swiss China Time Ltd. v Benetton Internation N.V.* [1999] E.C.R. I-3055, at [35], it stated that this review "may legitimately be limited in nature" and courts need not evaluate "all questions of fact and of law" (*Searing*, at [84]). Yet closer inspection

https://doi.org/10.1017/S0008197326101391 Published online by Cambridge University Press

reveals the review suggested by the CJEU to be highly demanding, with the potential to undermine the finality of arbitration.

First, the CJEU appealed to its elusive concept of "public policy" as an anchor-point permitting review. This is unfortunate. As A.G. Ćapeta compellingly noted, "[w]hat is and what is not EU public policy has not yet been explained in a general way" but rather remains a matter of "case-by-case" elaboration (*Opinion of Advocate General Ćapeta delivered of 16 January 2025*, C-600/23, EU:C:2025:24, at [68]). Although the CJEU in *Seraing* appeared to limit its remarks on public policy to the free movement of capital and workers and the freedom to provide services (at [89]), each of these freedoms is plausibly implicated in many instances of commercial arbitration. The touchpoint of "public policy" therefore appears to permit interference in a wide range of (commercial) arbitrations.

Second, the CJEU held that such review must permit national courts to draw "all the appropriate legal conclusions where [. . .] an inconsistency [with EU public policy] is found to exist" (at [103]). With respect, this is antithetical to the concept of a final, determinative arbitral process. Note that such powers will include the ability to adopt interim and final measures disapplying an arbitral award (at [101]–[102], [105]). Furthermore, as is consistent with the principle of EU law's supremacy, any contrary rules of national law or an arbitral association must be disapplied if necessary (at [105], [107]).

The CJEU then turned to RFC's allegations. While acknowledging that the ultimate judgment must be made by the national court (at [124]), its views were clear. The FIFA regulations and the CAS Award touched upon the free movement of workers, freedom to provide services and free movement of capital, and therefore implicated EU public policy (at [89]). RFC was entitled to obtain (indirectly) from Member State courts "effective review as to whether [the CAS Award] is consistent with the principles and provisions which form part of EU public policy" to be "assisted if necessary by the [CJEU] on the basis of Article 267 TFEU" (at [108]). Thus, Article 19(1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter, precluded Belgian law from conferring on the CAS Award the status of res judicata and probative value without a prior opportunity for "effective review by a court or tribunal of [a Member State] [. . .] authorised to make a reference to the [CJEU]" (at [125]).

In justifying its approach, the CJEU appeared to place weight upon its perception of FIFA as "a sports association with *sui generis* and particularly extensive regulatory and oversight powers" (at [93]), which "unilaterally imposed" mandatory arbitration upon RFC (at [96]). Only "from a formal point of view" was the arbitration clause the product of agreement (at [92]).

https://doi.org/10.1017/S0008197326101391 Published online by Cambridge University Press

It is not clear how (if at all) this allegation justifies the form of judicial review required by the CJEU. First, it is difficult to square these remarks with the remainder of the reasoning in *Seraing*, which rests not on an absence of commercial choice but rather the importance of upholding EU public policy.

Second, FIFA and RFC are both sophisticated, well-resourced commercial parties. RFC's decision to engage in FIFA sports was itself a free decision, and part and parcel of this choice was its consent to an arbitral process. The suggestion of an absence of free, informed commercial choice is, with respect to the CJEU, quite implausible.

Third, if the supposed lack of free choice *is* a factor permitting national courts, and in turn the CJEU, to review arbitral awards, it harms the integrity of the arbitral process. Rarely will there be a complete balance in bargaining power between parties, and arbitration clauses are commonly (and quite properly) "imposed" by one party upon another in the course of commercial negotiation.

It is well established that EU law claims supremacy. It is essential to this claim that the rights and freedoms guaranteed by EU law are upheld before national courts, with the assistance of the CJEU under the preliminary reference procedure. But the CJEU's interpretive authority does not extend to private arbitral processes. Its attempt in *Seraing* to (indirectly) affirm its authority over arbitral proceedings comes, regrettably, at the price of undermining the integrity and finality of freely adopted arbitration agreements.

Conor Hay

Email address for correspondence: hay.conor@proton.me.

https://doi.org/10.1017/S0008197326101391 Published online by Cambridge University Press