



## EUROPE

## CAS arbitration clause improper under EU law? The General Court of the EU disagrees

BY ALEKSANDRA ZANOWSKA - FEBRUARY 16, 2021 - 7 MINS READ



The General Court of the European Union ("**Court**"), in case no. T-93/18<sup>[1]</sup> between the International Skating Union ("**ISU**") and the European Commission ("**EC**"), had to address the question whether the arbitration rules of ISU conferring exclusive jurisdiction on the Court of Arbitration for Sports in Lausanne ("**CAS**") with respect to appeals from ineligibility decisions, are improper under the EU competition regulations. The Court decided that the EC's decision requiring ISU to change its arbitration rules was unjustified.

### Background facts

The proceedings took place as a result of the decision of the EC issued on 8 December 2017 ("**Decision**").<sup>[2]</sup> It was adopted with regard to the infringement of the Treaty on Functioning of the EU ("**TFEU**") after the EC received complaints from two athletes in 2014 regarding the incompatibility of ISU's eligibility rules with Articles 101 and 102 of the TFEU. The eligibility rules provided among others for a 'comprehensive pre-authorization system' ("**the pre-authorization system**"), according to which skaters could participate only in events authorized by the ISU and/or by its members, which were organized by representatives approved by the ISU and under its rules.

After conducting the relevant proceedings, the EC issued the Decision in which it found that ISU breached EU competition law, including Article 101 of the TFEU, by adopting and enforcing its eligibility rules. As the infringement was ongoing, the EC required ISU to end the infringement by making relevant changes in its regulations, including its arbitration rules.

The EC did not consider the arbitration rules included in these regulations to be themselves an infringement of the EU laws. Nevertheless, it considered them to reinforce the restrictions of competition. In the EC's view, the inclusion of an exclusive arbitration clause for proceedings before the CAS meant that it would be very difficult for athletes to obtain effective judicial protection against a potentially anti-competitive ineligibility decision of ISU based on breach of EU law. Further, the EC considered that the procedures for enforcement of foreign arbi-

tral awards such as CAS awards cannot ensure that EU law will be observed, as the basis for challenges against arbitral awards is limited. It also noted that all the practical hurdles that the athletes would have to overcome may have a discouraging effect on the decision to appeal from ISU's decisions.

As a consequence, EC required that the ISU change its regulations regarding the rules applicable to arbitration, if the pre-authorization system was maintained.

### **Factors considered**

On 19 February 2018, ISU filed an application before the Court, seeking to annul the Decision. It raised eight pleas in law, with one challenging the EC's claim that the arbitration rules of the CAS reinforce the alleged restrictions of competition ("**Arbitration plea**"). ISU claimed that the Commission wrongly concluded that the arbitration rules made it more difficult for an applicant to get effective judicial protection against a potentially anticompetitive decision. Further, it argued that this was irrelevant in so far as the Commission did not consider that recourse to the CAS arbitration procedure constituted an infringement of Article 101 TFEU.

On 17 May 2018, the EC filed its defense, disputing all the arguments of ISU and requesting the dismissal of the application. It disputed the admissibility of the plea, given that the Decision in its operative part did not explicitly require ISU to change the arbitration rules. In the alternative, it claimed that the Arbitration plea is unfounded.

### **The decision**

The Court dismissed all ISU's pleas except for the Arbitration plea. After having considered the arguments of all the parties, the Court concluded that the EC had no right to oblige ISU to change the arbitration rules.

The Court firstly dealt with the admissibility of the Arbitration plea. In this respect, the Court noted that the Decision has to be read as a whole. In the remedies section of the Decision, the EC determined which actions must be taken by ISU. This included an explicit requirement to substantially change the arbitration rules. This was sufficient for the Court to find that, although not expressed directly in the operative part of the Decision, ISU was obliged by the EC to change the arbitration rules. As such, the Arbitration plea was effective and admissible.

With respect to the substance of the plea, the Court considered whether the EC had the power to oblige ISU to change its arbitration rules. In this respect the Court referred to the guidelines applied to impose fines in case of infringements.<sup>[3]</sup> While these guidelines were not applied in this case, the Court considered them a limitation to the EC powers. As such, the Court decided that the main requirement for the circumstance to be considered as reinforcing the breach was their unlawfulness.

The Court then observed that the EC agreed that arbitration is a generally accepted method of dispute resolution and that in the Decision the EC did not consider arbitration to infringe the right to a fair hearing. The Court further noted that there is an interest in hearing international sports disputes in a specialized forum such as CAS. Further, the arbitration rules included in ISU's eligibility rules did not exclude the jurisdiction of national courts in cases concerning claims for damages for breach of the EU competition laws, in the course of which the courts could fully assess on their own whether there has been a breach of the EU competition law.

In light of these considerations, the Court concluded that the CAS arbitration system does not compromise the full effectiveness of EU competition law. This in turn led the Court to conclude that arbitration rules which

conferred exclusive jurisdiction to review the legality of ineligibility decisions on CAS did not constitute unlawful circumstances which make the infringement more harmful. As a result, the Court annulled the EC Decision with respect to the requirement that the arbitration rules be amended if the pre-authorization system is maintained.

### The significance

The fact that the Court did not agree with the EC and maintained the status quo of arbitration in the EU is welcome. The Court's observations correctly took into account the interplay that exists between arbitration and courts and their respective jurisdictions.

Arbitration, and in particular proceedings before CAS, are one of the most common methods of resolving disputes in professional sports. Therefore, the view of the EC, had it been upheld by the Court, that arbitration may be an improper method of resolving disputes could have significantly affected the approach to sports disputes within the EU.

What is more, the concerns which the EC raised in the Decision could be applicable to other arbitrations, including commercial disputes. Had the Court followed the EC's reasoning that arbitration may stand in the way of preserving EU competition law, the judgment could have resulted in creating grounds for challenging arbitration clauses pertaining to disputes in which this particular branch of EU law played even a small part.

The judgment is not final yet and may be still appealed on the points of law.

[1] Judgment of the General Court (Fourth Chamber, Extended Composition) of 16 December 2020, Case no. T 93/18, [Available here](#)

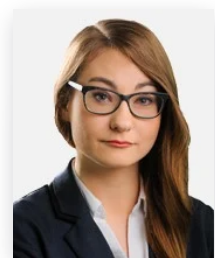
[2] The EC decision adopted on 8 December 2017 relating to Case AT/40208, [Available here](#).

[3] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210,

#### CATEGORIES:

EUROPE

SPORTS ARBITRATION



### Aleksandra Żanowska

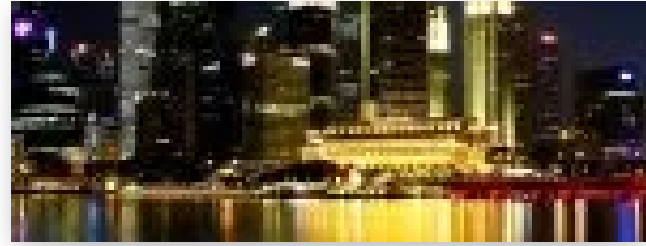
Aleksandra Żanowska is a senior associate in Baker McKenzie's Warsaw office and a member of the Firm's Global Dispute Resolution Practice Group. She specializes in arbitration, in particular investment arbitration. In addition, she represents clients in complex litigations, including IP disputes. She holds an LL.M. from Harvard Law School. In 2022, she was seconded to the arbitration team in Baker McKenzie's London office.



PREV POST

**CAM-CCBC Arbitration Center established Emergency Arbitrator and Expedited Procedure**

by JOAQUIM DE PAIVA MUNIZ - 3 MINS READ



NEXT POST

**New Defence raised during Closing Submissions – Arbitral Award set aside for Breach of Natural Justice**

by NANDAKUMAR PONNIYA AND RICHARD ALLEN - 7 MINS READ

## Related Posts

**International Arbitration Yearbook 2023-2024 – now available!**

FEBRUARY 27, 2024

**Swiss Federal Supreme Court affirms ICSID tribunal's restrictive rationale in upholding China's jurisdictional objection**

FEBRUARY 26, 2024

**Hope for the Litigation Funding Industry?**

FEBRUARY 13, 2024

## Subscribe to our monthly newsletter

---

Subscribe to this blog by email

SUBMIT

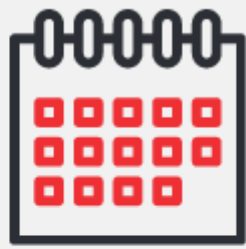
## Related Websites

---

**GLOBAL COMPLIANCE NEWS**

**GLOBAL LITIGATION NEWS**

**B&M PRACTICE OVERVIEW INTERNATIONAL ARBITRATION**



**Arbitration  
Events Calendar**



**International  
Arbitration Yearbook**



**Comparative Chart of  
International  
Arbitration Rules**

**DISPUTES  
CLAUSE  
FINDER**



## Global Attorney-Client Privilege Guide

### Other Publications

---



**International Arbitration 10x10: 100 Facts an in-house counsel needs to know**

Authors: Jörg Risse, Heiko Haller, Ragnar Harbst, Jürgen Schramke.

[ORDER HERE](#)



**A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration**

Autor: Ragnar Harbst.

[ORDER HERE](#)



**International Arbitration Checklists**

Editors: Grant Hanessian, Lawrence Newmann.

[ORDER HERE](#)



**The Complete (but unofficial) Guide to the Willem C. Vis International Commercial Arbitration Moot**

Authors: Jörg Risse, Markus Altenkirch, Ragnar Harbst, Anette Keilmann, Lisa Reiser.

**ORDER HERE**

## Archives

---

Select Month



---

© Copyright 2024 – Global Arbitration News

[Disclaimers](#) | [Privacy Statement](#) | [Attorney Advertising](#)