App. No. 10934/21

BEFORE THE GRAND CHAMBER
OF THE EUROPEAN COURT OF HUMAN RIGHTS

BETWEEN:

MOKGADI CASTER SEMENYA

Applicant

-v-

SWITZERLAND

Respondent

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Third-Party Intervener

WRITTEN COMMENTS OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS[1]

REPRESENTATIVES

MR. CAN YEGINSU
BARRISTER

3 VERULAM BUILDINGS
CHAMBERS

3, Verulam Buildings,
Gray's Inn,
London, WC1R 5NT.

Tel: +44 20 7831 8441
E-mail: cy@3vb.com

MR. PAUL OERTLY
SENIOR LEGAL POLICY ADVISER

OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

Palais des Nations
1211 Geneva 10,
Switzerland.

Tel: +41 22 917 9962
E-mail: paul.oertly@un.org

---

[1] Pursuant to leave granted by the President of the Grand Chamber under Rule 44 §3 of the Rules of Court, communicated by letter dated 2 February 2024 from the Deputy Registrar. This intervention is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the UN General Assembly on 13 February 1946.

I. INTRODUCTION

1. The United Nations High Commissioner for Human Rights (**the High Commissioner**) intervenes before the Grand Chamber in this case, by virtue of his mandate, as established in United Nations General Assembly Resolution 48/141, to, *inter alia*, protect and promote all human rights and to conduct necessary advocacy in that regard. The High Commissioner is the principal human rights official of the United Nations.

2. The present case raises several issues of considerable public importance, including issues of race and gender discrimination in sport. This was the subject of the report presented by the High Commissioner to the UN Human Rights Council at its 44th session.[2] The report addressed amongst other things the obligations on States and the responsibilities of sporting bodies towards female athletes; it identified potential gaps in the human rights protections available; and it made several recommendations aimed at enhancing those protections. The High Commissioner's views in relation to the application of admission criteria in female categories to athletes were considered, and referred to, by the Third Section in its Chamber judgment of 11 July 2023.[3] Several Interveners have made submissions on these issues in this case.

3. The High Commissioner does not seek to repeat or develop the report's findings here, or to make submissions that go to the facts of the Applicant's case. The focus of this intervention is instead on the nature and scope of a State's obligations to secure human rights protection, including the critical right to a practical and effect remedy, where the primary recourse for a victim of an alleged Convention violation is an arbitration, seated in a Council of Europe Member State (**Contracting State**). This is an issue of some general importance in view of the spread of arbitration as a form of dispute resolution in recent years. It rises to an issue of acute importance for this Court in cases where, as in the present case, the arbitration is not an *alternative* form of dispute settlement *chosen* by the parties, but rather the *only* form of dispute settlement, here *imposed* on individual athletes by their governing body.

4. In these mandatory arbitrations, there can be no question of a voluntary renunciation of rights under the Convention. Nor can the effect of compulsory arbitration before a private law arbitral tribunal be practically to deprive a victim of his or her human rights within the *espace juridique* of the Convention. In these cases, the primary responsibility for securing the necessary human rights

---

2 Office of the United Nations High Commissioner for Human Rights, *Intersection of race and gender discrimination in sport*, UN Doc A/HRC/44/26 (15 June 2020), submitted pursuant to Human Rights Council resolution 40/5 on the elimination of discrimination against women and girls in sport.

3 *Semenya v. Switzerland*, App. No. 10934/21 (**Judgment**), 11 July 2023, §§57-58. See, in particular, Chapter IV of the report which is devoted to the human rights impact of rules governing admission to women's sporting categories.

review and protection (including under the Convention) must necessarily fall, in the High Commissioner's view, to the domestic court(s) at the seat of the arbitration. If the domestic court(s) at the seat cannot or will not exercise a Convention-compliant rights review, then questions must inevitably arise as to whether the subject matter of the dispute is suitable in law for settlement by arbitration, at least in that Contracting State.

5. While the Chamber majority was right to point to the complexity and novelty of this case,[4] it is not a case, in the High Commissioner's view, that requires the Grand Chamber to depart from, or reconceive, established principle or authority. It is, however, a case in which the Grand Chamber has been asked to delimit the scope of the State's positive obligations inherent in ensuring the effective exercise of human rights, in the context of a compulsory arbitral process seated in a Contracting State. By these written comments, the High Commissioner seeks to assist the Grand Chamber in that exercise in three principal ways:

   a. First, by making a series of important contextual observations on the applicable legal framework that underpins international arbitration, the key function within that framework of the legal place or 'seat' of arbitration, as well as the *sui generis* nature of CAS arbitration.

   b. Secondly, by addressing jurisdiction under Article 1 of the Convention where a Convention rights challenge relates to a compulsory arbitration that was seated in a Contracting State and is, therefore, subject to the supervision of that State's domestic court(s).

   c. Finally, by considering the scope of review required of a final arbitral award by the domestic court(s) at the seat, in order to secure the full range of a victim's rights under the Convention in the context of a compulsory arbitration.

II. THE ARBITRAL CONTEXT: APPLICABLE LEGAL FRAMEWORK

6. The Strasbourg Court is no stranger to international arbitration.[5] However, a review of the legal framework underpinning the arbitral process may assist the Grand Chamber in view of: (i) the way in which the issues in this case have developed, and have been developed by the Parties and the Interveners; and (ii) the premise of certain observations and concerns raised in the Joint Dissenting Opinion of Judges Grozev, Roosma, and Ktistakis (**the Dissent**).

A. International Arbitration, National Court Supervision, and International Law

7. Arbitration has its roots in private law and the idea that private parties are entitled to agree to have a commercial dispute settled privately and finally by an independent and impartial arbitral tribunal, chosen by or for the parties, that will adopt a fair process in which only the parties and their

---

4 Judgment, §77.

5 The jurisprudence relating to arbitration emanating from the Strasbourg organs dates back to the decision of the Commission in *X v. Germany*, App. No. 1197/61, 5 March 1962 (Commission Decision).

representatives are involved.[6] Arbitration is essentially a private system of justice, with very limited public oversight. Arbitrators are private individuals; an arbitral tribunal or institution is not a State court or a State actor as a matter of domestic or international law.[7]

8. While the arbitral system was built on party consent, it cannot, and does not, operate in a legal or judicial vacuum. In particular:

   a. **Not all disputes are arbitrable**. Some disputes will belong exclusively to the domain of the national courts. Whether or not a particular dispute is suitable for arbitration, i.e. arbitrable, is a question of public policy under domestic law. Public policy varies from one country to the next,[8] and changes over time.

   b. **Each arbitration has a substantive or governing law**. This is the law applicable *in* the arbitration, i.e. the law that governs the substance of the dispute. The parties to an arbitration are free to choose the applicable law, subject to limited restrictions on the rule designed to ensure that the choice of law is *bona fide* and not contrary to public policy.[9]

   c. **Each arbitration has a 'seat' or a legal place**. This is the territory where the arbitration is deemed to take place legally (irrespective of where hearings are held physically or virtually) and where an arbitral award is issued. It is the law of the seat that governs the law applicable *to* the arbitral process itself, as well as, for example, the law applicable to the question of arbitrability, the court enforcement of arbitral orders, and any action to set aside an arbitral award. While each State has discretion to decide for itself what law it wishes to lay down to govern the conduct of arbitration conducted within its own territory,[10] 91 States – encompassing over 120 jurisdictions – have chosen to adopt the Model Law developed in 1985 by the United Nations Commission on International Trade Law (**UNCITRAL Model Law**), as amended in 2006.

---

6 The notable exception is the role of arbitration in the peaceful resolution of disputes between States: see Charter of the United Nations (adopted on 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 33(1), see also 1970 United National General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, UNGA Res 2625 (XXV) (24 October 1970). More recently, see arbitrations between foreign investors and States under bilateral and multilateral investment treaties.

7 See, ILC Articles on State Responsibility (2001), Articles 4 and 8 (which the ICJ referred to as codifications of customary international law in the *Genocide Convention Case*, ICJ Reports (2007), p. 43, §§385, 398, 407). See also, *Gogić v. Croatia*, App. No. 1605/14, 8 October 2020, at §19; and *Porush v. Lemire*, 6 F. Supp. 2d 178, (E.D.N.Y. 1998), at p.186, finding that "*private arbitrators are not state actors and, absent state action, there can be no violation of* [the Fourteenth or Fifth Amendments]."

8 For instance, in Switzerland, the insolvency of one of the parties will not generally affect the arbitration agreement and arbitrators retain a wide discretion to decide disputes relating to insolvency issues, including claims made on behalf of the estate itself: see, Swiss Federal Tribunal Decision No. 4A_50/2012 of 16 October 2012. German law adopts a similarly liberal approach to arbitrability in this context; see Lazic, *Insolvency Proceedings and Commercial Arbitration* (Wolters Kluwer, 1998), pp.163-4. In Brazil, by contrast, bankruptcy procedures are non-arbitrable: *Jutai 661 Equipamentos Eletrônicos Ltda. v. PSI Comércio e Prestação de Serviços em Telefones Celulares Ltda.*, Superior Court of Justice, 12 March 2013. Under English law, it is difficult to enforce an arbitration agreement against an insolvent party: Arbitration Act 1996, s.107 and Sch. 3, para 46; Insolvency Act 1986, s.349A.

9 For instance, in *Soleimany v. Soleimany* [1999] QB 785, the English Court of Appeal refused to enforce an arbitral award where the underlying transaction was not illegal under the applicable law but was illegal under English law.

10 The French Code of Civil Procedure, for example, includes a specific chapter (Bk IV, Title II) on international arbitration; Australia has adopted an International Arbitration Act 1974; and Switzerland has adopted Chapter 12 of the Private International Law Act.

d. **Each arbitration is subject to the supervision of the national court(s) at the seat.** Arbitrators and arbitral tribunals have no powers to enforce their own orders or directions during an arbitration. Arbitral institutions have limited powers to police the conduct of an arbitration. Therefore, the domestic court(s) at the seat may need to intervene to support the arbitral proceedings if required to do so, for example by removing or appointing arbitrators, ordering disclosure from third parties, or deciding whether or not a dispute is arbitrable as a matter of law.

9. Importantly, arbitral tribunals and institutions also have no powers to enforce their own arbitral awards. It is only through a national court that an arbitral award can be recognised and enforced in law, and it is only before the national court(s) at the seat that an award can be set aside. These procedures are governed in most States by obligations and standards set at the United Nations level:

a. Recognition and enforcement of international arbitral awards is governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**The New York Convention**).[11] The New York Convention has been acceded to by 172 States, including all 46 Contracting States.

b. The limited grounds to set aside an arbitral award at the seat of the arbitration, pursuant to the UNCITRAL Model Law, and the grounds on which an enforcement court may decide not to recognise an award, pursuant to the New York Convention, are the same. That is because the grounds in the UNCITRAL Model Law were taken directly from Article V of the New York Convention.

10. Within this framework, there are only six grounds on which a national court may set aside an international arbitral award or refuse its recognition. These are where (i) there was a lack of capacity to conclude an arbitration agreement, or lack of a valid arbitration agreement; (ii) the aggrieved party was not given proper notice of the appointment of the arbitral tribunal, or the arbitral proceedings, or was otherwise unable to present its case; (iii) the award deals with matters not contemplated by, or falling within, the arbitration agreement, or goes beyond the scope of what was submitted; (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself; (v) the subject matter of the dispute is not arbitrable under the public policy of the State in which the arbitration was seated; and (vi) the award, or any decision in it, is in conflict with the public policy of the State in which the arbitration is seated or where its enforcement is sought.

11. Grounds (v) and (vi) will turn on a State's own public policy, but the grounds themselves are taken from international law. Ground (vi) is contained in Article 34(2)(b)(ii) of the UNCITRAL Model Law. Importantly, that provision mirrors Article V(2)(b) of the New York Convention, providing

[11] Adopted on 10 June 1958, entered into force 7 June 1959: 330 UNTS 3.

for a court discretion to refuse recognition and enforcement of an arbitral award on the basis that it is contrary to the public policy of the enforcement State.

B. Switzerland as a Seat of Arbitration and CAS

12. The Swiss International Arbitration Act entered into force on 18 December 1987 and is codified in Chapter 12 of the Swiss Private International Law Act (**PILA**). Its 19 provisions were amended and expanded to 24 provisions, formally entering into force on 1 January 2021.

13. Switzerland's arbitration legislation did not adopt the UNCITRAL Model Law,[12] but there are no major differences between the two regimes. The Grand Chamber is invited to note that:

    a. The grounds on which an international arbitration award may be set aside in Switzerland mirror the grounds set out in the UNCITRAL Model Law: see Articles 190(2)(a) to 190(2)(e), PILA. This includes the ground to set aside on the basis that an award is incompatible with public policy: Article 190(2)(e), PILA.

    b. A setting aside proceeding is brought directly before the Federal Supreme Court: Article 191, PILA.

    c. The recognition and enforcement of a foreign arbitral award in Switzerland is governed by the New York Convention: Article 194, PILA.

    d. PILA is applicable to a wide variety of arbitral proceedings including commercial arbitration, sports arbitration, and investor state arbitration. Switzerland has refrained from developing separate and specialised legal regimes to cater to different categories of international arbitration proceedings, seated in Switzerland.

14. CAS, for its part, is a private law arbitral institution with jurisdiction over sports-related disputes that are subject to an arbitration agreement providing for recourse to CAS.[13] Disputes at CAS may be of a purely commercial nature,[14] i.e. of the kind resolved by arbitration through other arbitral institutions, such as the ICC International Court of Arbitration. But, importantly, the scope of the CAS arbitral jurisdiction extends beyond commercial disputes, including to decisions and regulations rendered and enacted by sporting governing bodies. These decisions and regulations can, as the present case shows, have a significant and direct impact on a wide range of fundamental rights, including on an individual's access to the sport, or ability to exercise their profession. In

---

12 The majority of Contracting States have adopted the UNCITRAL Model Law: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed on 22 February 2024).

13 See further, *Mutu and Pechstein v. Switzerland*, App. Nos. 40575/10 and 67474/10, 2 October 2018, at §65: "*...CAS is neither a domestic court nor any other institution of Swiss public law, but an entity emanating from the [International Council of Arbitration for Sport], a [Swiss] private-law foundation.*"

14 For example, disputes relating to sponsorship contracts, sale of television rights, staging of sports events, player transfers and agency contracts.

those cases, CAS arbitral tribunals will be applying not only a domestic (commercial) law, but also the applicable regulation(s) of the governing body.

15. The arbitral seat of every CAS arbitration is Lausanne. The law of the seat is therefore Swiss law, and CAS awards are subject to PILA, as well as the New York Convention. Supervision over CAS tribunals is provided for by the Federal Supreme Court. In providing that supervision, the Federal Supreme Court applies, without limitation, "*the federal acts and international law.*"[15]

III. STATE JURISDICTION UNDER ARTICLE 1 OF THE CONVENTION

16. Article 1 of the Convention provides: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*"

17. The position on jurisdiction under Article 1 is a straightforward one, applying orthodox principles. Where a Contracting State is designated as the seat of an arbitration, then it is, as a matter of law, both: (i) the territory in which the arbitration is taking place; and the (ii) territory in which an arbitral award is issued. It is *only* the domestic court(s) of that Contracting State, as the court of the arbitral seat, that will be able to exercise supervisory jurisdiction over the arbitration, and it is the domestic court(s) of that Contracting State that exercises *exclusive* jurisdiction to set aside the final award in that arbitration. Conduct in the arbitration is, therefore, conduct that has taken place in the *territory* of the seat.

18. Applying the well-established principles of this Court, it must follow – in the High Commissioner's view – that a Contracting State has a positive obligation under Article 1 to secure rights and freedoms, to everyone subject to an arbitration in its territory. That proposition is subject to the proviso that a limited category of rights may be capable of waiver by agreement.[16] But that proviso will have no application in compulsory arbitration,[17] nor can it absolve the domestic court(s) at the seat from its obligation to supervise and intervene in the arbitral process, where required to do so by the Convention, other international human rights obligations, or any applicable rule of law.

19. This analysis accords with the jurisprudence of this Court. The High Commissioner recalls that:

    a. The Strasbourg organs have long recognised State responsibility for private arbitration.[18]

---

15 Article 190 of the Swiss Constitution. See also, Judgment, §41 (emphasis added).

16 For instance, the right to an oral hearing under Article 6 of the Convention: *Souvaniemi v. Finland*, App. No. 31737/96, 23 February 1999, at p.5, with the Court stating that "*waiver may be permissible with regard to certain rights but not with regard to certain others.*" Voluntary waiver is only valid if: (i) it is free from duress; (ii) unequivocal; (iii) permissible; and (iv) there are minimum guarantees in place "*commensurate to the importance of the right waived*": *Suda v. Czech Republic*, App No. 1643/06, 28 October 2010, §48. See also, *Mutu and Pechstein v. Switzerland*, §145.

17 *Suda*, §§48-49. See also, *Mutu and Pechstein v. Switzerland*, §95.

18 *R v. Switzerland*, App. No. 10881/84, 4 March 1987 (Commission Decision).

b. State responsibility is not limited to the Contracting State of the arbitral seat, but also extends to a Contracting State enforcement court deciding whether or not to recognise and enforce an arbitral award, under the New York Convention.[19]

c. The Court has, on repeated occasions, recognised that arbitrations seated in Contracting States, including CAS arbitrations, can engage Convention rights.[20]

d. The Court's jurisprudence on arbitration follows the Court's general caselaw in other areas, which recognises that if a victim's rights are engaged within a Contracting State's territory, they will come within that State's jurisdiction for the purposes of Article 1.[21]

20. The Court's approach is also entirely consistent with States' other positive obligations under treaty and customary international law to exercise due diligence to prevent violations of human rights by private actors within their territory, or subject to their jurisdiction.[22] The positive obligation is similarly reflected in the United Nations Guiding Principles on Business and Human Rights, concerning the duty of the State to protect against human rights abuses within their territory and/or jurisdiction by third parties.[23] A key aspect of these positive international law obligations is the obligation to ensure access to practical and effective remedies for victims of human rights violations, including explicitly through "*effective adjudication*".

21. In an arbitration-related challenge under the Convention, the question of jurisdiction will, therefore, ordinarily turn on a State's *territorial* jurisdiction under Article 1, by reference to the place where the arbitration is legally taking place and/or where an arbitral award will be given legal effect through the process of court recognition and enforcement.

22. However, the Grand Chamber will also hear argument from the Parties on *extraterritorial* jurisdiction, under Article 1. It is not for the High Commissioner, intervening as a third party, to make submissions on an issue that is inherently fact specific. As to the applicable principles:

---

19 *Jakob Boss Sohne KG v. Germany*, App. No. 18479/91, 2 December 1991 (Commission Decision).

20 *Mutu and Pechstein v. Switzerland*, §98 (finding that CAS is a tribunal for the purposes of Article 6 §1) and §183 ("*there has been a violation of Article 6 § 1 of the Convention on account of the fact that the proceedings before the CAS were not held in public*"); *Affaire Platini c. Suisse* (dec.), App. No. 526/18, 11 février 2020, §70, ("*il s'avère que le requérant disposait en l'espèce des garanties institutionnelles et procédurales suffisantes, soit un système de juridictions privée (TAS) et étatique (Tribunal fédéral) devant lesquelles il a pu faire valoir ses griefs*"); *Affaire Ali Riza c. Suisse*, App. No. 74989/11, 13 juillet 2021, §100 (recalling that domestic proceedings must be considered as a whole and considering it appropriate to examine jointly whether the absence of a public hearing before both the CAS and the Federal Court violated Article 6 of the Convention). See also, Judgment, §§174-175, 182-184, §§235-236 and 239, and §§200-201.

21 For instance in cases involving property rights, where the property in question is located within the territory of the respondent State, but the applicant is located outside of that territory: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], App. No. 45036/98, ECHR 2005-VI, §137 (the impounding by Ireland of aircraft leased to a Turkish company); *Minasyan and Semerjyan v. Armenia*, App. No. 27651/05, 23 June 2009 (finding a violation of A1P1 in respect of property located in Armenia and owned by the US-domiciled first applicant).

22 See similarly, as regards Article 2(1) of the ICCPR: Human Rights Committee, General Comment No. 31, (2004) UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 8.

23 *UN Guiding Principles on Business and Human Rights* (2011) HR/PUB/11/04, including principles 1 and 25.

a. It is well established that "*acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention.*"[24]

b. In respect of State conduct occurring within its own territory but which produces effects on rights *only* beyond that territory, a State's jurisdiction will be engaged under Article 1 where there exists a jurisdictional link between a victim and the respondent State. Such a link will exist where:

   i. there are "*sufficiently proximate repercussions on rights guaranteed by the Convention,*" even if those repercussions occur *outside* the State's territory;[25] or

   ii. there are otherwise "*special features*" that justify the finding of a jurisdictional link in the particular circumstances of the case.[26] The High Commissioner is aware that the special features test was developed by this Court in the context of the procedural obligations to investigate and cooperate.[27] There is, however, in his view, no good reason in principle why the broadly-framed test should not apply in appropriate cases concerning alleged violations of substantive Convention rights, particularly where an applicant's rights are also affected across the wider *espace juridique* of the Convention.

c. The application of either test will necessarily turn on the factual matrix of the case before the Court. In the context of sports arbitration, where decisions are taken which may significantly impact a broad range of fundamental rights, and where arbitration is a mandatory exclusive forum, and where there is a real risk of a legal vacuum of Convention rights protection, including within the *espace juridique* of the Contracting States, the requisite jurisdictional link is capable of being satisfied.

23. Finally, the High Commissioner draws this Court's attention to the willingness of the UN human rights bodies to accept pure "effects-driven" jurisdiction for conduct felt abroad. For example, in *Sacchi et al. v. Argentina*, the Committee on the Rights of the Child accepted, as a matter of principle, the existence of jurisdiction where there was a causal link between the acts/omissions of the State in question and the negative impact on the rights of victims located outside its territory, when the State of origin exercised effective control over the sources of the conduct giving rise to such effects, and where the alleged harm suffered by the victims was reasonably foreseeable.[28]

---

24 See, *M.N. and Others v. Belgium* [GC], App. No. 3599/18, 5 March 2020, §§98-101; *Ilaşcu and Others v. Moldova and Russia* [GC], App. No. 48787/99, 8 July 2004, ECHR 2004-VII, §314.

25 *Ilaşcu and Others v. Moldova and Russia*, §317, referring to *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, p. 35, §§88-91. See also *Kovačić and Others v. Slovenia* (dec.) App. Nos. 44574/98, 45133/98 and 48316/99, 9 October 2003, pp. 52 and 54-55, (finding that the Slovenia's jurisdiction under Article 1 was engaged where it had passed legislation which "*continue[d] to produce effects*" in respect of the applicants' foreign-currency savings deposits held by branches of Slovenian banks in Croatia).

26 *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], App. No. 36925/07, 29 January 2019, §190.

27 The test was developed in the context of Article 2 but has also been applied in respect of the duty to investigate arising under Article 3 and Article 5: *Razvozzhayev v. Russia and Ukraine; Udaltsov v. Russia*, App. Nos. 75734/12, 2695/15, 55325/15, 19 November 2019, §157.

28 *Sacchi et al. v. Argentina*, Committee on the Rights of the Child, CRC/C/88/D/104/2019, 22 Sept. 2021, at para. 10.7.

IV. HUMAN RIGHTS REVIEW AT THE SEAT OF COMPULSORY ARBITRATION

24. The great majority of arbitrations seated in Contracting States will either engage Article 6 procedural rights, or will not engage Convention rights at all. This is also reflected in the Court's case law on arbitration. These will typically be *commercial* disputes, involving the application of domestic commercial law(s), in which the parties have chosen a final and binding arbitration process for the resolution of their dispute, subject to limited review by the court at the seat. Questions may arise as to waiver of some procedural rights under Article 6. A1P1 rights may be engaged where a domestic court sets aside or refuses to enforce a final arbitral award. But that is it.

25. There are, however, other specialist forms of arbitration in which a much broader range of Convention rights may be engaged, which in turn give rise to concomitant positive obligations on the part of the State. Compulsory sports arbitration is clearly a case in point. Here, there is no voluntary agreement to arbitrate, arbitration is the exclusive forum, and many arbitrations will relate to matters outside of the commercial realm, some will involve the application not of domestic law but transnational sporting regulations, and have a direct and significant impact on an individual's enjoyment of their fundamental human rights and ability to participate in their profession.

26. In these cases, it is the State of the arbitral seat that will bear the primary responsibility of supervising not only the arbitration (through its courts), but also the effective exercise of Convention and possibly other international human rights. The scope of the positive obligations on the State in any given case will be commensurate to the nature of the rights engaged under the Convention. But a core obligation on the State will *always* be to guarantee an individual's access to practical and effective remedies.

27. For the State of the arbitral seat, the control and human rights review will come through its court(s). As to this, the High Commissioner notes:

    a. As set out above, the grounds on which an international arbitral award may be set aside, or refused recognition and enforcement are *exhaustive*, and derived from *international* law. However, that international law framework was built principally for *commercial* arbitration, bearing in mind the *commercial* imperatives of party autonomy, speed, and finality in the context of commercial cross-border disputes.[29]

    b. That same international law framework provided space for States to regulate arbitration by reference to their own domestic public policy. This is found <u>both</u> in the ground to set aside

[29] See, e.g., Article I(3) of the New York Convention entitling a contracting state to declare that it will apply the Convention only to those differences arising out of legal relationships, whether contractual or not, that are "*considered as commercial under the national law of the State making such a declaration.*"

an arbitral award for violation of public policy, but also in the ground of arbitrability, which itself is governed by a State's public policy.

c. Public policy is not a static concept in law, and it will vary between States. But in all instances, application of the public policy ground will require balancing the interest of maintaining the autonomy, efficiency, and finality of arbitration with the State's interest in safeguarding fundamental principles,[30] which must include international law obligations to secure human rights.[31]

d. Therefore, the considerations informing a domestic court's assessment of public policy in (voluntary) commercial arbitration are unlikely to be sufficient in scope for the assessment of public policy in the context of (mandatory) sports arbitrations that may interfere with athletes' Convention rights, either within the seat State, or across the *espace juridique* of the Convention.

28. This gives Contracting States a choice. A State may permit arbitration as a form of alternative dispute resolution for disputes that engage an individual's rights under the Convention, which the State must then secure *fully* through its court(s). This can be achieved by construing public policy in the light of a State's obligations under the Convention. If the State is unwilling to secure those fundamental rights through its courts, then its obligations under the Convention, and potentially under international human rights law more broadly, will serve to make such disputes non-arbitrable on public policy grounds.

29. Either way, effective review of Convention and other international human rights obligations in arbitrations is an essential component to securing fundamental rights. While the arbitral framework presents novel questions, there is no basis for a departure from the familiar judicial function of rights review, whether at the domestic court level, or by this Court. The High Commissioner invites the Grand Chamber to approach the issues of cardinal importance raised by this case through the prism of its long-established jurisprudence, informed as it is by a special concern for the equal protection of the law, and for access to practical and effective remedies, for all persons whose enjoyment of rights are subject to the jurisdiction of the Contracting States.

Respectfully submitted,

Volker Türk,

United Nations High Commissioner for Human Rights

---

30 For instance, the public policy of England and Wales used to include the fundamental principles of European Union law: *Gazprom OAO* Case C-536/13, Opinion of Advocate General at [173], *Eco Swiss*, Case C-126/97.

31 cf Milan Corte d'appello, 3 May 1977, Renault Jacquinet c Sicea (1979) 4 ICCA Ybk 194; and Milan Corte d'appello, 4 December 1992, Allsop Automatic Inc c Tecnoski snc, (1994) Riv dir int privproc 873, both holding that the protection of human rights is part of Italian public policy. See also, *Krombach*, C-7/98 [2000] ECR, I-1935.